

United States Armed Intervention in Nicaragua: A Rejoinder

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On April 9, 1984, Nicaragua filed suit in the International Court of Justice (I.C.J.) charging the United States with engaging in military and paramilitary activities in and against Nicaragua in violation of the Charters of the United Nations and the Organization of American States, and of general and customary international law.¹ On May 10, 1984, after a hearing at which both states presented evidence and legal arguments, the Court ordered the United States to cease its "covert" war against Nicaragua pending the determination of the case on the merits.² The vote was 14-1, with only the U.S. judge dissenting.³ The Court then held hearings, in which both the United States and Nicaragua participated fully, on the preliminary issues of jurisdiction and admissibility. On November 26, 1984, the Court ruled in Nicaragua's favor on these issues by lopsided margins.⁴ Faced with a hearing on the merits of Nicaragua's claims, the United States announced on January 18, 1985, that it would not participate further in the case.⁵

Most litigants, of course, do not have the luxury of spurning a court that has declared its jurisdiction over their case, and on those rare occasions when they do so, they are considered fugitives from justice. The Reagan Administration's decision to scorn the World Court, after thirty-nine years of active support, cannot have been made lightly. The basis for its decision, however, is not hard to understand; it reflects the Administration's awareness of the factual and legal impossibility of defending its

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1. Application of Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings (Case Concerning Military and Paramilitary Activities in and against Nicaragua) (Application date Apr. 9, 1984).

2. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Provisional Measures Order of May 10).

3. *Id.* at 187, 190.

4. Nicar. v. U.S., 1984 I.C.J. 392, 442 (Judgment on Jurisdiction and Admissibility of Nov. 26). The votes were: 11-5 for jurisdiction based on Articles 36(2) and 36(5) of the I.C.J. Statute; 14-2 for jurisdiction based on the Friendship, Commerce and Navigation Treaty between Nicaragua and the United States; 15-1 for jurisdiction to take the case; and 16-0 for admissibility of the Application.

5. 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, 58-60 (1985).

actions before an objective tribunal, where, unlike in the political arena, unsupported allegations do not pass for evidence.

Mr. Rostow's article, *Nicaragua and the Law of Self-Defense Revisited*,⁶ which presumably reflects the arguments and evidence the State Department would have presented to the World Court had the United States not chosen to withdraw, is a striking illustration of the flimsiness of the United States' case on both the facts and the law. Mr. Rostow contends that Nicaragua unlawfully supports guerrilla groups fighting the governments of El Salvador, Honduras, and Costa Rica. To support this proposition, he relies almost exclusively on one State Department "report," which, in turn, relies either on nothing at all, or on dubious confessions by captured Salvadoran rebels made after prolonged periods of detention while in the custody of Salvadoran security forces. None of this so-called evidence, as the State Department is well aware, could withstand scrutiny in a court of law.

Similarly, the United States' claims of self-defense cannot withstand analysis. Such claims are flatly contradicted by admissions of senior members of the Reagan Administration, including President Reagan himself, and, in any event, cannot satisfy the armed attack, proportionality, and reporting requirements of article 51 of the U.N. Charter.

I. Factual Background

The United States' use of force against Nicaragua's sovereignty, territorial integrity, and political independence is so well documented that the U.S. scarcely bothers any longer to deny it. Periodically, however, Administration officials have attempted to justify U.S. support for the *contras* on the theory that such support was designed to interdict traffic in arms allegedly proceeding from Nicaragua to rebels fighting against the government of El Salvador.⁷ This claim is erroneous on at least two levels. First, arms interdiction has never been a purpose of U.S. military activities against Nicaragua. Second, U.S. allegations concerning supply and assistance by Nicaragua to rebels in El Salvador are simply falsifications designed to justify an otherwise indefensible policy.

David C. MacMichael, a CIA employee responsible for assessing and analyzing all evidence of arms traffic through Nicaragua for the period from March 1981 until April 1983, has stated that during that time there was "no reliable evidence to support the Administration's public charges

6. Rostow, *Nicaragua and the Law of Self-Defense Revisited*, 11 YALE J. INT'L L. 437 (1986).

7. See, e.g., Wash. Post, Apr. 13, 1984, at A18, col. 5; N.Y. Times, Apr. 9, 1984, at A1, col. 3.

against Nicaragua. Therefore, the use of these charges as justification for initiating the *contra* war in November 1981 was false, and the administration knew it was false."⁸

Mr. MacMichael did state in his testimony before the I.C.J. that there was some evidence of Nicaraguan involvement in arms traffic to El Salvador during the period of the January 1981 "final offensive" in El Salvador, but that there was not enough evidence to make a reliable determination one way or another.⁹ When pressed for his personal opinion, he said that he believed there might have been some government involvement at that time. However, after January 1981, Mr. MacMichael testified that there was no evidence of any kind of Nicaraguan government involvement in arms traffic to El Salvador or anywhere else, notwithstanding the extensive and sophisticated intelligence methods employed by the United States precisely to detect the existence of any such traffic.¹⁰ The substance of Mr. MacMichael's testimony has been confirmed by Pentagon officials, U.S. diplomats, and investigations by American newspapers.¹¹

A review of the evidence adduced by Mr. Rostow and the United States with respect to the subject of arms traffic shows it to be, as Mr. MacMichael testified, "unreliable . . . suspect and . . . presented in a deliberately misleading fashion."¹² Mr. Rostow's sole support for virtually all of his contentions concerning Nicaraguan government involvement in arms traffic is a State Department report entitled "*Revolution Beyond Our Borders*."¹³ Even a cursory glance at that document reveals that it is nothing more than a State Department propaganda piece, similar to those routinely distributed by the Department's Office of Public Diplomacy, in an effort to convince a skeptical U.S. public and Congress of the imminent danger Nicaragua supposedly represents to U.S. national

8. Wash. Post, Jan. 4, 1986, at A19, col. 2.

9. Testimony of David MacMichael (Nicar. v. U.S.), 1985 I.C.J. Verbatim Record (Case Concerning Military and Paramilitary Activities in and against Nicaragua), CR 85/21, at 21 (Testimony of Sept. 16, 1985) (copy on file with the *Yale Journal of International Law*).

10. *Id.* at 19-22.

11. See, e.g., Wash. Post, Jan. 18, 1986, at A21, col. 6; L.A. Times, June 16, 1984, § 1, at 1, col. 5; Boston Globe, June 10, 1984, at 1, col. 1; Christian Sci. Monitor, May 2, 1984, at 2, col. 3.

12. Testimony of David MacMichael, *supra* note 9, at 22.

13. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, SPEC. REP. NO. 132, "REVOLUTION BEYOND OUR BORDERS": SANDINISTA INTERVENTION IN CENTRAL AMERICA (1985) [hereinafter cited as REVOLUTION BEYOND OUR BORDERS]. The title of the report is the first indication of its unreliability. The State Department alleges that a senior Nicaraguan official once claimed that the Nicaraguan revolution had no frontiers and that this was proof of Nicaragua's determination to subvert its Central American neighbors. When pressed, however, the State Department could not supply a source for the statement. N.Y. Times, Mar. 30, 1985, at A1, col. 1. In fact, it was never made by any Nicaraguan official.

security.¹⁴ This report, like the others, is replete with sensational allegations, but devoid of verifiable evidentiary sources. For example, the pages cited in "*Revolution Beyond Our Borders*" in support of Mr. Rostow's assertion that arms and supplies began to arrive in El Salvador "by land, sea and air from Managua" during September and October 1980 do indeed contain allegations to that effect; however, they provide no supporting citations for the critical allegations.¹⁵

The State Department's technique here is quite simple: it makes a series of unsupported allegations in a report in September, and then cites that report as support for identical allegations made the following May. No doubt Mr. Rostow's article will, in turn, be cited as support for precisely the same undocumented allegations in the future. This technique is repeated throughout Mr. Rostow's article. Thus, when Mr. Rostow asserts that transport planes airlifted supplies from Nicaragua to guerrillas in El Salvador in January 1981, he again relies entirely on "*Revolution Beyond Our Borders*." This "source," in turn, cites only an unpublished White House intelligence summary and accounts by certain notoriously partisan newspapers in San Salvador, which do not themselves reveal their sources.¹⁶ This methodology is like opening a box to find another smaller box containing still another even smaller box, and so on, until you reach the last box, which is empty.¹⁷

14. Examples of documented Administration misrepresentations concerning Nicaragua are legion. See, e.g., Wash. Post, Mar. 18, 1986, at A6, col. 1; N.Y. Times, Mar. 30, 1985, at A1, col. 2. A recent report by Americas Watch found the Administration's approach to Nicaragua to be "deceptive and harmful," and to be based on "innuendo," "exaggeration," "distortion," and "misrepresentation." AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: REAGAN, RHETORIC AND REALITY 1-5 (1985). The report specifically condemns the distortion of data in State Department annual Country Reports. *Id.* at 13. Similarly, a subsequent Americas Watch report concludes, among other things, that "the Reagan Administration has provided false information to the Congress and the American public about gross human rights abuses by the *contras* in an effort to explain away those abuses." AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA, 1985-1986, at 2 (1986) (copy on file with the *Yale Journal of International Law*).

15. See Rostow, *supra* note 6, at 443, citing REVOLUTION BEYOND OUR BORDERS, *supra* note 13, at 6-7.

16. See Rostow, *supra* note 6, at 444 & n.27, citing REVOLUTION BEYOND OUR BORDERS, *supra* note 13, at 8.

17. In addition to treating unsupported allegations as facts, Mr. Rostow also makes a number of erroneous assertions concerning Nicaraguan officials and Nicaragua's witnesses in the World Court. For example, he accuses Ambassador Tünnermann of being "less than truthful," Rostow, *supra* note 6, at 439 & n.9, in a letter stating that Nicaragua votes with the nonaligned nations in the U.N. According to the State Department's own annual report on U.N. voting trends, Nicaragua's voting record is very close to that of other non-aligned countries. In 1985, Nicaragua voted against the U.S. 91.6% of the time, putting it virtually on par with India, one of the leaders of the non-aligned states, which voted against the U.S. 91.9% of the time. U.N. Voting Record, 40th General Assembly, News Release from the Office of Sen. Robert W. Kasten, May 15, 1986 (copy on file with the *Yale Journal of International Law*). Even major recipients of U.S. assistance voted consistently against the U.S.: Mexico (85.5%),

Mr. Rostow goes on to assert that the FMLN maintained headquarters in Managua from 1981 to late 1983, and that "Cuban and Nicaraguan advisers there trained guerrillas for war, and planned and directed specific operations."¹⁸ Once again, the only citation is to unsupported allegations in "*Revolution Beyond Our Borders*."¹⁹ In effect, he is telling us that we must believe these allegations because the State Department made them in one of its reports.

Of course, even if it were true that Nicaragua provided support to the Salvadoran guerrillas for their January 1981 offensive, that fact would not support the subsequent creation in November 1981—after eleven months had passed with no trace of Nicaraguan arms trafficking²⁰—of a *contra* army designed to overthrow the government of Nicaragua. Apparently recognizing this gaping hole in his case, Mr. Rostow attempts to plug the dike by asserting that "[s]ince January 1981, the FMLN has continued to receive supplies, including weapons, training, and direction from Nicaragua and Soviet bloc states."²¹ For that assertion, however, Mr. Rostow offers no support of any kind, except for a citation to—what else?—"Revolution Beyond Our Borders," which in turn relies on the confession of Napoleon Romero, a captured FMLN officer who has never been questioned outside of the presence of Salvadoran security forces.²² Even if Romero's "confession" were credible, it would not fill the gap in Mr. Rostow's argument. Not even the Salvadoran security forces could coax any specific information about Nicaraguan arms trafficking from Mr. Romero. He merely identified Nicaragua as the source of certain ammunition shipments. Specifically, he said that during a certain period his units (numbering between 2000 and 3000 combatants)

Egypt (84.7%), Brazil (84%), Argentina (83.6%), Jordan (85.8%), and Saudi Arabia (86.4%); Honduras and El Salvador, notwithstanding their dependence on U.S. aid, voted against the U.S. 70% of the time. *Id.* The trend is a product of solidarity among nonaligned nations. Wash. Post, May 16, 1986, at A21, col. 1.

Mr. Rostow also states that Nicaragua's witnesses at the International Court of Justice "corroborated the essence of the story of Nicaragua's support for Salvadoran insurgents." Rostow, *supra* note 6, at 446. This is simply false. As discussed, *supra* text accompanying notes 8-11, David MacMichael, formerly of the CIA, testified that during the period from late 1981 through 1983, when the *contras* were fashioned by the U.S. into a mercenary army launching daily attacks on Nicaragua, there was no credible evidence of Nicaraguan government support for the Salvadorans. Similarly, Luis Carrion, Nicaragua's Vice-Minister of the Interior, testified that Nicaragua did not support guerrillas in other countries. Testimony of Luis Carrion (Nicar. v. U.S.), 1985 I.C.J. Verbatim Record (Case Concerning Military & Paramilitary Activities in and against Nicaragua) CR 85/20, at 16 (testimony of Sept. 13, 1985).

18. Rostow, *supra* note 6, at 444.

19. REVOLUTION BEYOND OUR BORDERS, *supra* note 13, at 12.

20. Not even REVOLUTION BEYOND OUR BORDERS, *id.*, alleges the interception of any arms during this period.

21. Rostow, *supra* note 6, at 444.

22. REVOLUTION BEYOND OUR BORDERS, *supra* note 13, at 11-12.

received about 20,000-30,000 rounds of ammunition per month via Nicaragua.²³ That comes to a maximum of fifteen bullets per man per month. No wonder Pentagon officials have called Nicaragua's purported contribution to the Salvadoran insurgency "peanuts."²⁴

Glossing over the glaring lack of credible evidentiary support for his assertion that Nicaragua is involved in arms traffic to El Salvador, Mr. Rostow makes similarly unsupported claims with respect to Honduras. According to Mr. Rostow, the FSLN "provide arms, training, and advice to various guerrilla groups in Honduras."²⁵ Again, Mr. Rostow relies only on unsupported allegations contained in "*Revolution Beyond Our Borders*," and, in a variation of the self-citation technique, on an article by a member of the legal team that represented the U.S. in the jurisdictional phase of the World Court proceedings.²⁶ Not surprisingly, the cited portion of that article also bases its assertions exclusively on allegations in State Department reports that do not indicate their sources.

Mr. Rostow concludes his remarks on the evidence by contending that Nicaraguan officials have admitted that Nicaragua supports the guerrillas fighting the government of El Salvador. To back up this charge, he cites a purported statement by Commander Bayardo Arce; again, the source is "*Revolution Beyond Our Borders*," which, as usual, fails to provide any supporting citation.²⁷ Mr. Rostow also contends that President Daniel Ortega's call for an end to outside assistance to both sides of the Salvadoran conflict constitutes an implicit acknowledgment of Nicaraguan aid to the guerrillas. This conclusion, while illustrative of State Department reasoning, is untenable on its face, given the State Department's claim that aid to the Salvadoran guerrillas comes from many outside countries.

It is not unreasonable to require the United States to produce evidence to support its charges against Nicaragua. If Nicaragua were really engaged in arms trafficking, such evidence would be easy to adduce. The United States has invested millions of dollars in aerial surveillance of Nicaraguan territory and in electronic surveillance of Nicaraguan communications to catch Nicaragua in the act of supplying Salvadoran rebels. The U.S. also has the complete cooperation of Honduras and El Salvador, through which any such supplies would have to pass. Intelli-

23. *Id.*

24. Wash. Post, Feb. 21, 1983, at A1, col. 1.

25. Rostow, *supra* note 6, at 445-46 & n.36.

26. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986).

27. Rostow, *supra* note 6, at 446 & n.33, citing *REVOLUTION BEYOND OUR BORDERS*, *supra* note 13, at 23 n.23.

gence experts agree that under these circumstances, Nicaragua could not hope to send arms to Salvadoran rebels without detection by the U.S. or its allies. Yet, after more than five years of trying, there has not been a single interception of a shipment emanating from Nicaragua.²⁸

Arms shipments to Salvadoran rebels have been intercepted from countries other than Nicaragua. Indeed, the only arms interception mentioned in Mr. Rostow's article occurred in Comayagua, Honduras, in January 1981.²⁹ What Mr. Rostow neglects to mention is that no evidence of any kind tied the captured arms to Nicaragua; in fact, they were sent from Costa Rica. In March 1982, Costa Rican authorities uncovered a stockpile of arms in that country awaiting shipment to Salvadoran rebels.³⁰ Again, there was no connection whatsoever to Nicaragua; in fact, the leader of the smuggling ring told Costa Rican authorities that "there was too much vigilance" to ship arms from Nicaragua, and that "it is easier to do it in Costa Rica."³¹

In short, it is evident that the Reagan Administration has no credible evidence to support its allegations concerning supply and assistance by Nicaragua to rebels in El Salvador or anywhere else. It is therefore not surprising that the United States chose to withdraw from the case before the International Court of Justice.

II. Self-Defense under International Law

With certain important exceptions, Nicaragua and the United States agree on many of the rules governing self-defense under international law. Among other things, both states agree that governments frequently

28. See, e.g., Wash. Post, Feb. 21, 1983, at A18, col. 2 ("not a single major shipment of arms has been captured in or near El Salvador since a Costa Rican pilot was caught in [January] 1981"); Christian Sci. Monitor, May 2, 1984, at 2, col. 3 (according to American officials, "efforts to find proof of arms flowing into El Salvador from Nicaragua have turned up virtually nothing").

29. Rostow, *supra* note 6, at 444.

30. Christian Sci. Monitor, Mar. 17, 1982, at 5, col. 3.

31. *Id.* In his Surreply, Mr. Rostow mentions the December 1985 capture of a Lada automobile in Honduras. He neglects to mention, however, that the car had Costa Rican license plates, began its journey in Costa Rica, and was driven by one Elias Solís González, a member of the Costa Rican Communist Party. The car had been driven through Nicaragua, but there was no indication that it had been inspected by Nicaraguan border guards or that any Nicaraguan officials knew about the car's secret compartments or contents. See N.Y. Times, Dec. 20, 1985, at A15, col. 1. Contrary to Mr. Rostow's assertion, there was no evidence that the documents found in the car were sent from "the Managua headquarters" of the military wing of the Communist Party of El Salvador. Assistant Secretary of State Elliot Abrams, when pressed by reporters for evidence that the documents came from Nicaragua, was able to say only that they must have come from there because "we know for a fact [the guerilla headquarters] is in Managua." *Id.* No facts, however, were provided then or since to support this accusation. Nevertheless, in still another example of self-citation, Mr. Rostow treats it as evidence.

disguise armed attack “in the language of self-defense,”³² that a state that directs and supports “regular or irregular armed forces conducting operations in or against another state is responsible under international law for such operations,”³³ that self-defense must be a proportional response to an armed attack,³⁴ and that the legitimacy of self-defense turns in part on its purposes.³⁵ Applying these principles to this dispute, it is readily apparent that the United States’ decision to create and deploy the *contras* for the purpose of overthrowing Nicaragua’s government does not constitute any form of self-defense recognized under international law.

First, repeated admissions by President Reagan, senior officials of the Administration, senior members of the United States Congress, and current and former *contra* leaders demonstrate beyond question that the purpose of the Reagan Administration’s policy in Nicaragua is and always has been to overthrow the government of Nicaragua.³⁶ Indeed, President Reagan himself has openly announced that the goal of U.S. policy is to “remove [the government of Nicaragua] in the sense of its present structure.”³⁷ Similarly, Director of Central Intelligence William Casey has stated that the United States would not be satisfied by a treaty with Nicaragua that barred Nicaragua from acts of external aggression, and announced that the objective of United States’ policy is to prevent “further consolidat[i]on of the regime.”³⁸ And Donald Regan, the White House Chief of Staff, stated:

We have to get rid of it [the Nicaraguan government] in some way or another. And what we want to do is to try to help those who are trying to overthrow that communist government, try to force it to have free elections to allow that nation to have the leaders that they should have.³⁹

He went on to say that anyone who did not support aid to the *contras* would “allow that regime, Ortega and his communist allies, to stay in power in Nicaragua.”⁴⁰

32. Rostow, *supra* note 6, at 451.

33. *Id.* at 453.

34. *Id.*

35. *See id.*

36. Limitations on space preclude the quotation of more than a few of these admissions here. Many more are cited and discussed in the Memorial and Annexes submitted by Nicaragua to the International Court of Justice for consideration on the merits of Nicaragua’s claims. *See* Memorial of Nicaragua (Nicar. v. U.S.), 1985 I.C.J. Pleadings (Case Concerning Military and Paramilitary Activities in and against Nicaragua) (Memorial dated Apr. 30, 1985).

37. The President’s News Conference of Feb. 21, 1985, 21 WEEKLY COMP. PRES. DOC. 212 (Feb. 21, 1985).

38. DCI Remarks, Metropolitan Club of New York City 9-11 (May 1, 1985) (copy on file with the *Yale Journal of International Law*).

39. Transcript of interview with Donald Regan on *Meet the Press* 2 (Mar. 16, 1986) (copy on file with the *Yale Journal of International Law*).

40. *Id.* at 4.

Of course, different rationales have been advanced at various times to persuade a hesitant Congress to support Administration policy. As Congressman Lee Hamilton, Chairman of the House Permanent Select Committee on Intelligence, has stated:

Since 1981, various purposes have been advanced for the covert action against Nicaragua;

First, the United States sought to interdict the flow of arms from Nicaragua to El Salvador;

Then, to force Nicaragua to turn inward;

Then, to bring Nicaragua to the negotiating table;

Then, to bring pluralism and free elections to Nicaragua;

Then, to oust the Sandinistas.

Today U.S. policy statements on Nicaragua, especially those by the President, no longer emphasize the external conduct of Nicaragua but the removal of the Sandinistas. The President says we do not advocate the overthrow of the Sandinistas if they "would turn around and . . . say Uncle." That phraseology is surely tantamount to requiring their removal.⁴¹

The overthrow of the Nicaraguan government has always been the underlying goal of U.S. policy. As Edgar Chamorro, former member of the *contra* political directorate, declared in his sworn affidavit to the World Court:

[O]ur goal, and that of the C.I.A. as well (as we were repeatedly assured in private), was to overthrow the Government of Nicaragua, and to replace the Sandinistas as a government. It was never our objective to stop the supposed flow of arms, of which we never saw any evidence in the first place. The public statements by United States Government officials about the arms flow, we were told by the C.I.A. agents with whom we worked, were necessary to maintain the support of the Congress and should not be taken seriously by us.⁴²

Second, even if U.S. allegations with respect to arms traffic were true, and even if arms interdiction were really the goal of the United States, the U.S. response would not qualify as self-defense under article 51.⁴³ Self-defense under that article may be exercised only in response to "an armed attack." The actions charged against Nicaragua fall far below this

41. 131 CONG. REC. H2359 (daily ed. Apr. 23, 1985) (statement of Rep. Hamilton).

42. Affidavit of Edgar Chamorro (Nicar. v. U.S.), 1985 I.C.J. Pleadings (Case Concerning Military and Paramilitary Activities in and against Nicaragua) 11 (Affidavit dated Sept. 5, 1985) (copy on file with *Yale Journal of International Law*).

43. See, e.g., Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 663 (1985) ("even if Nicaragua were transporting significant amounts of military aid to the rebels in El Salvador, international law would restrain the United States from intervening into the internal affairs of Nicaragua as a form of self-defense . . .").

requirement. There is no suggestion that Nicaraguan armed forces have ever operated in El Salvador, nor is there any credible evidence that Nicaragua is "substantially involved" in the rebel operations in El Salvador or in any other country. Allegations contained in State Department reports cannot create an armed attack where none exists. In this regard, it is significant that none of the countries purportedly under armed attack—El Salvador, Honduras, or Costa Rica—publicly admits to supporting the *contras*. In fact, the President of Costa Rica has explicitly condemned U.S. support for the *contras*.⁴⁴ Surely, if these countries considered themselves to be under armed attack by Nicaragua, and further considered the use of the *contras* to be a legitimate means of self-defense against such attack, they would not hesitate to say so.

In any event, any response under article 51 to an armed attack must be proportionate in nature. Thus, for example, "if the attack did not amount to incursion into the territory of another state, the same should be true of the corresponding act of self-defense."⁴⁵ The U.S. creation of a 15,000-man mercenary army that regularly launches attacks against economic and civilian targets deep within Nicaragua—for the purpose of removing the Nicaraguan government—cannot be considered a proportionate response to purported arms shipments to El Salvador under any definition of the word "proportionate."

Additionally, the United States (and Mr. Rostow) have completely ignored the procedural requirements stipulated by article 51 for the exercise of the right of self-defense. Article 51 requires that measures taken for self-defense "shall be immediately reported to the Security Council."⁴⁶ This requirement is an important substantive limitation on the exercise of the right of self-defense, making its exercise "subject to the subsequent judgment and control of the international community."⁴⁷ The United States has made no effort to comply with this requirement; undoubtedly it recognizes that its actions are not taken in self-defense and that the Security Council, but for the United States' veto, would condemn U.S. actions against Nicaragua.⁴⁸

44. Wash. Post, Feb. 20, 1986, at A5, col 1.

45. Lachs, *The Development and General Trends of International Law in Our Time*, 169 HAGUE RECUEIL 10, 164 (1980). Accord Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1643 (1984) ("counter-intervention should be limited to the territory of the state" where the conflict is taking place even when "the prior intervention was illegal").

46. U.N. CHARTER art. 51.

47. Waldock, *The Use of Force in International Law*, 81 HAGUE RECUEIL 455, 495 (1952).

48. In March 1982, the Security Council produced a resolution prohibiting U.S. use of armed force against Nicaragua. The U.S., of course, vetoed the resolution. (The vote was 12-1 in favor, with 2 abstentions.) See *Council Fails to Adopt Draft Resolution Proposing Negotiation, No Overt or Covert Use of Forces*, 19 U.N. CHRON., May 1982, at 11, 18. Nicaragua

Finally, it should be remembered that the use of force in self-defense may only be taken in situations requiring an instant, reflexive response.⁴⁹ The United States has had almost five years to consider its choice of means of dealing with Nicaragua.⁵⁰ And even under the Administration's version of the events, the purported arms traffic to El Salvador has declined at least since 1983.⁵¹ Nonetheless, the United States has consistently escalated its use of force against Nicaragua. In fact, the Reagan Administration is currently seeking an additional \$100 million to fund attacks against Nicaragua—an amount greater than the amount the United States admits having spent for this purpose in the preceding four years.

returned to the Security Council in April 1984, after the U.S. mined Nicaragua's harbors. Once again, the Security Council's resolution condemning U.S. attacks against "the sovereignty, independence and territorial integrity of Nicaragua" was vetoed by the United States. This time the vote was 13-1 in favor, with one abstention. See Security Council Draft Resolution Condemning the Mining of Nicaraguan Ports (2529th Mtg.), U.N. Doc. S/16463, reprinted in 23 I.L.M. 669 (1984); N.Y. Times, Apr. 5, 1984, at A8, col. 1. Under these circumstances, Mr. Rostow's erroneous suggestion that "[u]nder 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," Rostow, *supra* note 6, at 455, rings particularly hollow.

49. Mr. Rostow erroneously suggests that the *Caroline* formula, confining the use of force in self-defense to situations requiring an immediate response, does not apply to the dispute between Nicaragua and the U.S. In fact, as other commentators have recognized, the requirement that "actions taken in self-defense must be necessary, immediate and governed by the bounds of reasonableness and proportionality" does govern the U.S. use of force against Nicaragua, whether it is characterized as "anticipatory" self-defense, "collective" self-defense, or otherwise. Joyner & Grimaldi, *supra* note 43, at 665 (emphasis added).

50. Mr. Rostow suggests, in this connection, that other options are unavailable to the U.S. because "Nicaragua has proved unwilling to meet the United States' concerns." Rostow, *supra* note 6, at 456. If by that Mr. Rostow means Nicaragua has refused to cry "Uncle," as President Reagan has demanded, he is certainly correct. Nicaragua has, however, continuously offered to meet legitimate U.S. security concerns either through a reciprocal settlement or through bilateral talks with the U.S. Indeed, Nicaragua agreed unconditionally to sign the 1984 draft Contadora accord, N.Y. Times, Sept. 23, 1984, at A1, col. 4, which was then rejected by the other Central American countries at the insistence of the U.S. Nicaragua also sought to reach agreement through direct negotiations with the United States in the "Manzanillo" talks, N.Y. Times, Sept. 26, 1984, at A11, col. 6; the U.S., however, broke off those talks last year. N.Y. Times, Feb. 11, 1986, at A7, col. 1. Nicaragua recently agreed to sign the current Contadora draft treaty if the U.S. would agree to end its support of the *contras*. The U.S. to date has refused to make that commitment.

It should also be noted that the eight Latin American countries directly involved in the Contadora talks (the four "Contadora" countries of Colombia, Mexico, Panama, and Venezuela, and the four "support group" countries of Argentina, Brazil, Peru, and Uruguay) have all urged the U.S. to halt its aid to the *contras* and to resume direct talks with the Nicaraguan government. Wash. Post, Feb. 11, 1986, at A9, col. 4; N.Y. Times, Feb. 11, 1986, at A7, col. 1.

51. Even REVOLUTION BEYOND OUR BORDERS, *supra* note 13, acknowledges that "the FMLN probably achieved its greatest military strength in late 1983," and that there was a "reduction in deliveries" after 1983. *Id.* at 11-12.

Conclusion

Mr. Rostow correctly observes that “[t]he 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.”⁵² It is precisely to obtain this result that Nicaragua brought its dispute with the United States to the International Court of Justice. In that forum, as in no other, the competing contentions of the parties may be examined and judged according to international law. The United States’ refusal to present its case to the Court suggests that the current Administration is not interested in reciprocal respect for article 2(4).

52. Rostow, *supra* note 6, at 461.