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# MR. CASEY'S "COVERT" WAR: THE UNITED STATES, NICARAGUA, AND INTERNATIONAL LAW\*

Robert A. Friedlander\*\*

## I. INTRODUCTION: THE NATURE OF THE PROBLEM

On September 1, 1984, Nicaraguan rebels attacked a government military school with three light, rocket-firing aircraft and one armed helicopter forming part of a combined air and ground assault. Two American soldiers of fortune were killed when the helicopter crashed during the rebel raid.<sup>1</sup> One week later the Nicaraguan ambassador to the United Nations denounced the attack before the UN Security Council, charging the United States with legal responsibility, accusing the Reagan administration of having committed a crime of aggression, and claiming the United States was involved in "state terrorism" directed against a victimized Sandinista regime.<sup>2</sup> "Our enemies and aggressors . . . may destroy us but they will never dominate us," the ambassador boldly asserted.<sup>3</sup> Despite his request for remedial assistance,<sup>4</sup> no Security Council resolution was forthcoming.

The United States Senate Intelligence Committee, after conferring with Defense Department and Central Intelligence Agency officials, reported that the CIA denied any involvement in the September 1st raid and any connection with an Alabama-based organization calling itself "Civilian Military Assistance" from which the two dead Americans had been recruited.<sup>5</sup> But four days earlier the Department of State had publicly acknowledged that U.S. embassy personnel in several Central American countries were in contact with a private American group that was supplying military equipment to El Salvador, Honduras, and the Nicaraguan rebels.<sup>6</sup> Immediately after that acknowledgement, a

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1. N.Y. Times, Sept. 8, 1984, § 1, at 1, 3, col. 1; *id.*, Sept. 2, 1984, § 1, at 10, col. 1.

2. The Blade (Toledo), Sept. 8, 1984, at 2, col. 2; *see* N.Y. Times, Sept. 8, 1984, § 1, at 3, col. 3.

3. The Blade (Toledo), Sept. 8, 1984, at 2, col. 2.

4. *Id.*

5. N.Y. Times, Sept. 12, 1984, at A10, col. 1. *See* Magnuson, *A Mystery Involving "Mercs,"* TIME, Sept. 17, 1984, at 33; Towell, *Group's Role in Nicaragua Raises Questions*, 42 CONG. Q. 2230 (1984).

6. N.Y. Times, Sept. 7, 1984, at A3, col. 3.

leader of the "Civilian Military Assistance" declared that the U.S. embassies in Honduras and El Salvador had facilitated contacts for his organization's activities. A State Department press spokesman reluctantly confirmed the statement.<sup>7</sup>

Columnist Jack Anderson subsequently claimed that the Reagan administration's goal was to "replace the CIA's controversial undercover operation [in Nicaragua] with a permanent, privately funded support program for Latin America's various anti-Communist efforts."<sup>8</sup> There was no administration denial. In point of fact, the Central Intelligence Agency had already been spending huge sums of money in support of the *contra* rebels, and Congress itself was on record as having appropriated \$24 million in covert aid for fiscal year 1984.<sup>9</sup> An additional \$21 million was requested by the Reagan administration in a proposed \$1.1 billion emergency spending bill, but that request was eventually denied by the Congress when the Senate eliminated the controversial funding measure at the end of June, 1984.<sup>10</sup> Secretary of State George Shultz reacted to congressional reluctance toward any further commitment of funds for the *contra* rebellion by vigorously expressing the administration's continuing moral support for the rebels, and by threatening to seek financial assistance from private sources and foreign governments.<sup>11</sup> The incident of September 1st indicated that this new policy had begun to be implemented.

Although the death of the two Americans in a U.S.-made helicopter caused a brief flurry of media excitement and an even briefer Senate Committee inquiry, no one bothered to point out that continuing CIA support of the *contras* was in direct violation of the interim judgment entered against the United States by the International Court of Justice on May 10, 1984.<sup>12</sup> The provisional order, subject to further proceedings, had the effect of an international injunction. The court held by a vote of fourteen to one that the states parties in question must refrain from any military or paramilitary activities that are prohibited by international law,<sup>13</sup> and unanimously determined that no ac-

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7. Magnuson, *supra* note 5; see N.Y. Times, Sept. 8, 1984, § 1, at 1, 3, col. 2.

8. Anderson, *Private Groups Aid Contras*, The Blade (Toledo), Sept. 14, 1984, at 13, col. 1.

9. Stanley, *Cutting Off Nicaragua's Contras*, TIME, July 9, 1984, at 18.

10. Felton, *Nicaragua Covert Aid Funds Blocked for Now by Senate*, 42 CONG. Q. 1554 (1984); Stanley, *supra* note 9. The Senate vote was a surprising 88 to 1 against the funding measure. 130 CONG. REC. S8173 (daily ed. June 25, 1984).

11. Stanley, *supra* note 9.

12. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 4, 21-22, *reprinted in* 23 INT'L LEGAL MATERIALS 468, 477 (1984).

13. Justice Schwebel of the United States dissented. See *id.* at 29, *reprinted in* 23 INT'L LEGAL MATERIALS at 481.

tion of any kind be taken that could aggravate or widen the dispute.<sup>14</sup> By another unanimous vote, the court mandated that no further action be taken by either party that might prejudice the rights of the other until the bench ruled with finality on the jurisdictional and substantive questions raised by Nicaragua's application to the International Court of Justice.<sup>15</sup> On these prohibitions alone the United States has been and continues to be in violation of the court's interim decree. To put it more bluntly, the United States government is currently persisting in a policy and course of action in willful violation of international law as determined by the World Court.

How did this come to pass? What are the implications of the United States position and of its reluctance to litigate the issue? What of the other questions involved? Is the United States practicing power politics pure and simple?<sup>16</sup> Has American foreign policy become autodeterminative in its aims, methods, and justifications? And what of the Monroe Doctrine? Does it, or should it, play any part in the Central American controversy?

During his appearance in military uniform before the United Nations General Assembly at the opening of its thirty-ninth session, Major Daniel Ortega Saavedra, coordinator of the Nicaraguan junta and Sandinista presidential candidate, accused the United States of preparing to invade Nicaragua after first fomenting disturbances on the Costa Rican border. He even predicted the invasion date—October 15, 1984—and ended by "appealing to the international community . . . to try and curb this [forthcoming] aggression."<sup>17</sup> The White House reply, given by Chief of Staff James A. Baker III, was both sharp and succinct: Ortega's allegations were "absolutely not true."<sup>18</sup>

What is true, however, under prevailing norms of international law, is that the United States was engaged in conflict with the Sandinista regime, and that the nature of their confrontation had at times attained that of interstate warfare. The key questions then became, who was doing what to whom? Who was the aggressor and who the victim? And what are the legal implications of the so-called covert measures taken by the United States to destabilize the Sandinista government with which the Reagan administration continued to maintain full diplomatic relations? In the words of one respected American commentator (in a slightly different context): "Either overt or subversive

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14. *Id.* at 22, reprinted in 23 INT'L LEGAL MATERIALS at 477.

15. *Id.*

16. On this accusation, see Beres, *U.S. Flouts International Law*, Chicago Tribune, Sept. 13, 1984, § 1, at 11, col. 1.

17. N.Y. Times, Oct. 3, 1984, at A4, col. 1.

18. *Id.*

complicity by a state in the overthrow of an adversarial regime should be construed as unlawful intervention and therefore a delict of international norms."<sup>19</sup> The United States has claimed that this is exactly what Nicaragua is doing in El Salvador,<sup>20</sup> while the Sandinista junta has maintained that this is what the United States has been doing in Nicaragua.<sup>21</sup> And the cycle of violence runs on.

## II. COVERT WARRIORS AND THE DIPLOMACY OF CONFLICT

On January 27, 1981, at the end of his first week in office, President Ronald Reagan welcomed the freed Teheran hostages back to the United States with a promise and a warning invoked as a canon of his administration:

Let terrorists be aware that when the rules of international behavior are violated, our policy will be of swift and effective retribution. We hear it said that we live in an era of limit to our powers. Well, let it also be understood, there are limits to our patience.<sup>22</sup>

This followed a popularly acclaimed inaugural address wherein the new Republican president sought to establish the foreign policy tenor of his government: "When action is required to preserve our national security, we will act."<sup>23</sup> Secretary of State Alexander Haig, Jr., conveyed the same message in his first press conference, strongly implying that the Reagan administration would focus on Central America as a testing ground for the forthcoming struggle with revolutionary Marxism.<sup>24</sup> In fact, two days after his inauguration, President Reagan suspended indefinitely all economic aid to the government of Nicaragua.<sup>25</sup>

The reasons for this hard-line approach were domestic as well as diplomatic, for the White House was seeking to draw a marked distinction between its repudiated, ineffectual predecessor and the forceful, forthright, newly installed incumbent.<sup>26</sup> Moreover, there were a grow-

19. Joyner, *Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 134 (1984).

20. *Nicar. v. U.S.*, 1984 I.C.J. at 29-30, reprinted in 23 INT'L LEGAL MATERIALS at 481 (Schwebel, J., dissenting).

21. *Id.* at 5-9, reprinted in 23 INT'L LEGAL MATERIALS at 469-71.

22. PUB. PAPERS: RONALD REAGAN—1981, at 42 (1982). [hereinafter cited as REAGAN PAPERS—1981].

23. *Id.* at 3.

24. N.Y. Times, Jan. 29, 1981, at A10, col. 5.

25. A. HAIG, JR., CAVEAT: REALISM, REAGAN AND FOREIGN POLICY 109 (1984); Black, *Government and Politics*, in NICARAGUA: A COUNTRY STUDY 143, 179 (J. Rudolph 2d ed. 1982) [hereinafter cited as NICARAGUA]. It was actually the Carter administration which, after having provided the Sandinista regime with \$65 million in aid, in its final days initiated suspension of economic aid due to suspected Nicaraguan shipments of arms to leftist rebels in El Salvador. Falcoff, *How to Understand Central America*, COMMENTARY, Sept. 1984, at 34.

26. See Friedlander, *United States Policy towards Armed Rebellion*, 37 Y.B. WORLD AFF.

39, 39-40, 62 (1983).

ing number of contacts between the Soviets and the Sandinista regime; a close connection was developing between the Palestinian Liberation Organization and the Nicaraguan government in weapons, training, and propaganda; and Cuban influence had become pervasive in the Sandinista security apparatus.<sup>27</sup> Last, but certainly not least, the Nicaraguan government as early as 1980 began to proclaim its political support for the leftist guerrillas in El Salvador.<sup>28</sup> Allegations already abounded by the time the Reagan administration assumed office that the Sandinistas were supplying the El Salvador rebels, and the U.S. State Department subsequently produced a White Paper attempting to substantiate those charges.<sup>29</sup>

By early spring 1981, according to Haig's *apologia*, there were over 2,000 Cuban, East European, and Soviet personnel training some 4,000 Salvadoran guerrillas in Nicaragua.<sup>30</sup> At the beginning of June, then assistant Secretary of State for Inter-American Affairs Thomas O. Enders accused Cuba of "attempting to build up Nicaragua as a forward base of operations with a large army and intelligence apparatus in place, supported by 600-800 Cuban military advisers."<sup>31</sup> Fear of growing Cuban influence in Nicaragua, and of growing Nicaraguan support to the El Salvador rebels, led Enders during August, 1981, to meet with the Nicaraguan leadership in their capital city of Managua.<sup>32</sup> The talks turned out to be a fiasco, leading to a total breakdown in communications, with bitter recriminations on both sides.<sup>33</sup> Surprisingly, the issue of foreign advisors became muted in the abortive negotiations, but immediately afterward it was resurrected by the United States as a critical point of disagreement.<sup>34</sup>

Mounting concern over Cuban activities in Central America provided the impetus for a clandestine meeting in Mexico City, arranged by the Mexican Foreign Minister, between Secretary of State Haig and Cuban Vice President Carlos Rafael Rodríguez at the end of Novem-

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27. Child, *National Security*, in NICARAGUA, *supra* note 25, at 185, 214-15. See also REAGAN PAPERS—1981, *supra* note 22, at 193 (President Reagan's interview with CBS correspondent Walter Cronkite on March 3, 1981). On the PLO's role in Nicaragua, see Bryen, *Nicaragua: Once pro-Israel, Now Judenrein*, Jewish J. (Fort Lauderdale, Fla.), July 28, 1983, at A14, col. 1.

28. Child, *supra* note 27, at 216.

29. *Id.*

30. A. HAIG, JR., *supra* note 25, at 128.

31. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 282, LATIN AMERICA AND THE CARIBBEAN: TASKS FOR U.S. POLICY IN THE HEMISPHERE 2 (address by Thomas O. Enders before the Council of the Americas in Washington, D.C. on June 3, 1981).

32. See Gutman, *Nicaragua: America's Diplomatic Charade*, 56 FOREIGN POL'Y 3, 3-8 (1984).

33. *Id.*

34. *Id.*

ber, 1981.<sup>35</sup> Haig accused the Cubans of exporting revolution to Nicaragua.<sup>36</sup> Rodríguez admitted the presence of 2,759 Cuban nationals in Nicaragua, but countered that they were teachers, technicians, doctors, and nurses, and denied that there were any soldiers present.<sup>37</sup> Rodríguez claimed that Cuba did not want a confrontation with the United States, and Haig warned about unleashing "bloody terrorism."<sup>38</sup> There was no agreement between them, except for further negotiations.<sup>39</sup> In March, 1982, President Reagan's personal emissary, General Vernon Walters, went to Havana to talk to Fidel Castro. According to Haig, "Castro made no attempt to deny Cuban involvement in Central America . . . ."<sup>40</sup> No further talks resulted and no measures were taken by the Cubans to reduce existing tensions.

That same month the director of the CIA, William J. Casey, told the editorial board of a prominent news magazine that there were between 1,800 and 2,000 Cubans in Nicaragua working on military and security projects, in addition to several hundred East Germans, Soviets, North Koreans, and Vietnamese, all engaged in some sort of military assistance. Casey went so far as to claim that Nicaragua had been "taken over and run by Cubans."<sup>41</sup> In late summer of 1982, Assistant Secretary of State for Inter-American Affairs Enders once again raised the red flag of warning over the Cuban-Sandinista connection when he claimed in an address to the Commonwealth Club of San Francisco that there were over 2,000 Cuban and East European military advisors present in Nicaragua.<sup>42</sup> He further charged that the Sandinista regime was not only aiding rebellion in El Salvador, but that it was also exporting violence to Costa Rica and Honduras.<sup>43</sup> Clearly, the Reagan administration was losing patience with the Sandinista junta.

The media and the Congress, however, were also losing patience with the White House. In March, 1982, the administration reiterated the now standard figure of 2,000 Cuban military advisors purportedly stationed in Nicaragua, and added to that charge what it believed to be

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35. A. HAIG, JR., *supra* note 25, at 133-36.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 136. Carter administration representatives had met with Cuban leaders, including Fidel Castro, for over a two and a half year period. Miami Herald, Oct. 12, 1981, at A1, col. 3. Another meeting between U.S. and Cuban officials was held in September, 1984. U.S. NEWS & WORLD REP., Sept. 24, 1984, at 13.

41. U.S. NEWS & WORLD REP., Mar. 8, 1982, at 24.

42. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 414, BUILDING THE PEACE IN CENTRAL AMERICA 2 (Aug. 20, 1982).

43. *Id.* at 3.

the smoking gun—photographs of Soviet weaponry (aging tanks, heavy howitzers, armored personnel carriers, and attack helicopters); of enlarged runways in the main Nicaraguan airbase, ostensibly for MIG-21 fighter planes, and of the construction of a Soviet-style obstacle course and physical-training compound.<sup>44</sup> In addition, the Defense Intelligence Agency accused Nicaragua of sending fifty pilots to be trained in Bulgaria and Cuba.<sup>45</sup> Two Nicaraguan pilot defectors scheduled to meet the press never appeared, while one captured Sandinista volunteer, produced for a press conference in Washington, turned out to be a double agent.<sup>46</sup> Within a year after the release of the controversial and factually suspect state department White Paper on Marxist aid to El Salvador,<sup>47</sup> the administration seemed covered with powder burns.

Possibly as a reaction to media criticism of its militant posture, the Reagan administration proposed an eight-point program in April, which offered to resume economic aid, to end the military training of Nicaraguan exiles, and to reduce the U.S. presence in the surrounding area.<sup>48</sup> The quid pro quo required by the U.S. included a reaffirmation by the Sandinistas of their promise of nonalignment originally made by them to the Organization of American States, cessation of aid to rebel guerrilla movements in the region, and the holding of free elections, to which the victorious Sandinista forces had pledged themselves upon taking power in Managua.<sup>49</sup> Predictably, the American proposals were rejected, and the U.S. did likewise with the thirteen-point Nicaraguan counterproposals.<sup>50</sup> Diplomatic stalemate then yielded to low-intensity conflict.

As early as November, 1981, President Reagan had approved a National Security Council decision to begin CIA-directed paramilitary support against the Sandinista political infrastructure.<sup>51</sup> The original plan was to train a force of approximately 500 Nicaraguan insurgents on Honduran territory with the aid of Argentina (whose assistance went down with their ships in the Falkland Islands conflict).<sup>52</sup> The stated purpose, as presented to the congressional intelligence oversight committees, was to interdict the alleged arms shipments from Nicara-

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44. Isaacson, *A Lot of Show, but No Tell*, TIME, Mar. 22, 1982, at 18, 20. See also *Judging Spies and Eyes*, *id.* at 22.

45. Isaacson, *supra* note 44, at 20.

46. *Id.* at 18, 22.

47. *Id.* at 22. Issued in February, 1981, the White Paper claimed that rebel arms were being channeled by Cuba and the Soviet Union through Nicaragua to El Salvador. *Id.*

48. Falcoff, *supra* note 25, at 35; Gutman, *supra* note 32, at 11-12.

49. Falcoff, *supra* note 25, at 35.

50. See *id.*; Gutman, *supra* note 32, at 11-12.

51. Gutman, *supra* note 32, at 10.

52. *Id.* at 11.



gua to El Salvador and to compel the Nicaraguan government to reconsider its radical political course.<sup>53</sup> Three so-called *contra* rebel groups comprise the anti-Sandinista insurrection.<sup>54</sup> Their numbers are estimated to be somewhere between 10,000 and 15,000.<sup>55</sup>

Following this decision and its implementation, the Reagan administration periodically charged Nicaragua with being a Cuban pipeline into El Salvador and, due to the size of the Nicaraguan armed forces, with threatening the general peace of Central America.<sup>56</sup> By the spring of 1983, CIA assistance to the *contra* rebels had grown to such an extent that the Nicaraguan Foreign Minister angrily declared, "we are under invasion by the United States . . . in an undeclared war. All they did was change its name to 'covert activity.'"<sup>57</sup> A distinguished Princeton University professor of international affairs who visited Managua in late summer of 1983 was even more succinct: "The Reagan Administration is at war with Nicaragua."<sup>58</sup> As Senator Daniel Patrick Moynihan, vice-chairman of the Senate Intelligence Committee, complained: "We find the [Central Intelligence A]gency briefings describe events . . . which we cannot see as being in compliance with the law . . ."<sup>59</sup>

Disillusioned with the conduct of the CIA's covert operations against the Sandinista regime,<sup>60</sup> the Congress voted in December,

53. *Id.*

54. See Falcoff, *supra* note 25, at 35.

55. *Id.* at 36; Gutman, *supra* note 32, at 11; Ullman, *At War with Nicaragua*, 62 FOREIGN AFF. 39, 40 (1983); *What's behind Reagan Strategy in Nicaragua*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 27 (interview with William Casey) [hereinafter cited as Casey interview]. The anti-Sandinista Democratic Nicaraguan Force estimated the number of *contra* fighters to be between 8,000 and 12,000. Mott, *Honduras: Key to U.S. Role in Central America*, N.Y. Times, Oct. 14, 1984, § 6 (Magazine), at 93.

56. See, e.g., 1 PUB. PAPERS: REAGAN—1982, at 186, 367 (1983) (President Reagan's press conferences of February 18, 1982 and March 24, 1982).

57. The Blade (Toledo), Apr. 2, 1983, at 3, col. 1. See also N.Y. Times, Apr. 3, 1983, § 1, at 1, 14, col. 1.

58. Ullman, *supra* note 55, at 39.

59. The Blade (Toledo), Apr. 2, 1983, at 3, col. 1. See N.Y. Times, Apr. 1, 1983, at A3, col. 4.

60. A four-page Defense Intelligence Agency Report, dated July 16, 1982, described one of the *contra* organizations (the 15 September Legion) as "a terrorist group." It also mentioned the "assassination of minor government officials and a Cuban advisor." The Courier (Findlay, Ohio), Aug. 22, 1983, at A16, col. 1. See also Anderson, *Brutalities Acknowledged by CIA-Backed Contras*, The Blade (Toledo), Sept. 30, 1984, at B5, col. 1; Wills, *Two Gaps: Missile and Terror*, Miami Herald, Aug. 19, 1984, at D3, col. 2.

It was acknowledged by administration intelligence sources in mid-October of 1984 that the CIA had produced a 90-page psychological warfare manual the year before, entitled *Psychological Operations in Guerrilla Warfare*. The booklet advocated selective terrorist violence and black-mail directed against Nicaraguan judges, police, and other security forces, and encouraged the recruitment of professional criminals to carry out certain jobs. The manual, written in Spanish, was distributed to the Nicaraguan-based Nicaraguan Democratic Force, which is the largest *con-*

1982, to deny funds for the Central Intelligence Agency or for the Department of Defense which would be used to overthrow the government of Nicaragua or to provoke a war between Nicaragua and Honduras.<sup>61</sup> In reaction to this unexpected congressional opposition, the Reagan administration then switched its line of argument. In mid-April of 1983, Assistant Secretary of State Enders, appearing before the Senate Foreign Relations Committee, once again raised the familiar charge of 2,000 Cubans acting as military and security advisors in Nicaragua, to which number he added fifty Russians, thirty-five East Germans, and a combination of fifty Palestinians and Libyans, or roughly one foreign advisor per 1,000 Nicaraguan troops.<sup>62</sup> Another familiar accusation was that of the training of Nicaraguan pilots at Bulgarian and other East European airfields.<sup>63</sup> Enders also complained of continuing Nicaraguan support for the insurgents in El Salvador.<sup>64</sup> The bottom line, however, was not a call for the overthrow of the Sandinista regime, but merely an indirect plea for the establishment of democracy in Nicaragua.<sup>65</sup>

The new turn in American policy was specifically expressed by President Reagan in his appearance before a joint session of Congress on April 27, 1983. Although he lashed out at the Soviet Union and Commander Daniel Ortega for threatening to position nuclear missiles on Nicaraguan territory, and although he firmly pledged to "support the security of the region's threatened nations,"<sup>66</sup> the president also sought to assuage congressional fears of a wider war.<sup>67</sup> The administration was acting, he suggested, according to the requirements of the De-

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tra organization. N.Y. Times, Oct. 15, 1984, § 1, at 6, col. 4. On the manual's proposed selective "neutralization" of politicians, see N.Y. Times, Oct. 17, 1984, at A1, col. 4. Commented House Speaker Thomas P. "Tip" O'Neill: "[It is] another one of our disasters in foreign policy." ABC World News Tonight, Oct. 18, 1984.

61. 128 CONG. REC. D1396 (daily ed. Dec. 8, 1982); 38 CONG. Q. ALMANAC 282 (1982).

62. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 476, NICARAGUA: THREAT TO PEACE IN CENTRAL AMERICA 1 (Apr. 12, 1983) [hereinafter cited as THREAT TO PEACE]. At a press conference held at the conservative Heritage Foundation in Washington, D.C. during mid-summer 1983, a former high-ranking member of the Sandinista secret police maintained that there were 7,000 Cuban operatives inside Nicaragua (including 3,000 troops) as well as 200 Soviet advisors (including five Red Army generals). HERITAGE TODAY, July-Aug. 1983, at 10. See also Casey interview, *supra* note 55, at 27. Castro's spokesman admitted to a presence of slightly over 8,000 Cubans in early October of 1984, but insisted that there were only 200 Cuban military advisors among them. The Blade (Toledo), Oct. 8, 1984, at 2, col. 4.

63. THREAT TO PEACE, *supra* note 62, at 1.

64. *Id.* at 4.

65. *Id.*

66. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 482, CENTRAL AMERICA: DEFENDING OUR VITAL INTERESTS 4 (Apr. 27, 1983).

67. The president stated, "There is no thought of sending American combat troops to Central America." *Id.*

cember, 1982, resolution prohibiting U.S. aid to the *contra* rebels for the purpose of overthrowing the Sandinista regime:

But let 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 should not—and we will not—protect the Nicaraguan Government from the anger of its own people. But we should, through diplomacy, offer an alternative.<sup>68</sup>

In mid-August, during President Reagan's weekly radio address delivered on the eve of his departure for Mexico City, the chief executive again stressed "peaceful, democratic change in Central America."<sup>69</sup> He went on to characterize the seizure of power by the Sandinistas as the creation of "a communist dictatorship," and declared that U.S. opposition to Nicaragua was due to the fact that it was ruled by an unelected regime that supported Marxist subversion in the hemisphere.<sup>70</sup> "Now, that, of course," he concluded, "puts us in sympathy with those Nicaraguans who are trying to restore the democratic promises made during the revolution, the so-called *contras*."<sup>71</sup> At the beginning of that same month, Secretary of State George Shultz, appearing before the Senate Foreign Relations Committee, echoed the Reagan refrain: "What we seek is a Central America more like Costa Rica than Cuba. We seek genuine democracy. . . ."<sup>72</sup> American support of the *contras* was, therefore, directed toward creating an incentive for the Nicaraguan Junta of National Reconstruction to modify its behavior and to begin a dialogue of accommodation with the United States.<sup>73</sup>

Yet the ones who actually sought to bring about some kind of accommodation between the two contending governments were the so-called *Contadora* countries—Colombia, Mexico, Venezuela, and Pan-

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68. *Id.* at 3 (emphasis added). Roy Gutman asserts that ex-Senator Richard Stone (D. Fla.), who is the special presidential envoy to Central America, was responsible for the stress placed on democratizing Nicaragua beginning in June, 1983. See Gutman, *supra* note 32, at 13-14. Not only is Gutman off by two months, but he ignores the president's remarks in April, and also neglects to mention the impact of the December, 1982, congressional prohibition.

69. DEP'T ST. BULL., Oct. 1983, at 32, 33.

70. *Id.* at 33.

71. *Id.* For the administration's description of the composition of the *contras*, see THREAT TO PEACE, *supra* note 62, at 3-4.

72. BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, CURRENT POL'Y NO. 502, COMPREHENSIVE STRATEGY FOR CENTRAL AMERICA 1 (Aug. 4, 1983).

73. See *id.* at 3.

ama. In May, 1983, the *Contadora* foreign ministers met at Panama City to seek to resolve the Nicaraguan-Costa Rican border disputes and the U.S.-Nicaraguan low-level conflict.<sup>74</sup> Their particular concern was "the repeated violation of essential principles of the international legal order."<sup>75</sup> Actually, the *Contadora* attempt to construct a viable peace process first began in January, 1983, and has continued until the present (as of this writing).<sup>76</sup> Further meetings developed a bland twenty-one point program, but did not do much to advance the cause of joint settlement.<sup>77</sup> When Nicaragua went to the United Nations Security Council in mid-May, 1983, the latter merely issued a unanimous statement of commendation for the *Contadora* efforts and urged those states parties concerned "to co-operate fully with the *Contadora* group, through frank and constructive dialogue, so as to resolve their differences."<sup>78</sup>

Sadly, the differences did not recede, though the Sandinista junta gave some indication of modifying their previous hard-line position. By fall 1983, the junta was giving indications of a willingness to moderate its differences with the Reagan administration, but the latter saw each mild concession as an opportunity to exact more stringent measures. For example, the Nicaraguans proposed in October to stop aid to the leftist guerrillas in El Salvador if the United States would do the same with the *contras* in Nicaragua.<sup>79</sup> The White House did not make a formal response until eight months later.<sup>80</sup> In November, 1983, the Nicaraguan Interior Minister offered to request Cuba to withdraw its military advisors as part of a larger regional pact.<sup>81</sup> The offer was ignored by the White House.<sup>82</sup> As one knowledgeable commentator has observed, "Each time the Sandinistas moderated their initial negotiating stance, each time they made proposals or submitted draft treaties, the specific offers were rejected, but the fact they were made was

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74. *The Contadora Process for Peace in Central America*, 23 INT'L LEGAL MATERIALS 836 (1984).

75. *Id.* at 837.

76. Dickey, *Central America: From Quagmire to Cauldron?*, 62 FOREIGN AFF. 659, 665 (1983); Gutman, *supra* note 32, at 15.

77. Dickey, *supra* note 76, at 665-66. See *Joint Meeting of Contadora Group and Central American Countries*, U.N. Doc. A/38/256, reprinted in 23 INT'L LEGAL MATERIALS 839-40 (1984). On May 15, 1984, Costa Rica and Nicaragua signed an agreement to set up a supervising border commission. *Costa Rica-Nicaragua Joint Resolution*, U.N. Doc. A/39/268, reprinted in 23 INT'L LEGAL MATERIALS 863 (1984).

78. 38 U.S. SCOR (2437th mtg.), U.N. Doc. S/530 (1983), reprinted in 23 INT'L LEGAL MATERIALS 838 (1984).

79. Gutman, *supra* note 32, at 17.

80. *Id.*

81. *Id.* at 18.

82. *Id.*

viewed as a sign they were buckling under, and therefore a reason to increase the pressure."<sup>83</sup>

On January 8, 1984, after a two-day meeting in Panama City, the foreign ministers of the *Contadora* group plus Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua agreed to continue with the *Contadora* process.<sup>84</sup> Moreover, the Central American representatives agreed to develop guidelines for "a reasonable balance of forces in the region," to aid in disbanding irregular combatants engaged in acts of destabilization against governments in the region, and to establish "mechanisms of direct communication with a view to averting incidents between States and devising solutions in the event of the occurrence of such incidents . . . ."<sup>85</sup> One informed U.S. journalist maintains that "[t]his was the high watermark of Nicaraguan conciliation."<sup>86</sup>

But the United States was far from convinced about Nicaragua's change of heart. The senior director for Latin American affairs in the National Security Council summarily dismissed the *Contadora* twenty-one point proposal in late November, 1983, and he also attacked Nicaragua's failure to assure viable verification procedures in the proposed elimination of foreign advisors and aid to irregular combatants.<sup>87</sup> One month prior to this rejection of possible Nicaraguan conciliatory efforts, Secretary of State Shultz wrote Congress that although there were signs that the Sandinista regime was beginning to "reconsider its pervasive intervention in the region," it was not in the best interests of the United States to withhold support from the *contras*.<sup>88</sup> Such an act would, he argued, "virtually destroy the prospect that Nicaragua may agree to reciprocal and verifiable agreements to end assistance to all guerrilla forces operating in this region."<sup>89</sup> In other words, any sign of concession was to be met by increased pressure to exact further concessions. It was, at the very least, a curious way to negotiate.

By mid-February, 1984, however, Secretary Shultz was giving a different view of the *Contadora* twenty-one point plan. It was now acceptable, he told the Boston World Affairs Council, if those principles were actually implemented.<sup>90</sup> But, he added, Nicaragua first had to

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83. Dickey, *supra* note 76, at 666. For a contrary view, see Falcoff, *supra* note 25, at 35.

84. *Communiqué of the Contadora Group and Central American Countries*, Jan. 8, 1984, U.N. Doc. A/39/71, reprinted in 23 INT'L LEGAL MATERIALS 857 (1984).

85. *Id.*

86. Gutman, *supra* note 32, at 18.

87. *Id.* at 19.

88. Letter from Secretary of State Shultz to Congress (Oct. 18, 1983), reprinted in DEP'T ST. BULL., Jan. 1984, at 85.

89. *Id.*

90. *Question—and—Answer Session Following World Affairs Council Address*, DEP'T ST. BULL. Apr. 1984 at 12, 14 [hereinafter cited as *Question—and—Answer Session*]. See also Sec-

adopt "democratic pluralism," which would not be easy to bring about. Nicaragua under the Sandinistas, he maintained, could be compared to Nazi Germany!<sup>91</sup> At the end of that month, appearing on the McNeil/Lehrer News Hour the secretary linked the *contra* insurgency to a lack of democracy and democratic values in Nicaragua.<sup>92</sup> Downplaying the Sandinista promise of free elections, Shultz wryly observed, "There are lots of elections held in this world, such as those in the Soviet Union, that don't mean much . . . ."<sup>93</sup> In retrospect, it should have been apparent that something was brewing.

One hint of that came in President Reagan's address before the Georgetown University Center for Strategic and International Studies on April 6, 1984, where he observed, "Much was learned from Vietnam . . . . Military force, either direct or indirect, must remain an available part of America's foreign policy."<sup>94</sup> This paralleled a presentation by Secretary of State Shultz before the Trilateral Commission three days earlier:

State-sponsored terrorism is really a form of warfare. Motivated by ideology and political hostility, it is a weapon of unconventional war against democratic societies . . . . [I]t is more and more appropriate that the nations of the West face up to the need for active defense against terrorism . . . . And anyone who believes that military support can be effective when it's given on an uncertain installment plan is not facing reality.<sup>95</sup>

At the end of the first week of April, there was a dramatic revelation in the American press: U.S. nationals, employed by the CIA, had been supervising the mining of three Nicaraguan harbors during the past few months.<sup>96</sup> This, apparently, was done without disclosure by the administration to the Senate and House Committees on Intelligence.<sup>97</sup> Between March 1 and April 7, 1984, vessels from six nations were damaged, including one from the Soviet Union.<sup>98</sup> The reaction of Senator Moynihan typified the sense of congressional outrage: "It is an act of war."<sup>99</sup> France immediately offered to aid Nicaragua in clearing the

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retary Shultz Visits Latin America, *id.*, Feb. 1984, at 19, 21-22 (Shultz's remarks in Caracas).

91. Question—and—Answer Session, *supra* note 90, at 14.

92. Secretary's Interview on "The MacNeil/Lehrer News Hour," DEP'T ST. BULL., Apr. 1984, at 30, 32.

93. *Id.* at 32.

94. Reagan, *American Foreign Policy Challenges in the 1980's*, *id.*, May 1984, at 1, 5.

95. Shultz, *Power and Diplomacy in the 1980's*, *id.*, at 12, 13-14. The Soviet Academy of Sciences accused the United States in an August, 1984 publication of "international terrorism and imperialist brigandage." L'EXPRESS, Aug. 17, 1984, at 38.

96. N.Y. Times, Apr. 8, 1984, § 1, at 1, col. 6.

97. *Id.* at 12, col. 1.

98. *Id.*

99. CNN-TV Evening News (Apr. 7, 1984); see also N.Y. Times, Apr. 8, 1984, § 1, at 12, Published by eCommons, 1984

mines.<sup>100</sup> The administration, however, took the opportunity to once again launch a verbal offensive. In mid-April, the president accused the Soviet Union, Cuba, and Nicaragua of jointly attempting "to install communism by force throughout this hemisphere."<sup>101</sup> The next month he warned of a Managua "Communist reign of terror."<sup>102</sup>

By July, the rhetoric had heated considerably. In his July 24th news conference, the president discarded the "pressure for democracy" argument and instead declared that the United States had a responsibility to prevent Nicaragua from becoming a Soviet base in the hemisphere,<sup>103</sup> and called Nicaragua "a totalitarian dungeon."<sup>104</sup> Immediately following the media disclosure of the CIA's role in mining the Nicaraguan waters, Director William Casey refused to comment. He later accused the Sandinista regime of being "the base for supporting insurgencies not only in El Salvador but in Costa Rica, Guatemala and Honduras as well."<sup>105</sup> Furthermore, he strongly indicated that it was only a matter of time before Mexico became the next country on the Nicaraguan hit list.<sup>106</sup> Casey readily admitted that the goal of the *contra* groups was to overthrow the incumbent Sandinista regime, but then unexpectedly predicted that they would not attain their objective, since they were too few in number and too small in influence.<sup>107</sup>

It was perhaps this belief (plus continuing congressional pressure) which led to the next major development in what had become, by then, a string of seemingly endless surprises. If, as the liberal German magazine *Der Spiegel* charged, President Reagan sees a Cuban or Russian behind every palm tree, and if "the U.S. is unable to carry out a foreign policy that can satisfy America itself and its allies,"<sup>108</sup> then what besides political schizophrenia can explain Secretary of State Shultz's hasty side-trip to Managua at the very time President Reagan had begun his summer, 1984 voyage of nostalgia to Ireland and to Europe?<sup>109</sup> On June 1, 1984, while on his flight home from President Duarte's inauguration in El Salvador, Secretary Shultz made a sudden visit to the Nicaraguan capital, where he conferred with the top leaders of the

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col. 1.

100. N.Y. Times, Apr. 8, 1984, § 1, at 12, col. 1.

101. Toronto Star, Apr. 15, 1984, at B1.

102. Gutman, *supra* note 32, at 16.

103. 42 CONG. Q. 1820 (1984).

104. Gutman, *supra* note 32, at 16.

105. Casey interview, *supra* note 55, at 27.

106. *Id.* at 28.

107. *Id.* at 27.

108. *The Price of Grenada*, DER SPIEGEL, reprinted in WORLD PRESS REV., Dec. 1983, at

44.

109. N.Y. Times, June 2, 1984, § 1, at 1, col. 5; *id.* § 1, at 1, col. 6.

Sandinista junta at the Managua airport.<sup>110</sup> A senior U.S. official revealed that Reagan had asked the secretary of state to make the stop in order to explore the possibility of improving relations between the two countries.<sup>111</sup> Although the junta leadership called the talks a good beginning, Secretary Shultz again made the following demands: an end to Nicaraguan support for rebel guerrilla groups in Central America; a reduction of Nicaraguan military strength to numbers that would restore a military balance between Nicaragua and its neighbors; and fulfillment of the original Sandinista commitment "to support democratic pluralism."<sup>112</sup>

Upon reaching Washington, D.C., however, the secretary of state, though indicating he would seek further talks with the other side, reiterated the Reagan administration's intention to request an additional twenty-one million dollars from Congress to continue aid for the *contras*<sup>113</sup> (which Congress denied the very next month). The talks did in fact continue, conducted mainly on the ambassadorial level.<sup>114</sup> But it was not long before the United States was back raising the specter of a Nicaraguan Marxist dictatorship and claiming once more to have evidence of clandestine Nicaraguan military assistance to antidemocratic guerrilla movements in Central America. The U.S. Army Chief of the Southern Command, stationed in Panama, even charged that the Sandinista leaders were involved in drug trafficking in the region, darkly hinting that the junta utilized this nefarious trade as "conduits for subversion."<sup>115</sup> Nearly two months later, Lieutenant General Paul F. Gorman repeated these accusations, but this time in addition provided low-light television film photographed from a U.S. AC-130 reconnaissance plane flying off the Salvadoran coast.<sup>116</sup>

With this new series of charges, the Nicaraguan regime announced that it was going to limit the political freedom of the coalition of opposition parties that had refused to take part in the November 4th

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110. N.Y. Times, June 2, 1984, § 1, at 1, col. 6.

111. *Id.*

112. *Id.*, June 3, 1984, at A1, col. 1; The Blade (Toledo), June 2, 1984, at 1, col. 3. Actually, the talks were the result of pressure from the president of Mexico. Russell, *The Secret of Manzanillo*, TIME, Sept. 3, 1984, at 50.

113. N.Y. Times, June 3, 1984, § 1, at 1, col. 3. A catchall spending bill, passed by Congress on October 11, 1984, continued the cutoff of U.S. funds to the *contras* at least until March 1985. Wall St. J., Oct. 12, 1984, at 2, col. 3.

114. Russell, *supra* note 112, at 50.

115. N.Y. Times, July 1, 1984, § 1, at 8, col. 4. In mid-July a government affidavit filed in the Miami Federal District Court accused the junta leaders, particularly Daniel Ortega, Interior Minister Tomas Borge, and Defense Minister Humberto Ortega, of being direct participants in cocaine smuggling activities. *Id.*, July 19, 1984, at A6, col. 1.

116. *Tracking the Arms Pipeline*, TIME, Aug. 20, 1984, at 41.



presidential election.<sup>117</sup> The decision to boycott the polls, in the words of a British journalist, shattered the "hope of a national reconciliation."<sup>118</sup> It also represented a slap in the face for the *Norteamericanos*, which was quickly compounded by Colonel Muammar Ghaddafi's claim that Libyan soldiers were fighting in Nicaragua on behalf of the Sandinista regime. Ghaddafi exclaimed:

We have fought along with Nicaragua, some miles away from America. Libyan fighters, arms, and backing to the Nicaraguan people have reached them because they fight with us. They fight America on its own ground. Backing Nicaragua, Grenada and Cuba means fighting America as it fights us on our borders . . . .<sup>119</sup>

Small wonder that Ambassador Otto Reich, coordinator for Central America in the U.S. Department of State, lashed out at the Sandinista junta near the end of the summer of 1984 saying, "The government of Nicaragua is a terrorist government."<sup>120</sup> In the litany of accusations aimed at Nicaragua, the most exasperated, if not the most intelligible, was Vice-President George Bush's complaint during his televised debate with Democratic candidate Geraldine Ferraro that the Sandinistas "have humiliated the Holy Father."<sup>121</sup> More ominous was the disclosure by the secretary of state in early September that the Reagan administration would discourage neither private groups nor other countries from aiding the *contra* guerrillas.<sup>122</sup> Concluded State Department spokesman John Hughes, this approach "is obviously within the framework of the law."<sup>123</sup>

Apparently no one in the U.S. government, and very few in Amer-

117. *Id.*

118. Evans-Pritchard, *Nicaraguans Polarized for Limited Elections*, *The Blade* (Toledo), Sept. 2, 1984, § 3, at 3, col. 1; *Wall St. J.*, Aug. 10, 1984, at 25, col. 3. Commandante Bayardo Arce, director of the Sandinista Electoral Commission, is on record as saying during the spring of 1984, "[w]hat a revolution needs is the essence of the dictatorship of the proletariat, and from that point of view the elections are a hindrance . . . [but] the elections have become an expedient in order to deprive our enemies of an argument." Rangel, *The Double Lives of Nicaraguas Commandantes*, *The Blade* (Toledo), Oct. 23, 1984, at 2, col. 3 (emphasis omitted).

119. *N.Y. Times*, Sept. 2, 1984, § 1, at 1, 11, col. 1.

120. Crossfire, CNN-TV (Aug. 9, 1984). Commandante Arce also claimed the Nicaraguan people "are in favor of Soviet-Cuban advance, are in favor of totalitarianism, are in favor of Marxist-Leninism, are in favor of Soviet-Cuban military advisers, are in favor of revolutionary internationalism." See Rangel, *supra* note 118.

121. *N.Y. Times*, Oct. 12, 1984, at B4, B5, col. 6.

122. *Id.*, Sept. 11, 1984, at A1, col. 5. For a discussion of such groups, see Anderson, *supra* note 8. Israel and Japan have been active supporters of the anti-Sandinista rebels.

123. *The Blade* (Toledo), Sept. 11, 1984, at 2, col. 4. *But see* *N.Y. Times*, Sept. 11, 1984, at A1, A14, col. 1: "The Neutrality Act prohibits private support for or participation in military expeditions against foreign governments that are at peace with the United States. Relations between the United States and Nicaragua have been strained, but the two countries have not severed diplomatic relations and remain officially at peace."

ican politics, were prepared for the announcement by the Sandinista junta on September 22, 1984, during an extraordinary meeting of the diplomatic corps in Managua, that the Nicaraguans would accept the draft peace treaty for Central America proposed by the *Contadora* group two weeks earlier.<sup>124</sup> The junta also simultaneously announced that the registration period for the forthcoming November presidential election would be reopened so that dissident candidate Arturo José Cruz could still run for the presidency.<sup>125</sup> The State Department's immediate reaction was that "there is much less to this than meets the eye."<sup>126</sup> An unidentified spokesman for the department went on to say that the Sandinista leadership "shouldn't be allowed off the hook with a few headlines suggesting they have done something spectacular . . . . It is a disgrace to take this at face value."<sup>127</sup>

The following day, Reagan administration officials admitted their fear that the Sandinistas had scored a public relations victory by accepting the *Contadora* peace plan. The State Department had expected the junta to reject the *Contadora* draft regional peace pact.<sup>128</sup> They also indicated that the United States still had serious substantive concerns about the *Contadora* plan.<sup>129</sup> But the ball was clearly in the American court, and the U.S. government was not handling the situation with either flexibility or finesse. Seeking to drive home his advantage and to place another wedge between the United States and its allies, Junta Coordinator Daniel Ortega repeated Nicaragua's challenge to the Colossus of the North on September 27th: "The United States has been saying for some time that it supports a peace agreement for Central America. If the United States truly wants peace, we are putting their intentions to the test."<sup>130</sup> The American reaction was predictable. According to a *Washington Post* report at the end of September, Reagan administration officials were urging their allies in Central America to reject the terms of the draft treaty on the grounds that verification procedures were inadequately defined.<sup>131</sup> On October 1st, speaking to the Foreign Policy Association of New York, Ortega issued a final—and ominous—challenge to the United States: "There will be a peaceful solution in Central America or there will be more war."<sup>132</sup>

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124. N.Y. Times, Sept. 23, 1984, § 1, at 1, col. 4.

125. *Id.*

126. *Id.* at 21, col. 1.

127. *Id.*

128. *Id.*, Sept. 24, 1984, at A12, col. 1.

129. *Id.*

130. LATIN AM. INDEX, Oct. 1, 1984, at 69.

131. *Id.* The U.S. also complained that Nicaragua was not required by the pact to reduce the size of its army. *Id.*

132. The Blade (Toledo), Oct. 2, 1984, at 2, col. 3. See also N.Y. Times, Oct. 2, 1984, at  
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The first setback for the United States in the world arena occurred when the Common Market foreign ministers, meeting in Costa Rica in September, 1984, pledged support for the *Contadoran* plan, although promising only a token increase in financial aid to the stricken region.<sup>133</sup> The latest *Contadoran* draft apparently included the following provisions: (1) A halt to the introduction of new arms systems that would disturb the present arms balance (tilted in favor of Nicaragua); (2) the elimination of foreign military bases and training centers; (3) a timetable to be developed for the withdrawal of all outside military advisors; (4) the elimination of regional and extraregional weapons traffic to forces, groups, organizations, and armed bands seeking the destabilization of incumbent regimes; and (5) the implementation of free, pluralistic, democratic elections with the goal of the democratization of the entire region.<sup>134</sup> Pressures built up by these proposals and the reaction to them led the four-nation *Contadora* alignment to revise the draft proposals to include: (1) A ban on the introduction of new weapons technologies; (2) the establishment of ten criteria for setting up a system of arms limitation; (3) immediate withdrawal of foreign advisors from combat zones; and (4) a freeze on further acquisition of arms and war materials within thirty days after the adoption of the *Contadora* plan. The effect of these new proposals would actually be a sharp curtailment of U.S. involvement in Central America.<sup>135</sup>

There can be no doubt that, as of this writing, pressure upon the Reagan administration to bring about some kind of negotiated compromise is growing. Representative Michael Barnes, chairman of the House Subcommittee on Hemispheric Affairs, has been particularly outspoken: "The administration's objections to the treaty reinforce my belief that it's never had any real interest in a negotiated settlement."<sup>136</sup> The appearance of Commandante Ortega before the UN General Assembly during the first week of October, 1984, fanned the flames of hostility still further when he predicted "the mercenary forces of the CIA and the Pentagon" were planning a major military offensive beginning on October 15.<sup>137</sup> Shortly after, in an interview with *Newsweek*, Ortega repeated his charge, adding that the U.S. Southern Command in Panama bore the responsibility for planning the alleged invasion.<sup>138</sup> One month prior to the elections in Nicaragua and the United

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A1, col. 1.

133. N.Y. Times, Sept. 30, 1984, § 1, at 7, col. 1.

134. The Blade (Toledo), Sept. 30, 1984, at A2, col. 1.

135. *Id.*, Oct. 7, 1984, at A2, col. 1.136. *A Diplomatic Dead End*, NEWSWEEK, Oct. 15, 1984, at 68, 70.137. *Id.* at 68; TIME, Oct. 15, 1984, at 70.138. *Ortega Speaks Out*, NEWSWEEK, Oct. 15, 1984, at 70. Commandante Ortega's

States the situation had become so serious that it appeared that only some outside, impartial source, such as Pope John Paul II, could defuse the ticking, Central America political bomb.<sup>139</sup>

### III. LEGAL RAMIFICATIONS AND POLITICAL OBFUSCATIONS

During the first two years of the United States-Nicaraguan confrontation, neither party found it advisable or desirable to seek remedial action through the existing international legal process. Nicaragua's reluctance was undoubtedly based in part upon the junta's belief that "the Contras have neither charisma, nor moral authority; they are outcasts of Nicaragua and on the payroll of the U.S. Central Intelligence Agency."<sup>140</sup> It is also possible that the junta and its communist allies did not believe that the United States, after its Vietnam experience, would be willing to take on a two-front war in Central America, even if it were only a low-level conflict. For its part, the Reagan administration was simply unwilling to take its case before any organ of the United Nations, which the White House perceived to be largely controlled by the Third World and Soviet bloc.<sup>141</sup>

This situation changed, temporarily, with the election (over strong U.S. objections) of Nicaragua to the UN Security Council at the beginning of the 37th session in 1982.<sup>142</sup> On March 23, 1983, Nicaragua formally charged the United States in the Security Council with aiding Nicaraguan rebel groups in their attempt to overthrow the incumbent Sandinista regime.<sup>143</sup> Recognizing the futility of seeking a favorable determination in the face of a certain U.S. veto, the Nicaraguan delegate merely indicated that he was using the Security Council as a public forum to air Nicaragua's legitimate grievance.<sup>144</sup> The American reply, delivered by Ambassador Jeane Kirkpatrick in two different sessions, accused Nicaragua of internal repression of its citizens and gross violations of human rights, plus illegal intervention in El Salvador.<sup>145</sup> The end result was a Security Council consensus resolution on May 19, 1983, which sought to commit everyone in Central America to

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charges reached a fever pitch at Harvard Law School, where he declaimed before an audience of 1,300: "The American government has poised itself to exterminate the Nicaraguan people." Wall St. J., Oct. 12, 1984, at 24, col. 1.

139. The Blade (Toledo), Oct. 13, 1984, at 1, col. 4.

140. See Evans-Pritchard, *supra* note 118.

141. Gottlieb, *How to Rescue International Law*, COMMENTARY, Oct. 1984, at 46-48. See generally Finger, *The Reagan-Kirkpatrick Policies and the United Nations*, 62 FOREIGN AFF. 436, 438-40, 447, 456-57 (1983-84).

142. Finger, *supra* note 141, at 451.

143. *Id.*

144. *Id.*

145. *Id.*

respect the rights of everyone else and to be on their best behavior.<sup>146</sup>

Nothing more was done by either side until the mine-laying incidents of early spring 1984 occurred.<sup>147</sup> Nicaragua, in accordance with articles 34 and 35 of the UN Charter, lodged an immediate complaint with the UN Security Council. On April 4, 1984, the Security Council attempted to vote a resolution condemning the mining of the main ports of Nicaragua, affirming the right of free navigation and commerce in international waters, calling for all states to refrain from any further hostile action, and expressing support for the *Contadora* efforts on behalf of a peaceful settlement.<sup>148</sup> The vote was thirteen to one in favor of the resolution, with Great Britain abstaining.<sup>149</sup> The negative vote by the United States constituted a veto, and thus the draft resolution failed.<sup>150</sup>

In both classical and contemporary international law, a blockade constitutes an act of war.<sup>151</sup> The Reagan administration position as presented to the Senate Select Committee on Intelligence was that the minefields were created as an act of legitimate self-defense.<sup>152</sup> But self-defense requires an armed attack, an aggressive act, or an imminent threat of force directed against the grieving party.<sup>153</sup> The administration maintained that Nicaraguan assistance to the guerrillas in El Salvador constituted a danger to the security of an American ally, and thereby affected U.S. security as well.<sup>154</sup> This, however, is stretching the causal chain well beyond established limits in international law.

Finding itself unable to obtain a remedy in the UN Security Council, Nicaragua promptly filed an application with the International Court of Justice, claiming that the United States was intervening in the internal affairs of a sovereign state, was using military force

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146. 38 U.N. SCOR (2437th mtg.), U.N. Doc. S/530 (1983), *reprinted in* 23 INT'L LEGAL MATERIALS at 838-39 (1984).

147. *See supra* text accompanying notes 96-98.

148. U.N. Doc. S/16,463 (1984), *reprinted in* 23 INT'L LEGAL MATERIALS at 669 (1984).

149. *Id.*

150. *Id.*

151. *See* C. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 389-91 (8th ed. 1976); J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 632-35 (8th ed. 1977); G. VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 653-57 (2d ed. 1970); Skubiszewski, *Use of Force by States. Collective Security. Law of War and Neutrality*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 740, 836-37 (M. Sorensen ed. 1968); *see also* Corfu Channel (Merits), 1949 I.C.J. 4.

152. A Washington Post reporter showed this author a confidential summary of the U.S. position as presented before the Senate Committee, Washington, D.C., April 14, 1984.

153. U.N. CHARTER art. 51; C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 298 (rev. ed. 1968); D. O'CONNELL, *1 INTERNATIONAL LAW* 315-16 (2d ed. 1970); C. ROUSSEAU, *supra* note 151, at 299; Dinstein, *A Survey of Self-Defense in International Law*, in *1 A TREATISE ON INTERNATIONAL CRIMINAL LAW* 273-84 (M. Bassiouni & V. Nanda ed. 1973).

154. *See supra* note 152.

against Nicaragua, and had violated the following international legal obligations: article 2(4) of the UN Charter; articles 18 and 20 of the Charter of the Organization of American States; article 8 of the Convention on Rights and Duties of States; and article I, part 3, of the Convention Concerning the Duties and Rights of States in the Event of Civil Strife.<sup>155</sup> Since American agents were undeniably involved along with the *contra* rebels in the laying of mines, this constituted a valid litigable issue, however complex.

Somehow, the United States had become aware of Nicaragua's intention to go to the World Court, and on April 6, 1984, sent a letter to the Secretary-General of the United Nations withdrawing from an eighteen-year acceptance of compulsory jurisdiction. The United States, wrote Secretary Shultz, would not submit to any adjudication regarding disputes with a Central American state, or arising out of events within the Central American region, for a period of two years.<sup>156</sup> His reason, which was convoluted at best, was that this would allow the United States "to foster the continuing regional process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."<sup>157</sup> National and global reaction to this unexpected turn of events ranged from astonishment to outrage.<sup>158</sup> For the first time in more than a half-century, the conservative American Society of International Law, meeting at its annual conference in Washington, D.C., only one week later, voted a resolution condemning U.S. policy: "The Society therefore deplores, and strongly favors rescission of, the recent action of the United States Government in attempting to withdraw from the jurisdiction of the International Court of Justice disputes with any Central American state."<sup>159</sup>

Why the Reagan administration chose this mode of withdrawal is puzzling, to say the least. A better method of delay, or of negating the ICJ judicial process by legitimate means, could be found in the declaration by President Harry S. Truman in August 1946, accepting—with reservations—the World Court's compulsory jurisdiction with U.S. Senate approval.<sup>160</sup> Truman's third reservation in the decla-

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155. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 4, 5, *reprinted in* 23 INT'L LEGAL MATERIALS at 468, 469 (1984).

156. Letter from Secretary of State Shultz to UN Secretary-General (Apr. 6, 1984), *reprinted in* 23 INT'L LEGAL MATERIALS at 670 (1984).

157. *Id.*

158. See, e.g., *The World Looks at Central America*, WORLD PRESS REV., June 1984, at 19.

159. Am. Soc'y Int'l L. Newsletter, May-June 1984, at 1.

160. 61 Stat. 1218, T.I.A.S. No. 1598, *reprinted in* 4 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 140-41 (C. Bevans ed. 1970).  
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ration specifies that the commitment to compulsory jurisdiction does not include "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction . . . ."<sup>161</sup> If the United States had relied on chapter VI, articles 27 and 28 of the Charter of the Organization of American States (OAS),<sup>162</sup> it could have applied the Truman reservations on the theory that an attack against one member state (El Salvador) was an attack against all member states; that the infringement of the territorial integrity and the political sovereignty of the victim state by another Central American state required the principle of collective self-defense; and that all states involved (El Salvador, Honduras, Costa Rica, Guatemala) should likewise be parties before the court.

The partial dissent of Judge Schwebel (U.S.), in the World Court's May, 1984 decision, did in fact mention Nicaragua's alleged violations of international law and the failure of the court to enjoin Nicaraguan destabilization efforts in El Salvador, Costa Rica, and Honduras.<sup>163</sup> Schwebel's point, which on its face is undeniably valid, refers to the fact that the United States might well have charged the government of Nicaragua with violating the same provisions of the UN and OAS Charters that Nicaragua accused the United States of violating. But the United States, in denying the validity of the court's jurisdiction, was therefore unable to reply in kind or to file a counterapplication.

Unrelenting critics of administration policy, such as Democratic senators Christopher Dodd and Daniel Patrick Moynihan, have not only accused the White House of engaging in acts of war, but also of blatantly violating international law.<sup>164</sup> In the words of Senator Dodd: "There are international rules of law. I know they are not important when we don't play by the rules. I don't like the inconsistency of views."<sup>165</sup> Nonetheless, Nicaragua does not have clean hands either. The general rule of international customary law has been that "a State may not allow its territory to be used as a base for hostile operations against another State with which it is in a state of peace, and it must

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161. *Id.* at 141.

162. Charter of the Organization of the American States, *done* Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 (entered into force for the United States, Dec. 13, 1951).

163. *Nicar. v. U.S.*, 1984 I.C.J. 4, 25-34, *reprinted in* 23 INT'L LEGAL MATERIALS 479-83 (1984).

164. Dodd called the mining incident "an act of terrorism." Crossfire, CNN-TV (Aug. 9, 1984).

take all reasonable steps to prevent such activities."<sup>166</sup> This stricture applies to both Nicaragua and Honduras. In the area of state responsibility, according to *Corfu Channel*<sup>167</sup> and its interpreters, a violation of state sovereignty constitutes a sufficient cause of action before the World Court.<sup>168</sup> Neither side in *Nicaragua v. United States* is free from taint then, although there is no clean hands doctrine in international law.

Nonintervention, however, is not—particularly in the Americas—a peremptory norm. According to Professor Derek Bowett, a leading authority on the subject and co-counsel for Nicaragua at the International Court of Justice, "Strict nonintervention is a poor answer to armed insurrection fueled by external powers."<sup>169</sup> The UN has, for better or worse, legitimated national liberation movements and provided a national liberation exception to the general prohibitions of the definition of aggression of December, 1974.<sup>170</sup> A prominent American legal scholar noted with some concern that "it is becoming increasingly more common for third states to champion the private army or its target . . . ."<sup>171</sup> The hard fact and cold reality is that the United States fumbled an opportunity to claim legitimacy for its aid to the *contras*, whom the Reagan administration has many times insisted are freedom fighters within a national liberation context. Earlier prohibitions against internal subversion by external means,<sup>172</sup> developed before the national liberation exception of recent decades, no longer apply in the post-Charter era. The United States could have turned the Third World revolutionary ideology inside out, and might have put conflict-promoting states on notice that despite its semilegal standing, national liberation is a double-edged sword.

Perhaps the strongest defense that could have been raised by the

166. G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 221 (1971).

167. (Merits), 1949 I.C.J. 4.

168. I. BROWNIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 66, 85 (1983).

169. *Preserving Order and Security*, 1981 AM. SOC'Y INT'L L. PROC. 64, 65 (1983) (remarks of Derek W. Bowett).

170. See G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) (definition of aggression). On the legal status of national liberation movements, see J. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS 138-48 (1982); Friedlander, *Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?*, 13 CASE W. RES. J. INT'L L. 281 (1981); Schwebel, *Wars of Liberation—as Fought in U.N. Organs*, in LAW AND CIVIL WAR IN THE MODERN WORLD 446 (J. Moore ed. 1974).

171. Reisman, *Private Armies in a Global War System: Prologue to Decision*, in LAW AND CIVIL WAR IN THE MODERN WORLD 252, 272 (J. Moore ed. 1974). See generally Leurdijk, *Civil War and Intervention in International Law*, in ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOUR OF A.J.P. TAMMES 143 (H. Meijers & E. Vierdag eds. 1977).

172. See generally Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521 (1960).



Reagan administration on behalf of its involvement in Nicaragua, Honduras, and El Salvador is the still relevant and legally permissible principle contained in the Monroe Doctrine. The Monroe Doctrine is in fact a generally recognized international legal norm.<sup>173</sup> "[T]he Monroe Doctrine remains alive, at least in instances when the OAS will not or cannot mutually protect continental security."<sup>174</sup> Neither the United States nor Nicaragua sought relief from the OAS, most likely because neither party could find a majority of states to approve of its actions in Central America. Nevertheless, the declaration by President Eisenhower still holds true: "I think that the Monroe Doctrine has by no means been supplanted. It has been merely extended."<sup>175</sup> The United States had interpreted the doctrine during the last quarter-century to be founded upon a previously asserted right of self-preservation. In the words of commentator Eric Severeid, "We shall prevent, by force if necessary, the establishment of another Communist regime in this hemisphere."<sup>176</sup>

Allowing private individuals and groups to give aid to the *contra* rebels may actually be a violation of the U.S. neutrality laws.<sup>177</sup> The Neutrality Act prohibitions against citizens of the United States are today substantially the same as they appeared in the original statute of 1794.<sup>178</sup> A challenge to U.S. involvement in the paramilitary actions of its private citizens acting as advisors or participants with the *contra* groups was made by U.S. House of Representatives member Ronald V. Dellums and several others. In their mandamus action to compel the U.S. attorney general to investigate whether the U.S. government had

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173. The Monroe Doctrine "is an enunciation of the principle that there shall be no intervention or domination by any non-American State in, nor any attempt to extend the European system to, any portion of the Western Hemisphere." M. GAMBOA, A DICTIONARY OF INTERNATIONAL LAW AND DIPLOMACY 181 (1973).

174. Thomas & Thomas, *The Organization of American States and the Monroe Doctrine—Legal Implications*, 30 LA. L. REV. 541, 581 (1970). For a contrary view, see the remark of Nikita Khrushchev that the Monroe Doctrine had died "a natural death." *Id.* at 541.

175. PUB. PAPERS: DWIGHT D. EISENHOWER—1960–61, at 651 (1961) (press conference of Aug. 24, 1960). For the contemporary substantiation of his pronouncement, see Friedlander, *supra* note 26, at 57–62.

176. Severeid, *The Monroe Doctrine, 20th Century*, Washington Star, May 11, 1965, reprinted in 111 CONG. REC. 10,737 (1965). Note also the statement by Alaskan Senator Ernest Gruening (D.), one of the original Senate opponents of the Vietnam War: "I do not consider the Monroe Doctrine obsolete. I support it unqualifiedly . . ." 111 CONG. REC. 9731 (1965).

Several high-level Reagan administration officials and some U.S. State Department legalists have begun to make reference to the doctrine. N.Y. Times, Nov. 13, 1984, at A8, col. 1. *But see* Smith, *The Legacy of Monroe's Doctrine*, N.Y. Times, Sept. 9, 1984, § 6 (Magazine), at 3: "It has always been a unilateral, and at times even a blatant, expression of American national interest and power."

177. See 18 U.S.C. § 960 (1982); see also *supra* note 123.

178. *Dellums v. Smith*, 577 F. Supp. 1453 (N.D. Cal. 1984).

violated the neutrality prohibitions, the plaintiffs were granted a summary judgment by the U.S. District Court of the Northern District of California.<sup>179</sup> The consequences of this decision remain to be seen, but they might in theory act as a war powers restraint upon the executive branch.

#### IV. CONCLUSION: THE ADMINISTRATION AND ITS CRITICS—IS THERE LIGHT AT THE END OF THE TUNNEL?

Liberal critics of the Reagan administration have not been hesitant to voice their outrage. Columnist Mary McGrory has berated the State Department for its refusal to welcome the Sandinista acceptance of the *Contadora* proposals by accusing the United States of acting "as if the Sandinistas' capitulation to reason were a communist plot."<sup>180</sup> Political scientist Louis Rene Beres argued that compared to the Reagan administration's Central American and Caribbean allies, "Nicaragua stands as a spotless model of Jeffersonian democracy."<sup>181</sup> He went on to warn that if the White House turned its back on international law in that region, "the victims of U.S.-backed repression will eventually throw out their rulers."<sup>182</sup> The editor of the *New York Times Book Review*, who recently wrote a study of Central America, urged that

A deal should be negotiated with Nicaragua's Sandinista Government. If the Sandinistas guarantee there will be no Soviet or Cuban bases in Nicaragua and allow the United States to verify the number of advanced weapons they have, the United States should agree not to use force (or finance and train the *contras*) to overthrow them. If Nicaragua then becomes a Soviet-type socialist state, it will not be a model for the rest of Latin America.<sup>183</sup>

The truth of the matter is that the Reagan administration has done many of the correct things, but has often proceeded in the wrong way; it has acted for basically correct reasons, but has often failed to provide adequate explanation and relevant legal justification for its actions. The Reagan White House was right to assume that a hands-off posture in Central America, which was being progressively undermined by several radical insurgencies when Reagan came into office, would inevitably result in a domino effect. Given the current security problems in Costa Rica and Mexico, this theory was hardly farfetched.

Most critics of the actions taken in Central America by the U.S.

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179. *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983). The attorney general's motion to alter the judgment was denied in *Dellums*, 577 F. Supp. 1449.

180. McGrory, *Openings for Mondale*, Pittsburgh Press, Oct. 4, 1984, at B2, col. 4.

181. Beres, *supra* note 16.

182. *Id.*

183. Ash, *The Military Fallacy*, N.Y. TIMES BOOK REV., Oct. 7, 1984, at 13.

government have yet to free themselves of the Vietnam quagmire, although it is now a decade after the conclusion of that historic trauma. All three presidential administrations since the Saigon surrender have found themselves immobilized by prior history and confrontational politics. It is undeniable that the Vietnam War had dramatically exposed the limits of American power in a chaotic world. Thus, Central America was chosen as the Reagan administration's first battleground in the world arena, because the president was unwilling to substitute the Brezhnev Doctrine for the Monroe Doctrine in any shape, sense, or form.

There is no doubt that present U.S. policy in Central America represents in part a return to the Monroe Doctrine of the past. However, foreign intervention should be no more permissible today than it was at the time of John Quincy Adams and James Monroe. Freedom is not divisible,<sup>184</sup> and America's national interest is best served by opposing alien sponsored and supported insurgencies throughout the hemisphere. Although the administration has talked geopolitical sense, it has also confused and confounded the legal and moral issues where they have arisen, and it has taken refuge in vacillation, mixed signals, and strident posturing. One need not make a call to action in order to assert a legal right. There is—and should be—an international rule of law. It is time that we as a nation started making use of it.

## V. POSTSCRIPT

The decision of the International Court of Justice on November 26, 1984, in which it accepted jurisdiction by a fifteen to one vote in the case of *Nicaragua v. United States*,<sup>185</sup> should have surprised no one, despite the reported stunned reaction of the U.S. legal representa-

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184. Although Ambassadors Kirkpatrick and Reich raised the issue of Nicaragua's egregious violations of human rights, see Finger, *supra* note 141, at 451, the United States government was wary of filing a complaint with the Inter-American Commission of Human Rights or seeking redress in the Inter-American Court of Human Rights. The persecution of the Miskito Indians by the Sandinistas is an ugly fact. See Frawley, *Among the Miskitos: Bluefields, Nicaragua, under the Sandinista Harrow*, 28 POL. REV. 50 (1984); Lieken, *Nicaragua's Untold Stories*, NEW REPUBLIC, Oct. 8, 1984, at 16-22; Muravchik, *Manipulating the Miskitos*, *id.*, Aug. 6, 1984; Nietschmann, *The Unreported War against the Sandinistas: 6,000 Indian Guerillas Are Fighting for Their Land*, 29 POL. REV. 32 (1984); Sancton, *Terror Right and Left*, TIME, Mar. 22, 1982, at 30-31; *By Remembering, We Can Prevent Genocide*, USA Today, Sept. 28, 1984, at 11A, col. 1 (interview with Elie Wiesel). The problems with pursuing a human rights legal remedy is that a number of America's hemispheric allies have also repressed their Indian populations, including Guatemala, Brazil, Paraguay, and Peru. Nevertheless, President Reagan's charge that "[t]he Sandinistas are a totalitarian government and a launching pad for further revolutions in Central America," has some validity, to say the least. See *Realism with the Soviets, Patience in the Mideast*, U.S. NEWS & WORLD REP., Oct. 22, 1984, at 30 (interview with President Reagan).

185. N.Y. Times, Nov. 27, 1984, at A1, col. 6.

tives at The Hague.<sup>186</sup> On the issue of whether the court should take jurisdiction, the majority was a lopsided fifteen to one.<sup>187</sup> On the equally important issue of the admissibility of the Nicaraguan complaint, the court found unanimously in favor of Nicaragua.<sup>188</sup> Two subsidiary issues were also weighted decidedly against the United States' positions. The court, by a vote of eleven to five, denied the American contention that the ICJ had no jurisdiction because of America's prior refusal to accept the court's authority in any Central American controversy, which the U.S. had announced just before the Nicaraguan complaint was filed on April 9, 1984.<sup>189</sup> By a vote of fourteen to two, the court added that its jurisdiction was also invoked by the alleged violation of the 1956 Treaty of Friendship, Commerce, and Navigation between Nicaragua and the United States.<sup>190</sup>

Some legalists (including this writer) believe that it was a mistake for the United States to make a special appearance before the World Court to contest jurisdiction in this case.<sup>191</sup> By doing so, the United States *ab initio* undercut its own legal arguments, however tenuous they may have been. Actually, if the court did not take jurisdiction in an international controversy of this nature, it would have soon declined to the status of a minor arbitral commission, instead of its Charter-assigned role as principal organ of the United Nations.<sup>192</sup> The chief aide of the U.S. ambassador to the UN has pointed out that the court's ruling involves it for the first time in a case of continuing warfare, either regular or irregular.<sup>193</sup> He warned that "serious consideration will be given to whether the U.S.'s acceptance of the court's jurisdiction makes sense at a time when so few other nations, and certainly no other great powers, have accepted the authority of the court to decide questions related to ongoing armed hostilities."<sup>194</sup>

Diplomats, like journalists, are prone to forgetfulness in times of crisis. The United States did not hesitate to make application to the World Court when its own diplomatic personnel were seriously threatened by the Iranian hostage seizure of November 4, 1979, a circumstance of armed confrontation.<sup>195</sup> Moreover, the reference by the

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186. *Id.* at A1, col. 5, A12, col. 4.

187. *Id.* at A1, col. 6.

188. *Id.* at A12, col. 3.

189. *Id.*

190. *Id.*

191. *Id.* at A1, col. 5, A12, col. 4.

192. See U.N. CHARTER arts. 2 & 92; S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 36-40 (1962).

193. N.Y. Times, Nov. 27, 1984, at A1, col. 5, A12, col. 4.

194. *Id.*

195. United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 4.

U.S.-UN counsel to "ongoing armed hostilities" raises the question of whether or not the United States is admitting to involvement in the hostilities. If the Reagan administration were taking the position that the court cannot rule on a continuing conflict between the United States and Nicaragua because there has been no precedent for such an approach, then the administration is also running the risk of being accused by Congress of a violation of the War Powers Resolution of November, 1973.<sup>196</sup>

According to a mid-level administration official, it is almost inevitable "that the United States is going to have to denounce the World Court. It is clearly foreseeable that we're going to lose on the merits, and anybody who doubts that is nuts."<sup>197</sup> Taking this view into account, U.S. legal representatives are already debating the question of whether to base a refusal to comply upon a claim of inherent bias in a court whose members reflect the national interests of their own governments.<sup>198</sup> This, certainly, has long been a concern of qualified international lawyers and commentators.<sup>199</sup> But the World Court has functioned for approximately six decades in one form or another without serious objection to the impartiality of its membership. It is a little late in the day to raise this particular objection when faced with what most observers believe is a losing cause.

The United States could argue that the Nicaraguan controversy is similar to the 1962 Cuban missile crisis, and could assert the same position it held when the Soviets urged the Security Council to request an advisory opinion on the matter from the World Court. The American ambassador to the UN had then argued: "What we have is a cold war political attack . . . . The International Court of Justice should not be brought into the cold war or into the jungle of communist propaganda."<sup>200</sup> But these arguments were successful only because the United States possessed a veto over any Security Council recommendation. To tell the International Court of Justice that it should abstain from all questions of international conflict is tantamount to saying that it should concern itself only with fish, boundaries, and contract disputes.

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President Carter, in a letter to House Speaker Thomas P. O'Neill, dated April 27, 1980, called the U.S. hostages victims of an "Iranian armed attack." N.Y. Times, Apr. 28, 1980, at 11. col. 3.

196. 50 U.S.C. §§ 1541-48 (1982).

197. N.Y. Times, Nov. 27, 1984, at A6, col. 5 (city ed.).

198. Interview with confidential government source (Nov. 1984).

199. See, e.g., *Strengthening the International Court of Justice: Hearings on S. Res. 74-78 Before the Senate Comm. on Foreign Relations*, 93d Cong., 1st Sess. (1973) (statements of various witnesses).

200. Jessup, *The Development of a United States Approach toward the International Court of Justice*, 5 VAND. J. TRANSNAT'L L. 6 (1971) (quoting Adlai Stevenson).

White House spokesman Larry Speakes denounced the November ICJ decision as harmful to the *Contadora* peace process and added that the court's action would impede future negotiating efforts.<sup>201</sup> The administration might have argued that the *Contadora* group and its activities fall under article 95 of the UN Charter, which permits member states to submit political differences to other tribunals. It is highly unlikely that the United States could get the *Contadora* governments to petition the court to intervene in the case, as permitted by article 62 of the Statute of the International Court of Justice, or that the nature of such intervention—if allowed—would be favorable to the United States.

What the Reagan administration has been left with, besides a pure power politics rationale, is an assertion that the Monroe Doctrine and the Johnson Corollary<sup>202</sup> are legally sacrosanct and politically immutable, and that the Nicaraguan dispute falls under their purview. It is not the best of arguments, but it does provide a fall-back defense. To reject the court's decision outright would raise serious problems as to the continuing U.S. role in international organizations. Admittedly, in the words of the most influential American legalist of the past half-century, "the United States has not been an assiduous advocate or patron of the Court."<sup>203</sup> But to deny the court's historic and legitimate role sets a dangerous precedent for the future of international law.

"When a conflict takes place within a legal framework, it is less dangerous and less destructive than it would otherwise be."<sup>204</sup> *Nicaragua v. United States* has become a ticking bomb in both a legal and political sense. The controversy may not subject itself to being defused, but it is utter folly for the Reagan administration not to try.

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201. N.Y. Times, Nov. 27, 1984, at A1, col. 5.

202. The Johnson Corollary to the Monroe Doctrine originated with the 1965 U.S. intervention in the Dominican Republic, wherein President Johnson justified the American actions, after the fact, as preventing a communist seizure of power in the Western hemisphere. See Friedlander, *supra* note 26, at 58-59; Rabe, *The Johnson (Eisenhower?) Doctrine for Latin America*, 9 DIPLOMATIC HIST. 95 (1985).

203. Jessup, *supra* note 200, at 42.

204. R. FISHER, IMPROVING COMPLIANCE WITH INTERNATIONAL LAW 348-49 (1981).

