

Feature*

Nicaragua and the Law of Self-Defense Revisited

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For nearly eight years, the Nicaraguan question has been the most heatedly disputed issue of American foreign policy since the end of the Vietnam War. It has focussed the attention of Congress, which continues to consider Administration proposals to provide assistance to the *Contras*,¹ and the American and Western press. Nicaragua has brought aspects of Nicaraguan-American relations before the International Court of Justice (I.C.J.),² and Carlos Tünnermann, Nicaragua's Ambassador to

* While this issue was in production, the International Court of Justice held, *inter alia*, by a vote of 12-3 that the U.S. is violating international law by training and supplying the *Contras*; it also rejected by a vote of 12-3, the justification of collective self-defense maintained by the U.S. See *Excerpts From Rulings by the World Court*, N.Y. Times, June 28, 1986, at 4, col. 2. This Feature remains an important part of the record and of the ongoing debate over, as Mr. Rostow put it in his Article, *infra* p. 439, "the rules underlying world public order." The authors of this Feature have seen drafts of each other's pieces to enhance the dialogue.

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1. The United States government refers to the *Contras* as the "Nicaraguan Democratic Resistance." See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPEC. REP. NO. 142, DOCUMENTS ON THE NICARAGUAN RESISTANCE: LEADERS, MILITARY PERSONNEL, AND PROGRAM 1 (1985) [hereinafter cited as DOCUMENTS ON THE NICARAGUAN RESISTANCE]. Critics of the *Contras* tend to support the Nicaraguan government's view that they are "mercenaries (many of whom served the former dictator Anastasio Somoza Debayle)." Tünnermann, *United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter*, 11 YALE J. INT'L L. 104, 105 (1985). See also Memorial of Nicaragua (Nicar. v. U.S.), 1985 I.C.J. Pleadings (Military and Paramilitary Activities in and against Central America) 3 *passim* (Memorial dated Apr. 30, 1985) [hereinafter cited as Memorial]. This Nicaraguan characterization does not withstand scrutiny. See, e.g., S. CHRISTIAN, NICARAGUA: REVOLUTION IN THE FAMILY 267-83 (1985) (*Contra* leadership); DOCUMENTS ON THE NICARAGUAN RESISTANCE, *supra*.

2. Nicaragua filed suit against the United States in April 1984, claiming that the United States had recruited, trained, armed, and directed a mercenary force that carried out attacks against Nicaraguan citizens and facilities, and that these actions violated the clearest and most important principles of international law. See Application of Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings (Military and Paramilitary Activities in and against Nicaragua) (Application dated Apr. 9, 1984) (U.S. violating U.N. and OAS Charters and customary international law) [hereinafter cited as Application]. The United States withdrew from the I.C.J. case in January 1985 and has refrained from publishing the memorial on the merits it would have submitted to the Court. See U.S. Dep't of State, U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, *reprinted in* 148 WORLD AFF. 58-60 (1985); Nash,

the United States, recently summarized his country's case in this *Journal*.³ Consciously or unconsciously, participants in the discussion are also addressing the future of world public order and of American foreign policy.

The outline of the Nicaraguan-American dispute is clear. As Ambassador Tünnermann asserted, Nicaragua regards as indisputable that the United States created a mercenary army in 1981 and, since 1982, unlawfully has used this mercenary army together with its own military intelligence personnel in attacks against the Nicaraguan government.⁴ The United States, on the other hand, asserts that its actions against Nicaragua are legally justified under article 51 of the United Nations Charter as actions of collective self-defense against Nicaragua's unlawful support, since 1979, for guerrilla groups attempting to overthrow the governments of El Salvador and Honduras.⁵ Nicaraguan officials deny this allegation. Thus, in an affidavit submitted to the I.C.J., Nicaragua's Foreign Minister "certif[ied] and declare[d]" that

I am aware of the allegations made by the government of the United States that my government is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the government of El Salvador. Such allegations are false, and constitute nothing more than a pretext for the U.S. to continue its unlawful military and paramilitary activities against Nicaragua intended to overthrow my government. In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador.⁶

The Contemporary Practice of the United States Relating to International Law, 79 AM. J. INT'L L. 438 (1985). See also Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986) (troubling aspects of the I.C.J.'s November 1984 decision on jurisdiction and admissibility).

3. Tünnermann, *supra* note 1, at 104 (article is based on Memorial, *supra* note 1).

4. *Id.* at 105.

5. See, e.g., BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPEC. REP. NO. 132, "REVOLUTION BEYOND OUR BORDERS": SANDINISTA INTERVENTION IN CENTRAL AMERICA 2 (1984) [hereinafter cited as REVOLUTION BEYOND OUR BORDERS]. See U.N. CHARTER art. 51 (inherent right of individual and collective self-defense).

6. Affidavit of Miguel D'Escoto Brockman, at 1 (sworn to Apr. 21, 1984, Annex B to Memorial, *supra* note 1) [hereinafter cited as D'Escoto Affidavit] (copy on file with the *Yale Journal of International Law*). Ambassador Tünnermann wrote:

On a factual level, it must be recognized that the allegations concerning supply and assistance by Nicaragua to the rebels in El Salvador are simply untrue. Not surprisingly, the United States has failed to produce any credible evidence either before the International Court of Justice or in any public forum to substantiate its allegations.

Tünnermann, *supra* note 1, at 130-31.

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Ambassador Tünnermann further argues that, even if the allegations (which he distorts) were true, Nicaragua would not have violated international law.⁷

Nicaragua cannot admit the truth of the United States' allegations without undermining its case before the I.C.J. That case depends on Nicaragua's being the victim of unprovoked uses of force. Admitting that it tries to subvert neighboring governments would amount to admitting that those governments are justified in acting in self-defense and that other affected governments also have a right to act in collective self-defense. The dispute as to events in Central America and the law applicable to them thus has greater significance than the outcome of a particular lawsuit, however important. It involves persistent, unresolved conflicts over the rules underlying world public order and the application of those rules.

It is important to note that, in the debate about Central America, Nicaragua's agents have evidentiary advantages. As a direct result of the Sandinistas' media controls,⁸ Americans lack a Nicaraguan equivalent of the *Congressional Record* or of a free press reporting Nicaraguan decisions and activities. Nicaraguan officials are less than truthful in their statements and writings,⁹ and as a result, are less than helpful to those seeking to understand the issues debated. On March 25, 1986, for example, Nicaragua formally denied that it had sent troops into Honduras despite evidence to the contrary from the battlefields.¹⁰

Fortunately, enough publicly available information exists to permit an evaluation of events in Central America and arguments about the application of international law to them.¹¹ The contours of American policy

7. Tünnermann, *supra* note 1, at 135. Ambassador Tünnermann wrote that the United States alleges that Nicaragua supplies "some conventional arms to the insurgents." *Id.* This statement is false. See *REVOLUTION BEYOND OUR BORDERS*, *supra* note 5, at 2 (Nicaragua engages in major effort to overthrow government of El Salvador by supplying arms, training, and operational direction to Salvadoran guerrillas, and has used its own security personnel in support of guerrillas fighting the governments of Honduras and Costa Rica).

8. See, e.g., S. CHRISTIAN, *supra* note 1, at 171-72 (1980 decrees restricting press freedom); Ruiz, *Nicaragua: What Censorship is Really Like*, Wash. Post, May 6, 1986, at A19, col. 1 (author is managing editor of Managua daily La Prensa).

9. For example, Ambassador Tünnermann recently wrote that "Nicaragua is a nonaligned nation and votes solidly with the nonaligned countries in the United Nations." Letter from Carlos Tünnermann B., N.Y. Times, Apr. 12, 1986, at A20, col. 3. On the contrary, as John Norton Moore noted, Nicaragua voted for unified Soviet-Cuban positions 96% of the time in 1983-84. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 52-53 (1986).

10. N.Y. Times, Mar. 26, 1986, at A1, col. 1.

11. See generally Moore, *supra* note 9; S. CHRISTIAN, *supra* note 1; *REVOLUTION BEYOND OUR BORDERS*, *supra* note 5, and the published documents and United States government reports cited therein. Memorial, *supra* note 1, shows how bountiful is the documentation of

are well-known.¹² What we know about Nicaraguan policy decisions derives in considerable part from accounts by former members of the Sandinista government who participated either in making decisions or in implementing them. Information about Nicaraguan activities also comes from investigative reporting by journalists; testimony by defectors from Nicaragua's armed forces, other bodies, and Salvadoran guerrilla groups;¹³ guerrillas and weapons captured in El Salvador and Honduras; documents seized in Grenada in 1983;¹⁴ and intelligence gathered by the United States.¹⁵

American policy towards Central America. The bulk of Nicaragua's evidence consists of statements made by Administration officials and by Congressmen and Senators, and articles published in American newspapers.

12. *See, e.g.*, BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, CURRENT POLICY NO. 797, SECRETARY SHULTZ, NICARAGUA: WILL DEMOCRACY PREVAIL? (1986); Central America, Address Delivered Before a Joint Session of the Congress, 19 WEEKLY COMP. PRES. DOC. 608 (Apr. 27, 1983).

13. On the value of defector testimony, the following exchange between Judge Schwebel and David MacMichael, a witness for Nicaragua, is instructive:

Q. [Schwebel]: Now you spoke before of that famous incident in which the United States came forward with a defector who was introduced as someone who would testify to Nicaraguan support for the Salvadoran insurgency and, in fact, he did not, and he testified, in fact, that it was not so, and that he was put up to saying so, and so on. Is that correct?

A. [MacMichael]: That is true.

Q.: What became of that gentleman may I ask?

A.: He is, to my knowledge, in Nicaragua today.

Q.: I see. He wasn't shot on the spot? He showed no signs of torture? He walked away as a free man? He was in Nicaragua welcomed as a hero. Is that not correct?

A.: I do not know, Your Honor, as to whether he showed any signs of torture. I had no chance to examine him physically. I will accept and glory in the fact, as you do, that people who appear in the custody of the United States Government, in the United States of America, under guarantees given by that government, find those guarantees respected and in his case they were.

Q.: Right, now given his example, do you see any reason why a defector from the Salvadoran insurgency should fear to speak the truth? They can well see that if they come out with a story contrary to that which one would suppose the United States would want them to hear [*sic*] would await them as a hero's welcome in Nicaragua? So why wouldn't they speak the truth? . . . [A]s you know there are a large number of defectors both from Salvadoran and Nicaraguan sources whose testimony is similar to that of the nature I have cited to you. I could go on and on giving you examples like this, but I do not think we can use the time of the Court. My point is simply, that, is not this single example of the treatment of that single captive suggestive of the fact that persons in the custody of the United States need not fear to speak the truth as they know it? Would that not be the lesson you would draw if you were in a similar situation?

A.: I certainly believe that is the case.

1985 I.C.J. Oral Arguments and Documents (Verbatim Record (uncorrected) CR 85/21, Sept. 16, 1986, at 46-47) [hereinafter cited as Verbatim Record and identified by CR number and date] (copy on file with the *Yale Journal of International Law*).

14. *See* U.S. DEP'T OF STATE & U.S. DEP'T OF DEFENSE, GRENADA DOCUMENTS (1984).

15. The U.S. government may not reveal information derived from secret sources without compromising those sources as well as the government's intelligence capabilities.

Nicaragua Revisited

I. Nicaragua at the Center of Conflict, 1979-1985

The State Department has written that, with regard to the conflicts in Central America, the United States and Nicaragua agree about the law, not the facts.¹⁶ Whatever the import of the first part of this statement, the debate about Central America concerns facts; one relevant set involves Nicaragua's foreign policy since the Sandinistas came to power in 1979.

A. *Support for Revolution in Central America*¹⁷

Critics of United States policy towards Nicaragua tend to slide over, or ignore, evidence of Nicaragua's support for revolutionary activity in El Salvador and Honduras.¹⁸ Members of the Sandinista National Liberation Front (FSLN) have not been so discreet. At a meeting September 21-23, 1979, the National Directorate of the FSLN adopted *An Analysis of the Situation and Tasks of the Sandinista People's Revolution*,¹⁹ which, among other things, set out the Sandinista's foreign policy principles.

16. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 1.

17. For purposes of this Article, it is unnecessary to attempt a history of Nicaragua's relations with its neighbors, even were such a history presently possible to write. The following discussion aims only to outline such relations for purposes of examining the application of generally recognized principles of international law to events in Central America. Nor is it necessary for purposes of this Article's analysis to elaborate on Nicaraguan violations of human rights and the professed values of the international community. In this connection, see Moore, *supra* note 9, at 49-54, 118-21 (Sandinista National Liberation Front tyranny); S. CHRISTIAN, *supra* note 1, at 202-66, 290, 299 (Sandinista dealings with the church, merchants, farmers, Miskito Indians, and the press); U.S. DEP'T OF STATE, PUB. NO. 9467, HUMAN RIGHTS IN NICARAGUA UNDER THE SANDINISTAS (1986).

18. See, e.g., Foley, *Contra Aid: An Act of War*, Wash. Post, Apr. 15, 1986, at A17, col. 2 (U.S. policy a prescription for undeclared proxy war; scant mention of Nicaraguan policy); Schlesinger, *Bay of Pigs Again—Only Worse*, Wall St. J., Apr. 17, 1986, at 28, col. 1 (Reagan Doctrine will lead to commitment to endless foreign wars; no mention of Nicaraguan policy). The United States government has published evidence of Nicaraguan support for insurgency in El Salvador, and Honduras. See, e.g., BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPEC. REP. NO. 80, COMMUNIST INTERFERENCE IN EL SALVADOR (1981) [hereinafter cited as SPEC. REP. NO. 80]; U.S. DEP'T OF STATE, COMMUNIST INTERFERENCE IN EL SALVADOR: DOCUMENTS DEMONSTRATING COMMUNIST SUPPORT OF THE SALVADORAN INSURGENCY, DOCS. E, F, G, H, I (1981) [hereinafter cited as DOCUMENTS]; REVOLUTION BEYOND OUR BORDERS, *supra* note 5. For a criticism of SPEC. REP. NO. 80, *supra*, as failing to support the government's conclusions, see Caldeira, *Responding to the Crisis in El Salvador: A Public Order Perspective*, 8 YALE J. WORLD PUB. ORD. 325, 348 (1982), which summarizes press criticism of the Report. Caldeira neither discusses nor cites the State Department's rebuttal. U.S. DEP'T OF STATE, RESPONSE TO STORIES PUBLISHED IN THE WALL STREET JOURNAL AND THE WASHINGTON POST ABOUT SPECIAL REPORT NO. 80 (1981) (on file with the *Yale Journal of International Law*).

19. COORDINATOR FOR PUBLIC DIPLOMACY FOR LATIN AMERICA AND THE CARIBBEAN, U.S. DEP'T OF STATE, "THE 72-HOUR DOCUMENT": THE SANDINISTA BLUEPRINT FOR CONSTRUCTING COMMUNISM IN NICARAGUA, A TRANSLATION (1986).

The foreign policy of the Sandinista People's Revolution is based on the full exercise of national sovereignty and independence and the principle of revolutionary internationalism. The objective of the FSLN's foreign policy is to achieve the consolidation of the Nicaraguan revolution as this will help to strengthen the Central American, Latin American, and world revolution. The consolidation must be achieved through the solution of the military and economic problems, principally because with the solution of the first we are strategically preparing to repel any aggression and with the second we can make headway in severing the ties of economic dependence on North American imperialism. This concept will govern our foreign policy as expressed in the following guidelines:

- a) Develop political and diplomatic relations which will strengthen our process of military consolidation and economic independence.
- b) Stimulate and strengthen the formulation of a national anti-imperialist and democratic policy, both internationally as well as on the continental level, and in the Caribbean area in particular.
- c) Contribute to and promote the struggle of the peoples of Latin America against fascist dictatorships [and] for democracy and national liberation.
- d) In the Central American region, because of its immediate strategic value, the same principles will apply, emphasizing the need to neutralize, through the proper handling of their internal contradictions, the aggressive policies of the military dictatorships of Guatemala and El Salvador and the differentiation with the special situation in Honduras and the friendly conduct of Costa Rica and Panama.²⁰

Nicaragua's support for guerrillas fighting the government of El Salvador is the kind of activity that gives practical meaning to these principles.

Four days after Somoza's departure in July 1979, FSLN leaders in Managua discussed providing assistance to Salvadoran guerrillas. In part, the Sandinistas wanted to repay Salvadoran guerrillas for their help

20. *Id.* at 13-14. This long document sets forth the FSLN goals in 1979 to consolidate power by using temporary alliances and coercion to remove non-Marxists from positions of political and economic power in Nicaragua, *id.* at 5-6. The strategy was adopted at a time when the United States, having tried to assist a peaceful transition from Somoza to a new government, was supplying emergency assistance to meet Nicaragua's reconstruction needs. In 1979, the United States provided \$48 million in aid to Nicaragua. In November 1979, the Carter Administration proposed supplemental emergency assistance of \$75 million to Nicaragua. *Assistance to Central America and the Caribbean: Hearings Before the Committee on Foreign Relations on S. 2102 to Amend the Foreign Assistance Act of 1961 to Authorize Assistance in Support of Peaceful and Democratic Processes of Development in Central America*, 96th Cong., 1st Sess. 77-80 (1979) (statement by Deputy Secretary of State Warren Christopher before the Senate Foreign Relations Committee, Dec. 7, 1979), reprinted in AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980, at 1335, 1337 (1983). In 1980, Congress approved the proposal, but conditioned expenditure on the President's certifying that Nicaragua was not aiding or abetting acts of violence or terrorism in other countries. Special Central American Assistance Act of 1979, Pub. L. No. 96-257, § 536(g), 94 Stat. 422 (1980); to amend the Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 533(f), 75 Stat. 424 (1980).

during the uprising against Somoza.²¹ Unity among the various Salvadoran guerrilla groups, however, was necessary if they were to topple the Salvadoran government. Castro encouraged such unity in 1979 and 1980. Thus pressed by Castro, Salvadoran guerrilla groups formed the Farabundo Marti National Liberation Front (FMLN) as an umbrella organization.²² Nicaragua henceforth became a central part of the multi-lateral network providing arms, training, and other support to the FMLN in El Salvador.

Disorder in El Salvador tempted the guerrillas and their supporters to plan for a victory analogous to the overthrow of Somoza. In 1980, Salvadoran Communist Party leader Jorge Shafik Handal embarked on an extended trip to Communist and other countries in search of arms.²³ The arms and supplies were sent to Salvadoran guerrillas by way of Cuba and Nicaragua. They began to arrive in Cuba and Nicaragua in September and October 1980, and in El Salvador by land, sea, and air from Managua during the same period.²⁴ Nicaragua dismissed American diplomatic protests against its assistance to Salvadoran guerrillas. Nicaraguan officials said that some of their colleagues may have assisted Salvadoran guerrillas, but that the government disapproved of such activity and had taken steps to end it.²⁵

21. See Le Moyne, *The Guerrilla Network*, N.Y. Times, Apr. 6, 1986, § 6 (Magazine), at 70-71.

22. See *id.* at 70; REVOLUTION BEYOND OUR BORDERS, *supra* note 5; SPEC. REP. NO. 80, *supra* note 18, at 6.

23. Moscow referred him to Vietnam, where he received commitments to supply weapons, mainly American. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 5-6. According to William Shawcross, Colonel Bui Tin, deputy editor of the Vietnamese People's Army newspaper, acknowledged in 1981 that Vietnam shipped weapons left by American forces to Salvadoran guerrillas: "It's not fair to say the US can help the junta but we cannot help our friends. We do our best to support revolutionary movements in the world. We don't have to ask permission from Washington." Shawcross, *In a Grim Country*, N.Y. REV. OF BOOKS, Sept. 24, 1981, at 65. Documents captured by Salvadoran security forces and published in this country, and serial numbers on M-16s captured in El Salvador and Honduras traced to weapons left by American forces in Vietnam show that Vietnam agreed to ship some 60 tons of arms to Nicaragua for transshipment to Salvadoran guerrillas in June 1980. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 46. Czechoslovakia also promised weapons; East Germany, medical supplies. *Id.* at 6.

24. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 6-7.

25. *Id.* at 7, 21 (summarizing classified diplomatic correspondence); D'Escoto Affidavit, *supra* note 6, at 1 (Nicaragua intercepted busload of arms destined for El Salvador). See also Letter from Ambassador Carlos Arguello, Nicaragua's agent to the I.C.J., to the Registrar of the I.C.J. (Nov. 26, 1985) (written response to questions posed by the Court) (copy on file with the *Yale Journal of International Law*):

As the Government of Nicaragua has consistently stated, it has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purposes, it has never permitted Salvadoran insurgents to establish a headquarters or operations base or command and control facility in Nicaraguan territory and has never permitted its territory to be used for training of Salvadoran insurgents.

Despite official denials, evidence of Nicaraguan support for the FMLN accumulated in late 1980 and early 1981. In April 1981, for example, Honduran security forces intercepted a truck containing arms—including M-16s from Vietnam—and ammunition en route to El Salvador.²⁶ American photoreconnaissance showed the improvement of the Papalonal (Nicaragua) airstrip in 1980 to accommodate cargo aircraft. In January 1981, transport planes from Papalonal dropped supplies to guerrillas in southeastern El Salvador. A small plane crashed in El Salvador. Weapons were captured. The pilot said the flight and arms cargo originated in Managua.²⁷

In addition to shipping arms to Salvadoran guerrillas, Nicaragua provided headquarters, training, and operational guidance. The FMLN headquarters were near Managua from 1981 to late 1983, and Cuban and Nicaraguan advisers there trained guerrillas for war and planned and directed specific operations. To prepare for the December 30, 1983, attack on El Salvador's 4th Brigade headquarters, for example, a model of the base was constructed in Cuba and FMLN troops practiced assaults against it. The weapons used in the actual attack were shipped through Nicaragua.²⁸

At the beginning of 1981, the FMLN attempted to seize control of El Salvador by a "final offensive." Nicaragua scarcely veiled its support. On January 10, 1981, a "secret" radio station in Nicaragua announced that "the decisive hour has come."²⁹ After the FMLN achieved initial successes, Radio Managua announced victories achieved "by *our* forces."³⁰ Despite the FMLN's widespread attacks, the final offensive failed to unseat El Salvador's government. It did, however, provoke President Carter, in his last days in office, to send military assistance to El Salvador for the first time since 1977.³¹

Since January 1981, the FMLN has continued to receive assistance, including weapons, training, and direction from Nicaragua and Soviet bloc states. Information about the flow of arms, however, has been sporadic. It in part depends on captures in the field. The State Department believes that the FSLN adjusts its deliveries depending on the temper of American politics, as well as on the needs of the guerrillas. After the

26. *Customs Seizes Van with Arms at Nicaraguan Border*, Foreign Broadcast Information Service [hereinafter cited as FBIS] (Lat. Am.), Apr. 10, 1981, at 10 (Tegucigalpa, Honduras, Radio America, Apr. 9, 1981); REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 9.

27. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 8.

28. *Id.* at 12.

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 10.

Grenada operation in October 1983, for example, Nicaragua reduced its assistance, possibly from fear that the United States would take military action against the Managua government.³²

Nicaraguan officials have implicitly and explicitly admitted that Nicaragua supports guerrillas fighting the government of El Salvador. In July 1981, for example, FSLN Directorate member Bayardo Arce told the American chargé d'affaires in Managua that "the United States 'had better realize that nothing you can say or do will ever stop us from giving our full support to our fellow guerrillas in El Salvador.'"³³ On July 19, 1983, Nicaragua's Junta Coordinator Daniel Ortega called for an end to outside assistance to both sides of the Salvadoran conflict, thus acknowledging Nicaraguan aid to the guerrillas.³⁴

Though focussing their energy on El Salvador, which in 1979 appeared a promising place for successful revolution, Nicaragua and Cuba have supported guerrillas operating in other Central American states as well. Honduras has been an especially important target.³⁵ Honduras is the overland route from Nicaragua to El Salvador and the home to groups of armed opponents of the Sandinista regime. The Sandinistas collaborate with Honduran revolutionary groups to maintain a network for shipping arms to El Salvador. They also provide arms, training, and advice to

32. *Id.* at 12. In 1985, a defector from the FMLN's largest constituent group said that his group received 50 tons of material every three months from Nicaragua before the Grenada operation. *Id.* at 11. See also REPORT OF THE NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA 116 (1984).

Fears of American military action seem to have dissipated, although the FSLN tries to encourage them. In any event, fear of the United States has not imposed changes on the FSLN program as outlined in 1979. See *supra* note 20 and accompanying text. For example, in May 1984, Bayardo Arce, a member of the Sandinista National Directorate, explained to the Political Committee of the Nicaraguan Socialist Party:

Imperialism asks three things of us: to abandon interventionism, to abandon our strategic ties with the Soviet Union and the socialist community, and to be democratic. We cannot cease being internationalists unless we cease being revolutionaries.

We cannot discontinue strategic relationships unless we cease being revolutionaries. It is impossible even to consider this.

Yet the superstructure aspects, democracy as they call it, bourgeois democracy, has an element which we can manage and even derive advantages from for the construction of socialism in Nicaragua. What are those advantages, what is it we explained to the party leadership? The main thing about the elections, as far as we are concerned, is the drafting of the new constitution. That is the important thing. The new constitution will allow us to shape the juridical and political principles for the construction of socialism in Nicaragua.

U.S. DEP'T OF STATE, PUB. NO. 9422, INTER-AMERICAN SERIES 118, COMMANDANTE BAYARDO ARCE'S SECRET SPEECH BEFORE THE NICARAGUAN SOCIALIST PARTY (PSN) 4-5 (1985).

33. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 23 n.23.

34. *Id.* at 27.

35. *Id.* at 13-14.

various guerrilla groups in Honduras.³⁶ Thus supported, Honduran guerrillas tried in 1983 and 1984 to establish bases in isolated provinces of Honduras, but Honduran security forces prevented success. Nicaraguan efforts to train and arm guerrillas in Honduras nevertheless continued in 1985.³⁷ Starting three days after the Sandinistas came to power and continuing to the present, Nicaragua has conducted hundreds of raids into Honduras and has mined both sides of the border.³⁸

B. *Testimony at the International Court of Justice*

Those who testified on behalf of Nicaragua at the I.C.J.'s hearings in September 1985 corroborated the essence of the story of Nicaragua's support for Salvadoran insurgents. Nonetheless, denials that Nicaragua supports, or has ever supported, such insurgents permeates Nicaragua's formal presentations to the I.C.J. in the case against the United States, Ambassador Tünnermann's article, and other Nicaraguan government statements.³⁹ Nicaraguan unwillingness to discuss either the details of Nicaraguan foreign policy or the evidence of Nicaragua's support for

36. *See id.* at 14; Moore, *supra* note 9, at 59. Despite Nicaraguan assistance, armed groups fighting the Honduran government have not been particularly successful, although they have carried out attacks on government buildings, and engaged in hostage-taking and aircraft hijacking. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 13-14.

37. REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 15.

38. *See* N.Y. Times, Mar. 26, 1986, at A6, col. 4 (noting attack of May 1985 and previous raids); *U.S. Newsmen Killed in Nicaraguan Attack*, FBIS (Lat. Am.), June 22, 1983, at 16 (Tegucigalpa, Honduras Domestic Service, June 22, 1983); REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 15. Nicaragua also supports insurgents in Costa Rica and Guatemala. *See* REVOLUTION BEYOND OUR BORDERS, *supra* note 5, at 16-18 (Costa Rica); Moore, *supra* note 9, at 58-60 (Guatemala and Costa Rica).

39. Nicaragua's submissions to the I.C.J. contradict the direct testimony of its witnesses. For example, Nicaragua's principal government witness denied that Nicaragua supported guerrillas in other countries or in any way violated the territorial integrity or political independence of its neighbors. *See* Verbatim Record, CR 85/20 (Sept. 13, 1985), *supra* note 13, at 16 (testimony of Vice-Minister of the Interior Luis Carrion). Documents submitted by Nicaragua to support its claim include congressional findings that Nicaragua supports insurgencies in neighboring states and newspaper articles referring to such support. For example, one of Nicaragua's documentary submissions is the May 1983 report of the House of Representatives Permanent Select Committee on Intelligence. The Committee reported that:

At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty:

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-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.

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insurgencies in other countries is intentional and indispensable to Nicaragua's legal case; that case would collapse if Nicaragua conceded that it was assisting an insurrection against the government of El Salvador and had been doing so for more than two years before the date that it alleges the United States began supporting the opponents of the FSLN. Both formal statements of international law and the existing pattern of state practice make clear that providing arms and other help to insurgents constitutes an armed attack against the government confronting the insurgency. Efforts at individual and collective self-defense against such attack may include incursions into the state providing such help.

A central figure in Ambassador Tünnermann's article and in Nicaragua's presentation of evidence to the I.C.J. is David MacMichael, a contract employee of the Central Intelligence Agency from March 1981 to April 1983. Ambassador Tünnermann describes MacMichael as writing and testifying that "the Administration and the CIA have systematically misrepresented Nicaraguan involvement in the supply of arms to Salvadoran guerrillas to justify its efforts to overthrow the Nicaraguan government."⁴⁰ Yet, under questioning by Judge Stephen Schwebel of the I.C.J., MacMichael admitted that the evidence inclined him "towards ruling 'in' " that Nicaragua had armed Salvadoran guerrillas for the final offensive of January 1981.⁴¹ As the following exchange shows, Nicaragua's star witness could not support Nicaragua's claim to be the innocent victim of American policy.

Q. [Judge Schwebel]: Have you [MacMichael] heard of an airfield in Nicaragua at Papalonal, or an airstrip?

HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, REPORT ON AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H.R. REP. NO. 122, 98th Cong., 1st Sess. 6 (1983), submitted as Annex E, Attachment 1, to Memorial, *supra* note 1. Newspaper articles emphasizing what Nicaragua wanted to show also reported Nicaraguan support for insurgencies in other countries in Central America. See *id.* Annex F; *Senate Conducts Its Own Probe of Latin Unrest*, Wash. Post, Mar. 13, 1982, at A1, col. 1 (briefing showed Sandinista involvement in Salvadoran insurgency); *A Lot of Show, but No Tell*, TIME, Mar. 22, 1982, at 21 (evidence of Sandinista support for insurgents in El Salvador classified; Sol Linowitz, Zbigniew Brzezinski, and William P. Rogers found it convincing); *Nicaraguan Aid Called Not Vital to Salvadorans*, Wash. Post, Feb. 21, 1983, at A1, col. 1 (Nicaraguan aid not sole source of arms used by insurgents); *U.S. Seeks Increase in Covert Activity in Latin America*, N.Y. Times, July 25, 1983, at A1, col. 6 (beginning in 1981, aid to *Contras* to prevent arms shipments from Nicaragua to Salvadoran rebels); *Salvador Rebels Reported to Get Little Arms Aid*, N.Y. Times, July 31, 1983, at A1, col. 5 (conflicting reports as to extent of arms shipments to Salvadoran rebels from outside country in 1983; State Department asserted deliveries recently increased); *Nicaraguan Army: 'War Machine' or Defender of a Besieged Nation?*, N.Y. Times, Mar. 30, 1985, at A1, col. 2 (many Administration critics convinced Nicaragua supplies Salvadoran guerrillas).

40. Tünnermann, *supra* note 1, at 131.

41. Verbatim Record, CR 85/21 (Sept. 16, 1985), *supra* note 13, at 29 (testimony of David MacMichael).

A.: Yes, I have.

Q.: Are you aware of the fact that the United States Government under the Carter Administration made representations to the Nicaraguan Government about the use of that airfield as a principle staging area for the airlift of arms to insurgents in El Salvador?

A.: Yes, I recall that very well.

Q.: In an interview with the *Washington Post* published on 30 January 1981, the outgoing Secretary of State, Edmund Muskie, stated that arms and supplies being used in El Salvador's bloody civil war were flown from Nicaragua "certainly with the knowledge and to some extent the help of Nicaraguan authorities." Now as you know the Administration for which Mr. Muskie spoke had given more than \$100 million in aid to the Sandinista Government since it took power.

A.: That is correct.

Q.: More than the United States had given Nicaragua under the Somozas in more than 40 years. Do you think that Mr. Muskie was speaking the truth?

A.: Oh yes, in that case. For example, I spoke earlier under direct questioning from Mr. Chayes [counsel for Nicaragua] regarding information that had existed for that period—late 1980 to very early 1981—and when I mentioned defectors I had in mind as a matter of fact some persons who testified under interrogation—I should not say testified—but who stated under interrogation following their departure from Nicaragua that they had assisted in the operations out of Papalonal in late 1980 and very early 1981, and as I say, I am aware of this; there was also an interception of an aircraft that had departed there—that had crashed or was unable to take off again from El Salvador where it had landed—and I think that was in either very early January or late December 1980 and this was the type of evidence to which I referred, which disappeared afterwards.

Q.: I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency. Is that the conclusion I can draw from your remarks?

A.: I hate to have it appear that you are drawing this from me like a nail out of a block of wood, but, yes, that is my opinion.⁴²

Whatever the decision of the I.C.J.,⁴³ the problem of transnational subversion and its place in international law will remain. If the Court

42. *Id.* at 40-41. Judge Schwebel's questions also put Nicaragua's other witnesses on the defensive and created an impression that theirs was not the whole story, or even a relevant part of it. See Verbatim Record CR 85/20 (Sept. 13, 1985), *supra* note 13, at 13-20 (Schwebel's questioning of Luis Carrion); CR 85/21 (Sept. 16, 1983), at 67-71 (Schwebel's questioning of Michael Glennon); CR 85/22 (Sept. 17, 1985), at 30-33 (Schwebel's questioning of Father Loifon); CR 85/23 (Sept. 17, 1985), at 19-28 (Schwebel's questioning of Nicaraguan Minister of Finance William Hupper). See also Moore, *supra* note 9, at 66-69.

43. The I.C.J. may not render default judgments. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 53, para. 2 (I.C.J. must satisfy itself as to jurisdiction, facts, and law before deciding in favor of claimant when respondent fails to appear).

decides, for example, that Nicaragua supports insurgencies in other countries, that such support is unlawful under international law, and that support for the FSLN's opponents and the 1984 mining of Nicaraguan harbors constitute lawful measures of collective self-defense (a conclusion arguably outside the competence of the Court to reach⁴⁴), it is most unlikely that Nicaragua will change its policy. Managua denies it is engaging in any such activity. If, on the other hand, the Court holds for Nicaragua, the situation in Central America will not change. Rather, such a decision would encourage Nicaragua and other states to increase their support of insurgencies. Such a result would greatly increase the risk of general conflict by freeing states from legal obstacles to supporting insurgencies in other countries.

II. International Law and the Use of Force

World public order is impossible without generally recognized and respected rules regarding the international use of force. Those rules are rooted in the nature of the world system of states;⁴⁵ and contemporary international law, especially the U.N. Charter, mirrors the structure of world politics.

A. *Use of Force Under the U.N. Charter: Basic Principles*

The U.N. Charter reflects the structure of world public order, for almost all states are members of the U.N. Membership in the U.N. is open only to "peace-loving states,"⁴⁶ the law articulated in the Charter codified rules to govern state behavior generally.

The major premise of the Charter system is the sovereign equality of states.⁴⁷ Thus, the Charter's most important prescription prohibits the use or threat of force by states against the territorial integrity or political independence of other states except in the exercise of the inherent right, which "[n]othing in the present Charter shall impair," of individual or collective self-defense against "armed attack."⁴⁸ The Charter qualifies

44. The United States argued, and the I.C.J. rejected the argument, that the U.N. Charter grants the Security Council alone the power to restrict an exercise of the right of self-defense in connection with the exercise of its responsibility to maintain peace and security. 1984 I.C.J. 392, 436 (Judgment on Jurisdiction and Admissibility of Nov. 26). See also Reisman, *supra* note 2.

45. Cf. Montesquieu, *De l'Esprit des Loix*, in *OEUVRES COMPLÈTES* 530 (1964) ("Laws, in their widest meaning, are the necessary relations that derive from the nature of things . . .") (translation by author).

46. U.N. CHARTER art. 4, para. 1.

47. U.N. CHARTER art. 2, para. 1.

48. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

this right by reference to measures to maintain peace and security which the Security Council might take. In the absence of Security Council action, the Charter makes clear, states are not powerless to protect themselves.⁴⁹ The system of states dictates these principles, which proclaim the only rules consistent with such a structure of world politics. However open to abuse and confusion,⁵⁰ these principles shape international relations; they also influence the terms by which states justify their uses of force.

The Charter's rules create the standard against which to judge international uses of force. A different standard, one making the lawfulness of a use of force dependent on the constitution or functioning of a particular government, for example, would invite even more abuse than do articles 2(4) and 51. Under such a regime, no state would be safe. The logic of a state system also dictates that, if a state supports a rebellion against the authority of a government of another state, it is engaging in coercion against that state. Such coercion may amount to an armed attack.⁵¹ The

manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4. Article 51 provides, in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

49. See, e.g., L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 345 (3d ed. 1969); Waldock, *The Regulation of the Use of Force By Individual States in International Law*, 81 HAGUE RECUEIL 455, 498 (1952).

50. See, e.g., M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 190-96 (1961) (various kinds of coercion that may constitute armed attack).

51. See Waldock, *supra* note 49, at 496-98; Moore, *supra* note 9, at 82-85; I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 373 (1963); M. MCDUGAL & F. FELICIANO, *supra* note 50, at 232-41; E. ROSTOW, Book Review, 82 YALE L.J. 829 (1973) (reviewing J.N. MOORE, LAW AND THE INDO-CHINA WAR (1972)). The literature on intervention constitutes a substantial body of learning, much of it informed by the debates over the legality under international law of United States involvement in the Vietnam War. See, e.g., Friedmann, *Intervention and International Law I*, in INTERVENTION IN INTERNATIONAL POLITICS 40 (L. Jaquet ed. 1971); Higgins, *Intervention and International Law*, in INTERVENTION IN WORLD POLITICS 29 (H. Bull ed. 1984); ESSAYS ON INTERVENTION (R. Stanger ed. 1964); R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY (1970). These and other works wrestle with the question of the lawfulness of supporting one side in a civil war or insurgency. Some argue that the justice of the cause determines the permissibility of the intervention. See the discussion in Higgins, *supra*. Others argue that, in a civil war, a state may support one side once another state has taken steps to support the other. Such positions equate the legal position of the government with the rebellion. See generally Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521 (1960); 2 L. OPPENHEIM, INTERNATIONAL LAW 659-60 (H. Lauterpacht 7th ed. 1953); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 265-74 (1964) (concludes that law is unsettled). These discussions strive to articulate a sensible rule for guidance in situations of domestic disturbance. Most dislike the notion that a government may, as a matter of law, call on the assistance of another state to suppress a revolution, as Metternich's Austria did in 1848. In civil war, where does sovereignty repose? Ultimately, the question of intervention resolves itself into one of prudence. See generally W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW, *supra*, at 265-74; Moore, *Toward an Applied Theory for the Regulation of Intervention*, in LAW AND CIVIL WAR

authors of the U.N. Charter had this reality firmly in mind. The inter-war period had provided ample evidence of governments' ingenuity in disguising armed attack in the language of self-defense—what we now call humanitarian intervention⁵²—and self-determination.⁵³ These examples informed the thinking at the San Francisco Conference in 1945.⁵⁴ Conscious of this history, the Charter's drafters intended article 51 to accommodate regional security treaties to the Charter, not to narrow the customary law regarding the right to use force in self-defense.⁵⁵

Self-defense is a narrower concept than self-preservation.⁵⁶ It derives its meaning from the totality of the circumstances giving rise to the action taken in self-defense, that is, "[t]he expectations which the contending participants create in each other."⁵⁷ These expectations "are a function not only of the simple fact that the military instrument has or has not been overtly used but also of the degree and the kind of use to which all other instrumentalities of policy are being put."⁵⁸ Because of

IN THE MODERN WORLD 3 (J. N. Moore ed. 1974); Schachter, *The United Nations and Internal Conflict*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 401 (J. N. Moore ed. 1974). As with so many international legal and political questions, the decision to intervene depends on the stakes and the dangers. In the case of the American Civil War, the North's success on the battlefield and undoubted readiness to wage war against any state assisting the South encouraged neutrality. Similarly, fear of general conflict played an important role in the Western powers' decision not to intervene in the Spanish Civil War. Few would contest now, as then, the legal right of states to have supported the republican government of Spain against Franco, and the forces of Germany and Italy. Then, as now, ideology played its part. In the present configuration of world politics, where groups of states regard others as deserving destruction as a matter of morality, if not of law, one should hesitate to espouse a rule that encourages the states to subvert regimes merely because they dislike their constitution or internal politics. See, e.g., Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 *VA. J. INT'L L.* 109, 124-34 (1985) (Geneva Protocol I would confer combatant status on guerrillas fighting colonial or racist regimes or alien domination). Ultimately, all states share an interest in the right to exist *qua* state. And most states are potentially vulnerable to dissension that could become insurgency if outside support were legitimated.

52. See generally M. MCDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 238-42 (1980) (humanitarian intervention consistent with article 2(4) if it serves community values).

53. For example, Germany claimed that it invaded Poland in 1939 in self-defense. The Soviet Union advanced the same justification for its 1939 invasion of Finland. In 1938-39, Hitler claimed to be saving the German-speaking Czech citizens of the Sudetenland from oppression. He considered Germany to be assisting Franco in protecting Spain from communism as well as liberating it from the decadent corruptions of republican government, and claimed that the Anschluss with Austria constituted self-determination. Mussolini, at times, justified the invasion of Ethiopia as necessary to civilize a barbarian state. One could add to the list.

54. L. GOODRICH, E. HAMBRO & A. SIMONS, *supra* note 49, at 2-3.

55. See, e.g., D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 182 (1958); M. MCDUGAL & F. FELICIANO, *supra* note 50, at 235; Moore, *supra* note 9, at 83; Waldock, *supra* note 49, at 503-04.

56. See Waldock, *supra* note 49, at 461.

57. M. MCDUGAL & F. FELICIANO, *supra* note 50, at 241.

58. *Id.*

the risk of abuse, the test for the lawfulness of a use of force in self-defense against another state is high, as has been well-established for over a century.⁵⁹ Inevitably, the issue turns on the purpose of the use of force; a lawful use of force affirms legal rights.⁶⁰

Under the U.N. Charter, states not only are barred from unlawfully using or threatening to use force in their international relations, but also are responsible for uses of force originating from their territories about which they had known and should have tried to prevent. In an early application of this principle, Great Britain was required to pay damages to the United States for the depredations of a Confederate cruiser that had been constructed in Britain and allowed to sail despite American urgings that it not be allowed to do so.⁶¹ The I.C.J. affirmed in the *Corfu Channel* case⁶² that, under the U.N. Charter, every state has an obligation "not to allow knowingly its territory to be used for acts contrary to

59. Commentators cite (often incorrectly) the *Caroline* case for the customary norm. See, e.g., Waldock, *supra* note 49, at 462-64; Tünnermann, *supra* note 1, at 129-30. Both overlook the fact that the *Caroline* case involved anticipatory self-defense. See M. McDOUGAL & F. FELICIANO, *supra* note 50, at 218. Any act of self-defense, of course, to a greater or lesser degree, anticipates what others are likely to do. To borrow an example from personal self-defense, we anticipate that the fellow who shoots at us will do so again if given the opportunity, and we seek to deprive him of that opportunity by firing back before he can get off that next shot. We anticipate otherwise at peril of our lives. The same analysis applies to situations involving the use of force by one state against another. Under the U.N. Charter, an action taken in response must be directed at preventing or deterring anticipated further unlawful uses of force.

The *Caroline* case involved the following facts. In 1837, a rebellion against the Royal Government of Canada occurred. An armed band of New Yorkers prepared to carry "supplies and military stores from the American side of the river to the rebels in Navy Island, part of British territory." 2 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 414 (1906). Warned of this activity by the New Yorkers' public appeals for support, and determined to stop it, British forces crossed the border, captured the *Caroline*, in which the supplies were shipped, and sent it over Niagara Falls. *Id.* at 409. The Secretary of State summed up the United States' view that the right to violate international borders in self-defense "should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'" *Id.* at 412. The Israeli attack at the beginning of the Six Day War in June 1967 constitutes one of the clearest applications of the *Caroline* standard.

Not surprisingly, those who seek to impeach the self-defense claim at issue most often invoke this test, since the "instinctive" need expressed by Webster hardly ever is encountered in situations short of an outright invasion of one state by the armed forces of another, or direct and ongoing conventional military action against its territory, vessels, aircraft, or personnel. That one may fire back immediately when fired upon does not help much in evaluating use-of-force instances as they actually arise in international affairs. To go further and say that one may fire back only under those circumstances, and none other, is to advocate a view more suited to domestic criminal law, where effective community peacekeeping institutions exist, than to international law and relations.

60. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 30-31 (Judgment on Merits of Apr. 9); Waldock, *supra* note 49, at 500-01.

61. See 6 J.B. MOORE, *supra* note 59, at 998-99 (*Alabama* claims arbitration).

62. (U.K. v. Alb.), 1949 I.C.J. 4 (Judgment on Merits of Apr. 9).

the rights of other States.”⁶³ The Court held Albania liable for damages to British warships that struck mines while exercising the right of innocent passage through Albania’s territorial waters.

A use of force may take various forms. A given use violates article 2(4) if it constitutes unilateral action to deprive forcibly the target state of its legal rights. Thus, a state that arms, trains, supplies, or otherwise supports regular or irregular armed forces conducting operations in or against another state is responsible under international law for such operations. If such operations violate article 2(4), the target state may exercise its right of self-defense against that state. Nothing in the Charter or in customary international law commands that “armed attack” take a particular form; similarly, there is no prohibition on particular forms of self-defense so long as they are reasonably calculated to end the unlawful use of force that triggered and justified the defensive use of force.

B. *Defensive Uses of Force in Practice*

The affirmation of legal rights conditions both the right to use force and its exercise. In this context, the *Caroline* standard⁶⁴ is a formula articulating the principle that the use of force in self-defense must be justified by a prior breach of international law of a forceful character. Under article 2(4) of the Charter, such a breach means an attack on the territorial integrity or political independence of another state. To be lawful, a responsive use of force under article 51 must aim to cure the breach that gave rise to the exercise of the right of self-defense. It must be proportional, involving no more than the force reasonably required to cure the breach.⁶⁵

Permissible uses of force in self-defense, aimed to achieve permissible objectives, may take as many forms as the impermissible uses of force giving rise to the claimed right to act in self-defense. At one extreme, the removal of Napoleon (and, during World War II, of Hitler, had he not committed suicide) became a necessary and proportional object of the allied uses of force. In Napoleon’s case, it was clear that his government had consistently adopted a policy of aggression and that no peace treaty could assure its good behavior. Similarly, any state that is a continuing victim of Libya’s terrorist attacks would have a strong case for a responsive use of force under article 51; the removal of Qadhafi’s government

63. *Id.* at 22.

64. See *supra* note 59; I. BROWNIE, *supra* note 51, at 429 (The *Caroline* “test is primarily verbal: it deals with a question of degree and in fact merely states that governments should exercise their discretion to act in defence of their vital interests with caution.”).

65. See M. McDOUGAL & F. FELICIANO, *supra* note 50, at 242.

may be the only way to end Libya's use of terrorist attacks against such states and their citizens in violation of article 2(4). Certainly, the present Libyan government has failed to change its policies when confronted by diplomatic exhortation and economic pressure.

These examples constitute extreme cases. A responsive, defensive use of force ought to reflect only what is necessary to end the violation of international law that gave rise to the right to use force in self-defense. Thus, support for the FSLN's opponents is a proportional use of force in self-defense, designed to encourage the Sandinistas to cease supporting guerrillas fighting Nicaragua's neighbors—that is, to end Nicaragua's persistent and sustained violation of international law.⁶⁶ Equally, mining Nicaragua's harbors in 1984, which caused such controversy and figures so prominently in Nicaragua's I.C.J. case against the United States and in Ambassador Tünnermann's article,⁶⁷ constituted a proportional response to Nicaragua's supplying arms and other matériel to Central American guerrillas by aiming to deprive Nicaragua of its sources of these supplies. Contrary to Ambassador Tünnermann's suggestions,⁶⁸ President Reagan has often declared that American policy aims to end Nicaragua's support of guerrillas in other countries, not to overturn the FSLN government.⁶⁹

C. *Necessity for Defensive Use of Force*

The question of the justification for a defensive use of force dominates scholarly consideration of article 51 of the U.N. Charter as it did scholarly consideration of the customary law—the substance of article 51.⁷⁰ Ambassador Tünnermann asserts that, since 1982, the United States has

66. See Moore, *supra* note 9, at 87-90 (use of paramilitary forces as part of defensive response lawful). But see Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621 (1985) (Nicaragua not aggressor under international law, *id.* at 660; direct attack by Nicaragua against El Salvador cannot be fully substantiated, *id.* at 661; U.S. restrained by international law from intervening in Nicaraguan affairs, *id.* at 663).

67. See, e.g., Application, *supra* note 2; Memorial, *supra* note 1, at 43-48; Tünnermann, *supra* note 1, at 109.

68. Tünnermann, *supra* note 1, at 130.

69. See, e.g., Central America, Address Delivered Before a Joint Session of the Congress, 19 WEEKLY COMP. PRES. DOC. 608-11 (Apr. 27, 1983) ("[L]et us be clear as to the American attitude toward the Government of Nicaragua. We do not seek its overthrow. Our interest is to ensure that it does not infect its neighbors through the export of subversion and violence. Our purpose, in conformity with American and international law, is to prevent the flow of arms to El Salvador, Honduras, Guatemala, and Costa Rica. We have attempted to have a dialogue with the government of Nicaragua, but it persists in its efforts to spread violence.")

70. See generally M. MCDUGAL & F. FELICIANO, *supra* note 50, at 229-41; D. BOWETT, *supra* note 55, at 10; Waldo, *supra* note 49, at 495-99; J. BRIERLY, *THE LAW OF NATIONS* 406-07 (6th ed. 1963).

used force against the political independence of Nicaragua, and that “[i]n no sense can [this] use of force . . . be regarded as the only available means of protecting essential rights from irreparable harm.”⁷¹ This assertion requires analysis. Under article 51, the “target-claimant”⁷² must evaluate the coercive pressures attacking its legal rights and decide if it should exercise its inherent right of self-defense to affirm the legal rights attacked. In Central America, El Salvador and other neighbors of Nicaragua are “under the pressure of an effective armed attack . . . and [are] threatened in [their] territorial integrity, in [their] sovereignty, and in [their] independence.”⁷³ The U.N. Charter recognizes that states have the legal right to enjoy territorial integrity, sovereignty, and political independence as attributes of sovereign equality. Effective enjoyment of this right is a necessary predicate to world public order in a system of states.⁷⁴

Article 2(4) of the Charter requires a good faith effort to seek a peaceful resolution of the conflict in light of all the circumstances of the case before a state being attacked uses force in self-defense. The test is a practical one, not one of ritual punctilio. Under article 51, the judgment of the state being attacked is final, unless and until the Security Council takes measures necessary to maintain international peace and security. However subjective, self-defense represents an effort to end significant violations of international law and to prevent their recurrence. These goals discipline the use of force in self-defense. They do not qualify the right to act, for only the Security Council may do so. Rather, they establish criteria for determining what kind of action is permissible.

Exhaustion of alternative forms of dispute resolution thus is not a prerequisite to using force in self-defense. Nicaragua’s neighbors and the United States, while acting under article 51, nonetheless have tried alternatives to the use of force to counter Nicaragua’s support for, and encouragement of, guerrillas in El Salvador and Honduras. Since 1981, Latin American states and the United States have pressed Nicaragua to agree to a comprehensive, regional framework for addressing what all participants agree are interrelated political, economic, social, and military problems. Since 1983, the Contadora negotiations conducted under

71. Tünnermann, *supra* note 1, at 129. This statement implicitly admits that Nicaragua irreparably harms its neighbors’ “essential rights.”

72. M. McDUGAL & F. FELICIANO, *supra* note 50, at 230.

73. Declaration of Intervention by the Republic of El Salvador (Nicar. v. U.S.), 1984 I.C.J. Pleadings (Military and Paramilitary Activities in and against Nicaragua) (Declaration dated Aug. 15, 1984).

74. See U.N. CHARTER art. 2, para. 1 (sovereign equality); art. 2, para. 4 (territorial integrity and political independence).

the auspices of Colombia, Mexico, Panama, and Venezuela have generated a program for resolving the region's problems, but, as of June 1986, no agreement on implementing it. The United States regards itself as committed to "abide by a comprehensive, verifiable and simultaneous implementation of the Contadora Document of Objectives of September 1983, as long as such agreement is being fully respected by all the parties."⁷⁵

So long as Nicaragua continues to support insurgencies in other Central American countries, responsive uses of force in self-defense remain lawful under article 51. What Ambassador Tünnermann means by suggesting that there are other options available to the United States is unclear. Certainly, Nicaragua has proved unwilling to meet the United States' concerns expressed in negotiations with the Sandinistas as well as in public statements.⁷⁶

D. *The United States and Nicaragua: Collective Self-Defense*

Ambassador Tünnermann entertains his readers with a canard:

If the United States refused to regard the Soviet placement of missiles in Cuba—nuclear warheads aimed directly at its territory—as an armed attack, the actions charged against Nicaragua must fall far below the requirement of Article 51. They do not involve the use of armed forces. Nicaraguan troops and other forces under its direction and control are not alleged to be operating outside its borders. It is not even asserted that Nicaragua is "substantially involved" in the rebel operations in El Salvador. All that the United States has alleged—without producing a shred of proof—is that Nicaragua has provided some conventional arms to the insurgents.⁷⁷

75. Letter from Ambassador Philip C. Habib to Congressmen Barnes, Richardson, and Slatterly (Apr. 11, 1986) (copy on file with the *Yale Journal of International Law*). On September 9, 1983, all five Central American states agreed to a 21-point Document of Objectives, which included proposals both to terminate all subversion, terrorism, or sabotage, and to establish "machinery necessary to formalize and develop the objectives contained in this document, and to bring about the establishment of appropriate verification and monitoring systems." *REVOLUTION BEYOND OUR BORDERS*, *supra* note 5, at 27 n.41. For a detailed account of diplomatic efforts to resolve Central American problems through direct U.S.-Nicaraguan negotiations in 1981, 1982, 1983, and 1984 through the Manzanillo talks, among others, see *id.* at 23. See also *Wash. Post*, May 11, 1986, at A4, col. 1 (details of possible scheme for verifying Central American agreement).

76. See generally *REVOLUTION BEYOND OUR BORDERS*, *supra* note 5.

77. Tünnermann, *supra* note 1, at 135. Ambassador Tünnermann relies on assertions by Professor Abram Chayes that the quarantine of Cuba in 1962 was not undertaken under article 51. Professor Chayes was the Legal Adviser at the time and his opinion is relevant evidence, not authoritative. In any event, the United States was, and is, not bound by Professor Chayes' legal opinions. The United States' actions with regard to the Cuban Missile Crisis must have been based on article 51; nothing else will justify them as a matter of law. Professor Chayes is now counsel for Nicaragua before the I.C.J. It is not clear what Ambassador Tünnermann

This straw man, that the issue concerns Nicaraguan attacks against the United States, warrants examination only because Ambassador Tünnermann raises it. The United States has never claimed that Nicaragua is attacking the United States. It has claimed that Nicaragua is attacking El Salvador and Honduras, and that the United States has the inherent right to act to end such attacks, which constitute aggression.

A number of commentators assert that article 51's reference to the inherent right of collective self-defense presents semantic difficulties.⁷⁸ Article 51 does contain ambiguities. In this respect, it is not unique among legal documents. Those ambiguities are reconciled if the article is read in context and in the perspective of its policy goals. In addition to the fact that the drafters of article 51 contemplated the existence of regional security treaties and intended that the U.N. Charter allow them,⁷⁹ other compelling reasons argue for construing article 51 to encompass the full range of customary international law existing before the time of the U.N. Charter and to permit arrangements of collective self-defense like those of NATO and the other American security treaties.⁸⁰ The failure of the Security Council as an effective peacekeeping institution underlines the importance of such a construction.⁸¹

When a group of states acts to counter a violation of article 2(4), it provides an alternative framework for achieving the fundamental purpose of the Charter and any other legal system: "the prevention and

means by "shred of proof." Abundant evidence exists concerning Nicaragua's active involvement with guerrilla movements in Central America. Perhaps he means evidence, of which there is a substantial quantity, that would be admissible in federal court.

78. See, e.g., D. BOWETT, *supra* note 55, at 200-48 (advocates restrictive view of collective self-defense; rights flow to individual states rather than groups, and states may exercise their individual rights collectively); H. KELSEN, *THE LAW OF THE UNITED NATIONS* 913-15 (1951) (collective self-defense means one state's assisting another exercising its right of self-defense); M. MCDUGAL & F. FELICIANO, *supra* note 50, at 247-50 (criticism of Bowett, Kelsen, Stone, and others; groups may have rights and can exercise self-defense; collective self-defense is one modality of permissible coercion); J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 245 (1954) (one state has no right of self-defense arising out of an attack on another); Waldock, *supra* note 49, at 503-05 (collective self-defense predicated on right of individual self-defense). See also Joyner & Grimaldi, *supra* note 66, at 665-67 (U.S. must invoke Rio Treaty for its actions in Central America to qualify as exercise of right of collective self-defense).

79. See *supra* note 55 and accompanying text.

80. M. MCDUGAL & F. FELICIANO, *supra* note 50, at 250.

81. The Charter permits regional security arrangements. These arrangements must, however, express values that conform to the Charter's articulations of universal values. Thus article 52 provides, in part:

Nothing in the present Charter precludes the 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 or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

U.N. CHARTER art. 52, para. 1.

suppression of unilateral change by destructive coercion."⁸² As with uses of force in individual self-defense, such uses of forces must be proportional; that is, reasonably calculated to achieve the goals of a lawful use of force. Just as the Security Council may review claims of individual self-defense, it may review self-defense claims asserted by a group. Neither article 51 nor the Inter-American Treaty of Reciprocal Assistance purports to require third party approval before a state may exercise its right to act in individual or collective self-defense.⁸³

By casting the issue in terms of a mythical, direct Nicaraguan armed attack against the United States and denying and ignoring the evidence of his government's assistance to guerrillas fighting the governments of El Salvador and Honduras, Ambassador Tünnermann dodges a reality even critics of the Administration's Central American policies recognize.⁸⁴ By doctoring the record, Ambassador Tünnermann seeks to create the impression that Nicaraguan actions conform to the law they violate.

Nicaraguan policy challenges the most important U.N. Charter rules regarding world public order. Nicaraguan support for guerrillas in neighboring states constitutes a unilateral attempt to impose change by the use of force on the ground that a Socialist government has the right under international law to propagate its principles by the sword. That Nicaragua deploys far larger forces than either of its immediate neighbors⁸⁵ increases the threat posed by guerrillas operating with Nicaraguan

82. M. MCDUGAL & F. FELICIANO, *supra* note 50, at 250.

83. Joyner & Grimaldi, *supra* note 66, at 665, assert that the United States must invoke the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) in order to exercise its right of collective self-defense in the hemisphere. Moore, *supra* note 9, at 104-05, notes that they misread the Treaty and misunderstand the notion of collective self-defense. *See also id.* at 90-91 (United States has not violated Charter of Organization of American States). Both the Rio Treaty and the OAS Charter provide that armed attack against one state-party shall be considered an armed attack against every other American state. Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, art. 3(1), 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77; OAS CHARTER, Apr. 30, 1948, art. 27, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, *as amended*, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

84. *See, e.g.,* Foley, *Contra Aid: An Act of War*, Wash. Post, Apr. 15, 1986, at A17, col. 2 (Foley mentions Nicaraguan assistance to guerrillas in passing, although referring to such assistance weakens his own argument). *See also* HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, REPORT ON AMENDMENT TO THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 1983, H.R. REP. NO. 122, 98th Cong., 1st Sess. (1983) (Boland Committee Report hostile to Administration policy while recognizing that Nicaragua commits aggression against its neighbors).

85. Since 1979, Nicaragua has built a substantial military machine. Whereas Somoza deployed fewer than 15,000 troops, the Sandinistas now boast a regular military establishment of some 62,000 active duty forces. With reserves, militia, and security forces, the total is at least 119,000. Its forces are equipped with advanced Soviet weapons superior in quantity and quality to those possessed by its neighbors. *See generally* U.S. DEP'T OF STATE & U.S. DEP'T OF DEFENSE, DEP'T OF STATE PUB. 9432, INTER-AMERICAN SERIES 119, THE SANDINISTA

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support. For example, El Salvador, Honduras, and Costa Rica together lack the power to force Nicaragua to change its policy.⁸⁶ The United States alone has sufficient power either to bring an end to Nicaraguan violations of the international law regarding the use of force or to project a protective screen over the targets of Nicaraguan policy.

III. The Nicaraguan Challenge

The Nicaraguan problem is deceptively simple. At one level, it concerns contrasting descriptions of events in Central America. Nicaragua claims to be the victim of unlawful armed attack by the United States and its surrogates dating from early 1982. The United States asserts that, on the contrary, since 1979, Nicaragua has engaged in armed attacks against its neighbors by supporting, arming, training, and directing like-minded guerrillas fighting the governments of El Salvador and Honduras. American support for resistance to Sandinista policies responds to Nicaragua's unlawful use of force. Therefore, the United States' policy is consistent with the U.N. Charter's affirmation of the right to engage in collective self-defense. On a more fundamental level, however, the Nicaraguan problem is part of a broader, unresolved conflict about the appropriate rules of world public order.

The U.N. General Assembly's adoption in 1974 of a Definition of Aggression⁸⁷ provides one example of this conflict. The General Assembly adopted the definition by consensus; there was no roll-call. Article 7 of the Definition provides:

Nothing in this Definition, and in particular article 3 [invasion, bombardment, blockade, attack by armed forces, sending armed bands, allowing territory to be used by a second State to commit aggression against a third State, may qualify as aggression], could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-

MILITARY BUILD-UP (1985). Costa Rica deploys essentially constabulary forces totalling 8,000 troops; Honduras has 18,000 troops. The disparities in equipment mirror those in numbers. *Id.* at 37.

86. *See id.*; INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE 1983-1984, at 110-12 (1984) (El Salvador's armed forces totaled 24,650 and were being increased).

87. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter cited as Definition of Aggression]. *See generally* J. STONE, CONFLICT THROUGH CONSENSUS (1977); Tyner, *Wars of National Liberation in Africa and Palestine: Self-Determination for Peoples or for Territories?*, 5 YALE STUD. WORLD PUB. ORD. 234 (1979). Ambassador Tünnermann cites the Definition of Aggression to bolster his description of the law. *See* Tünnermann, *supra* note 1, at 117-18.

operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor to the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.⁸⁸

The debates about the meaning and application of this article revealed profound disagreement about the commanding force of article 2(4) in circumstances analogous to those existing in Central America.⁸⁹ For example, the East German delegate asserted, probably with unconscious irony:

As colonial rule, *apartheid* and other forms of alien suppression constituted a permanent aggression against the oppressed peoples, resistance against those forms of external use of force and suppression was an act of self-defense. Any assistance, political or material, to those struggling for independence and self-determination was therefore in full conformity with the Charter and other documents of the United Nations⁹⁰

Most Soviet bloc delegates carefully distinguished struggles against colonial oppression from "police actions" within other states.⁹¹ The Chinese delegate agreed that article 7's reference to outside support included armed support, particularly against Israel.⁹² Delegates from NATO and other Western countries argued that article 7 did not legitimate armed force and that the U.N. Charter's rules regarding the use of force clarified its meaning; they were a distinct minority among those who spoke.⁹³

These efforts to reconcile the conflicting goals of the Definition of Aggression have failed both as a matter of logic and in the realm of state practice. No one has succeeded in explaining how the law can tolerate armed attacks against disfavored states and prohibit them against all states.⁹⁴

The debates over the meaning of article 7 revealed at least nominal disagreement about the meaning and application of article 2(4) of the U.N. Charter. This disagreement is integral to the Nicaraguan dispute. Given the contrary evidence, the denials by Ambassador Tünnermann

88. Definition of Aggression, *supra* note 87, art. 7.

89. Indeed, Nicaragua claims the right to support liberation movements in the Caribbean area. See *supra* text accompanying note 20 & note 32.

90. 29 U.N. GAOR C.6 (1476th mtg.) at 7, U.N. Doc. A/C.6/SR.1476 (1974) (italics in original).

91. J. STONE, *supra* note 87, at 85.

92. 29 U.N. GAOR C.6 (1475th mtg.) at 62, U.N. Doc. A/C.6/SR.1475 (1974). The Chinese delegate also criticized the Soviet Union for committing aggression in 1968 when it invaded Czechoslovakia. *Id.* See generally J. STONE, *supra* note 87, at 85.

93. See generally J. STONE, *supra* note 87, at 81-85.

94. U.N. practice when confronted by civil strife illuminates the problem. See generally Schachter, *supra* note 51.

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and other Nicaraguan officials that Nicaragua has ever supported insurrection in other Central American states, or that, even if Nicaragua supports insurrections abroad, that such support does not violate international law,⁹⁵ suggest that the Sandinistas regard such support as lawful, although they deny that it is so when directed against the FSLN.

Few states are free from demands by people claiming to be oppressed. In Europe, for example, various ethnic groups have long asserted such claims. To suggest that the existence of an insurrection liberates states from their obligations to refrain from the use or threat of force and allows them to provide armed support to the insurrection stands the Charter on its head and is a prescription for anarchy. If this view becomes part of the international law governing the use of force, no state will be safe, and the risk of general war will increase.

Conclusion

The debate about the law regarding the use of force reflected in state practice ought, in a rational world, to be resolved in favor of reciprocal respect for article 2(4) of the U.N. Charter. That a substantial number of states disposing of great power appear not to want this outcome threatens world public order.

Public order cannot survive on a double standard. If violations of article 2(4), such as Nicaragua's with respect to El Salvador, Honduras, and Costa Rica,⁹⁶ become evidence of what the law is, the law will disappear. *Sauve qui peut* will become the order of the day. At a minimum, the states that are attacked may defend themselves by adopting the methods of their attackers. Such a course of events would lower the threshold for general war. In a nuclear world, if states are to avoid war, they must insist on reciprocal respect for the U.N. Charter's commands regarding the use of force. No other rules make sense for a system of states, and there is no alternative policy if peace is to be preserved. The rules of articles 2(4) and 51 correspond to the necessities of the state system if it is to be a system of international cooperation and not of anarchy.

95. Tünnermann, *supra* note 1, at 135.

96. *See supra* note 38.