

# Nicaragua: A Surreply to a Rejoinder

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If readers can ignore the tone adopted by Messrs. Reichler and Wippman in their “rejoinder,”<sup>1</sup> they will see that both what the Rejoinder says and what it omits confirm my argument.<sup>2</sup>

Messrs. Reichler and Wippman claim that “[w]ith certain important exceptions, Nicaragua and the United States agree on many of the rules governing self-defense under international law.”<sup>3</sup> This statement is correct in general, although I find the formulation of the law by Messrs. Reichler and Wippman to be oversimplified and unsophisticated, particularly with regard to state practice. As a result, our differences are more important than our areas of agreement.<sup>4</sup>

Messrs. Reichler and Wippman misstate the international law of self-defense that necessarily structures the debate about events in Central America. As article 51 of the U.N. Charter notes, the customary law of self-defense is unchanged by the Charter.<sup>5</sup> Basing their view on a quotation from an article by Judge Lachs, they propose a rule that amounts to an obligation that the defending state mirror the attacking state in its actions: “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.”<sup>6</sup> As Judge Lachs himself recognized, state practice under the Charter belies so narrow a view, and the realities of modern weaponry and contemporary techniques of aggression make inappropriate so simple-minded an interpretation of article 51 as the Rejoinder offers. Judge Lachs advocated a quite different view. He proposed that the scale of the act of self-defense should not be disproportionate; that is, it should not go

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1. Reichler & Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT'L L. 462 (1986).

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

3. Reichler & Wippman, *supra* note 1, at 468.

4. Messrs. Reichler and Wippman mistakenly assume that I am writing in an official capacity. *Id.* at 463.

5. See U.N. Charter art. 51 (“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. . . .”).

6. Reichler & Wippman, *supra* note 1, at 471 & n.45, quoting Lachs, *The Development and General Trends of International Law in Our Time*, 169 HAGUE RECUEIL 9, 164 (1984).

beyond what self-defense requires. Thus, in his preceding sentence, which Messrs. Reichler and Wippman do not quote, Judge Lachs noted that “[t]he counter-measures envisaged need not be identical in nature to those against which they are directed—in fact that may be impossible (as in the case of a blockade)—but they should be *ejusdem generis*, are bound to be proportionate.”<sup>7</sup> The Reichler-Wippman formula would sanction indirect aggression, including terrorist and guerrilla operations, without giving the victim state a right of self-defense in reply.<sup>8</sup>

The requirement of proportionality in the application of the international law of self-defense supports no such rule. Rather, the act of self-defense should not exceed what is reasonably required to end the illegal use of force. The responsibility of states for acts of force committed from their territories goes far beyond “incursions,” and the state claiming a right to act in self-defense need not passively suffer attacks on its political independence or territorial integrity simply because such attacks do not take the form of transnational movements by regular armies.

What is reasonably calculated to end an illegal use of force necessarily depends on circumstances.<sup>9</sup> Thus, the United States was prepared to send troops to Cuba to force the removal of Soviet missiles there in 1962 although no Soviet incursion of American territory occurred; and President Kennedy said that any use of missiles based in Cuba against the Western Hemisphere would provoke an American response against the Soviet Union.<sup>10</sup> Are Messrs. Reichler and Wippman suggesting that such a response would have been disproportional under article 51?

Similarly, Messrs. Reichler and Wippman write that article 51 permits a use of force only against an armed attack and that “[t]he actions charged against Nicaragua fall far below this requirement.”<sup>11</sup> To adopt this view of article 51 and of Nicaragua’s actions would be an act of jurisprudential naivete. Read in the perspective of the purposes it is designed to serve, the meaning of article 51 is clear. It incorporates, rather than abolishes or amends, the customary international law re-

7. Lachs, *supra* note 6, at 164.

8. Reichler and Wippman further err with regard to the necessity giving rise to the right to use force in self-defense. Reichler & Wippman, *supra* note 1, at 471 & n.49 (use of force permissible only in circumstances “requiring an instant, reflexive response”). This statement of the law does not reflect state practice or common sense. See generally Rostow, *supra* note 2, at 453-56; M. McDougal & F. Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 217-41 (1961) (right to use force in self-defense depends on nature of violation of international law giving rise to right and on circumstances).

9. See, e.g., Lachs, *supra* note 6, at 164.

10. John F. Kennedy, 1962 Pub. Papers 808 (1963) (radio and television address, Oct. 22, 1962).

11. Reichler & Wippman, *supra* note 1, at 470-71.

flected in state practice. That law, as articulated in the most famous episodes involving self-defense, recognizes the various guises of armed attack and the equally various forms of permissible self-defense. As to article 51's reporting requirement for actions in self-defense, Messrs. Reichler and Wippman raise a canard. Are they suggesting the Security Council is unaware of events in Central America? Or simply, and typically, paralyzed?

Messrs. Reichler and Wippman devote most of their Rejoinder to denying the evidence of Nicaraguan support for guerrillas trying to overthrow the governments of El Salvador and Honduras. Their method is a familiar one. Notwithstanding the facts, they write that the United States "has no credible evidence to support its allegations concerning supply and assistance by Nicaragua to rebels in El Salvador or anywhere else."<sup>12</sup> The record is quite different. Napoleon Romero, also known as "Miguel Castellanos," a former member of the Central Committee of the Popular Liberation Forces (FPL) (a Salvadoran guerrilla group and one of five constituent members of the FMLN) was arrested by Salvadoran security forces on April 11, 1985. He revealed during his "debriefings" in April and May 1985 the system by which Salvadoran guerrilla groups receive supplies from Nicaragua. Shipments of arms and materiel originate in Nicaragua and arrive at night by small boat at points on the Usulután coast of El Salvador. Coded messages transmitted from Nicaragua notify guerrillas of impending deliveries. Supplies, including arms, also arrive from Nicaragua by land. They are shipped by truck to the Salvador-Honduras border after which they are carried on foot into El Salvador. Documentation and vehicles, which have secret compartments, are changed in Honduras to avoid the suspicion that attaches to shipments originating in Nicaragua. Most shipments are small to limit the loss in the event of discovery.<sup>13</sup>

A recent capture of one such vehicle confirms Romero's description of the logistical network linking Salvadoran guerrillas and Nicaragua. On December 7, 1985, a Soviet-built Lada automobile had a blow-out in Honduras. Honduran investigators at the scene discovered that it contained ammunition, communications equipment, codes, medical supplies, money, letters to guerrillas, and instructions from the Managua head-

12. *Id.* at 468.

13. Office of Public Diplomacy for Latin America and the Caribbean, U.S. Dep't of State, *Salvadoran Guerrilla Policy and Their Ties with the Sandinistas: the Testimony of Ex-Guerrilla Leader Napoleon Romero Garcia, AKA "Miguel Castellanos" (1985)* [hereinafter cited as *Salvadoran Guerrilla Policy*] (copy on file with the *Yale Journal of International Law*).

quarters of the military wing of the Communist party of El Salvador to guerrilla commanders in El Salvador.<sup>14</sup>

Examples such as this ought to make it impossible to continue to deny that Nicaragua materially supports guerrillas trying to overthrow the government of El Salvador. Undeterred by fact, Messrs. Reichler and Wippman go further, and try to rehabilitate their star witness before the International Court of Justice, David MacMichael, who worked for the Central Intelligence Agency from March 1981 to April 1983. Despite MacMichael's statements that credible evidence exists of Nicaragua's material support for Salvadoran guerrillas, Messrs. Reichler and Wippman suggest that he said the opposite.<sup>15</sup>

Messrs. Reichler and Wippman begin and end their Rejoinder with erroneous assumptions about the international law of self-defense and the

14. See Press Briefing, Evidence of Nicaraguan Subversion in Central America, Dec. 19, 1985 (Assistant Secretary of State for Inter-American Affairs Elliott Abrams) (copy on file with the *Yale Journal of International Law*) [hereinafter cited as Press Briefing]; N.Y. Times, Dec. 20, 1985, at A15, col. 1; Wash. Post, Dec. 20, 1985, at A49, col. 4.

This and other such episodes disprove Messrs. Reichler's & Wippman's statement that "after more than five years of trying, there has not been a single interception of a shipment emanating from Nicaragua." See Reichler & Wippman, *supra* note 1, at 468. But see 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]. Messrs. Reichler and Wippman received a draft of this Surreply and, as a result, added footnote 31 to their rejoinder. They now refer to this Lada episode, dismissing it on the ground that the license plates on the car were Costa Rican and that there was no indication the car had been inspected by Nicaraguan border guards or that Nicaraguan officials had any knowledge of the car's secret compartments or contents. *Id.* In reply to questions from the press about the connection between Nicaragua and the car, Assistant Secretary of State Elliott Abrams said, among other things, that the compartment was padded with Nicaraguan newspapers, that the driver said that the car was loaded in Nicaragua, and that the codes were typical of the Armed Forces of Liberation, a constituent part of the FMLN with headquarters in Managua. He added:

If it is not the Sandinistas, then I would give you two equally plausible theories. That it is some kind of freelance group operating under the nose of the Sandinistas in Managua, helping the FMLN, or it is the tooth fairy, because those are equally plausible. It is impossible in a country with the degree of control that exists in Nicaragua for there to be shops to build this kind of car, for there to be ways of filling it with explosives, with letters from the Soviet Union and Cuba, with code materials which [are] generated, as I said, by pretty sophisticated computers—it is impossible that all that should take place in Managua without the involvement of the Sandinistas.

See Press Briefing, *supra*.

15. Compare Reichler & Wippman, *supra* note 1, at 463-64, with MacMichael's testimony, Sept. 16, 1985, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1985 I.C.J. Oral Arguments and Documents (Verbatim Record (uncorrected) CR 85/21 at 20 (evidence of Nicaraguan arms supplies to Salvadoran guerrillas 1980-81); *id.* at 14 (arms capture in Costa Rica destined for El Salvador must transit Nicaragua); *id.* at 29 (credible evidence of Nicaraguan arms supplies to Salvadoran guerrillas); *id.* at 35 (Salvadoran guerrilla leaders credibly reported to be operating from Nicaragua); *id.* at 39-47 (Nicaraguan supplies to Salvadoran guerrillas 1980-82) (copy on file with the *Yale Journal of International Law*); Rostow, *supra* note 2, at 447-48; J.N. Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 66-68.

role of the International Court of Justice under the U.N. Charter. The inherent right of a state to engage in individual or collective self-defense is the fundamental attribute of sovereignty, and the U.N. Charter leaves this right unimpaired. A state may act in self-defense until the Security Council takes effective measures to make such acts unnecessary. Nothing in the U.N. Charter requires the Security Council's prior approval to act in self-defense or the Council's validation of any such act. The Charter does not, moreover, make either the General Assembly or the International Court of Justice a super Security Council in this respect.

The real significance of the Reichler-Wippman rejoinder lies in its silence, not in the arguments, however weak, that it advances. The real attitude of the Nicaraguan government with regard to the international law governing the use of force and self-defense mirror that espoused in Havana and Moscow. Like Cuba and the Soviet Union, Nicaragua acts on the view that international law permits the support of insurrections in other states against governments it can label "imperialist," "bourgeois," "fascist," and the like, and that the United States may not help such states defend themselves.<sup>16</sup> Messrs. Reichler and Wippman cannot make this argument because they know it is inconsistent with the U.N. Charter and customary international law. They, therefore, must deny what even congressional committees opposed to Reagan Administration policies in Central America know to be true and what Nicaragua's leaders admit: that Nicaragua provides arms, funds, training, direction, and other support to guerrillas in El Salvador and other Central American countries. Denying reality does not change it.<sup>17</sup>

16. See generally Rostow, *Law and the Use of Force By States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

17. Typical of their handling of evidence, Messrs. Reichler and Wippman wrote: "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. The vote was 14-1, with only the U.S. judge dissenting." Reichler & Wippman, *supra* note 1, at 462. The Court's decision, to which this description refers, reads:

The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principles that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169, 187 (Indication of Provisional Measures, May 10, 1984).