

SECRET WAR IN CENTRAL AMERICA

A DOCUMENTATION

JOHN NORTON MOORE

The core principle of modern world order is that aggressive attack is prohibited in international relations and that necessary and proportional force may be used in response to such an attack.

This dual principle is embodied in Articles 2(4) and 51 of the United Nations Charter, Articles 21 and 22 of the revised Charter of the Organization of American States, and virtually every modern normative statement about the use of force in international relations.

Indeed, it is the most important principle to emerge in more than 2,000 years of human thought about the prevention of war. In the contemporary world of conflicting ideologies and nuclear threat, no task is more important for international lawyers and statesmen than to maintain the integrity of this principle in both its critical — and reciprocal — dimensions: prohibition of aggression and maintenance of the right of effective defense.

Today this core principle faces a fundamental threat. That threat has already contributed to a serious destabilization of world order and, unless arrested, holds potential for the complete collapse of constraints on the use of force. It takes the form of an assault on world order by radical regimes that share an antipathy to

democratic values and a "true belief" in the use of force to spread their ideology.

By maintaining that the achievement of "revolutionary internationalism" justifies the use of force, these regimes simultaneously fight a guerrilla war against the core Charter principle and publicly deny any state-sanctioned use of force so as to gain the protection of the very legal order they are attacking. Thus, their assault undermines both the authority of the prohibition of aggression and the effectiveness of the right of defense. Nowhere has this assault been more threatening — and harmful to the legal order — than in the contemporary Central American conflict.

The Nicaraguan revolution

At the moment of its success, the 1979 revolution that overthrew President Anastasio Somoza in Nicaragua was broad-based and popular. It enjoyed the support of organized labor, professional and business groups, the church, campesinos and

most segments of Nicaraguan society. Pursuant to an extraordinary OAS resolution of 1979 that recognized the insurgency against the sit-

ting government of an Organization of American States member, many democratic countries in Latin America, including Mexico, Venezuela, Panama, and Costa Rica, supported the insurgents. Mr. Somoza had virtually no allies.

As a condition of OAS support, the 1979 resolution required the insurgents to support a democratic, pluralist, and non-aligned Nicaragua. These conditions were accepted by the Sandinista National Liberation Front (FSLN) in a cable of July 12, 1979, to the OAS. In the immediate aftermath of the revolution, there was great hope — shared by the United States — that this pledge would be kept.

Sadly, however, the nine Marxist-Leninist comandantes who had controlled the effective military insurgency progressively assumed power and thus caused a purge of genuine democrats. In addition, the comandantes curtailed civil and political rights, denied free elections, initiated massive militarization of society, and, in general, began to move sharply toward Cuban-style totalitarianism.

The Cuban effort to capture the effective military insurgency against Mr. Somoza seems to be the principal cause of this failure of the Nicaraguan democratic revolution. Fidel Castro had provided some arms and training to the FSLN during the early 1960s. Beginning in 1977-1978, a high official of the Cuban "American Department," Armando Ullis Estrada, made repeated secret trips to Nicaragua to unify the three major factions of the FSLN as a condition for receiving stepped-up Cuban aid.

From the outset, Cuba concentrated on ensuring that a hard-core Marxist-Leninist group was in charge of the effective military insurgency in Nicaragua. It was by far the most important source of assistance to that insurgency.

Today the nine comandantes who rule Nicaragua face substantial and growing internal opposition, as Nicaraguans increasingly perceive the democratic revolution as betrayed. The rapid growth in opposing "contra" forces in Nicaragua and the stream of recent defections, including, since 1979, two Nicaraguan ambassadors to the United States, provide dramatic evidence of a shift in popular Nicaraguan feeling about the comandantes.

Continued

Initial U.S. relations

When the Sandinistas came to power, the United States made every effort to establish good relations with the new regime. President Jimmy Carter invited Comandante Daniel Ortega to the White House to discuss ways of creating good relations and to underscore the seriousness of the U.S. interest in establishing them. The United States gave \$118 million in economic assistance, including more than 100,000 tons of food, to the regime during the first two years.

(This was more aid than was given by any other nation and overwhelmingly more than the United States had given to the Somoza regime at any time.)

While the United States was striving to build good relations with the Sandinistas, the comandantes were secretly concluding military agreements with Soviet-bloc countries, beginning a massive military buildup and joining with the Cubans in launching an intense secret guerrilla war against El Salvador and Guatemala and armed subversion against Costa Rica and Honduras. In its waning weeks in office in late 1980, as intelligence data unmistakably began to show the extent and

seriousness of this secret attack, the Carter administration informally suspended economic assistance to the Sandinistas.

The Sandinista response

As they openly assumed political power, the comandantes began to put in place the familiar apparatus of a totalitarian police state: it was marked by the suppression of labor movements, attacks on the church and religious freedom, attacks on the semi-autonomous Indians of the Atlantic region, attacks on and the clandestine murder of political opponents, press controls and censorship, a Cuban-style internal security system down to the block level, a virtual merger of the Sandinista Party with the state, sham trials by "people's courts" and, ultimately, the suspension of the rights of habeas corpus, detention of growing numbers of political prisoners, and institution of a massive state propaganda system.

The Sandinistas have also violated their pledge of non-alignment. Prior to the takeover of power in Nicaragua, on March 6, 1978, the Demo-

cratic Front for the Liberation of Palestine and the FSLN issued a joint statement from Havana declaring war against "Yankee imperialism, the racist regime of Israel" and the Nicaraguan government. The Sandinistas' foreign advisers and teachers have been selectively chosen from Cuba, the Soviet bloc, and other radical states. The rapid Cuban- and Soviet-assisted military buildup and early secret military assistance agreements with Soviet-bloc sources reflect this alignment.

In the United Nations, the Sandinista voting record has been thoroughly aligned with that of the Soviet bloc. For example, in the 38th session of the General Assembly (1983-1984), the Sandinistas voted for a unified Soviet-Cuban position 96 percent of the time. They approved of the Vietnamese invasion of Kampuchea, supported action on an amendment to oust Israel, and have repeatedly refused to condemn the Soviet invasion of Afghanistan, while using the debates on Afghanistan as an occasion for vehemently attacking the United States and Israel.

Moreover, the comandantes' rhetoric is even more revealing than their voting record. Sandinista Army Commander in Chief Humberto Ortega told his officers in August of 1981: "We are anti-Yankee, we are against the bourgeoisie, we are guided by the Marxist-Leninist scientific doctrine of the Revolution." Comandante Tomas Borge told a North Korean audience in June 1980 — while the Sandinistas were still receiving massive United States economic assistance — that "the Nicaraguan revolutionaries will not be content until the imperialists have been overthrown in all parts of the world. . . . We stand with the . . . socialist countries."

Sandinista rhetoric has also insulted Latin Americans. On Oct. 11, 1985, Ecuador broke diplomatic and consular relations with Nicaragua. In announcing the break, Ecuador's Foreign Minister Edgar Teran said that Comandante Daniel Ortega has made "gross, inadmissible attacks on the dignity, sovereignty and independence" of Ecuador. Apparently underlying the rupture was the discovery that the comandantes had assisted terrorists in a notorious attack in Ecuador.

The military buildup

The massive and secret military buildup began even as the United States poured in economic assistance. Before there was any "contra" threat, the Nicaraguan armed forces had

been built up to nearly six times the size of Mr. Somoza's National Guard. Today, they are nine times that level and still escalating. They now have some 350 tanks and armored vehicles, compared with three tanks and 25 antiquated armored cars under Mr. Somoza, none in Costa Rica, 16 armored reconnaissance vehicles in Honduras and less than 30 armored personal carriers in El Salvador — a nation faced with a substantial guerrilla insurgency. A major airfield capable of accommodating the largest aircraft in the Soviet arsenal is being built at Punta Huerte, and Nicaraguan pilots are being trained in Bulgaria to fly Soviet-built MiGs.

This Sandinista military buildup is unprecedented in Central America and, with the exception of the Honduran Air Force, its result far outclasses the small armed forces of Nicaragua's neighbors. It

was begun as a deliberate policy well before any "contra" threat was evident, that is, in 1980, two years before there was any significant armed opposition to the regime. In 1980 the first group of Nicaraguans was sent to Eastern Europe for flight training in MiGs. In February 1981, the Sandinistas announced that they would build a 200,000-man militia, but, as *The New York Times* pointed out, they faced "surprisingly little counterrevolutionary activity" at that time.

The militarization of Nicaraguan society produced by this buildup is similar to that in Cuba. On a per-capita basis, Nicaragua now commands a greater military than any other nation in the region except Cuba. On an absolute basis, it now has the third-largest army in Latin America, after only Brazil and Cuba.

Waging secret war

The comandantes came to power with substantial Cuban assistance — although they also rode in on a U.S. cutoff of military assistance to Mr. Somoza, a wave of popular sentiment in Nicaragua against Mr. Somoza and OAS- and U.S.-assisted international isolation of the Somoza regime.

The joint statement of goals of the FSLN published in 1969, a decade before it took power, stated its support for "[a] struggle for a 'true' union of the Central American peoples within one country, beginning with support for national liberation movements in neighboring states."

Consistent with this statement, the comandantes elected as one of their first orders of business to join their patron, Cuba, in supporting "revolutionary internationalism" in

the Central American region. The most serious attacks in the Cuban-Nicaraguan secret war against neighboring states have been directed against El Salvador and Guatemala, although Honduras and, to a lesser extent, Costa Rica, have been targets of similar small-scale subversion, terrorism, and efforts at destabilization.

It should be understood in appraising the armed attacks by Cuba and Nicaragua on their neighbors that these attacks are intended by their perpetrators to be secret and non-attributable to either country.

To that end, they have consistently employed all the mechanisms available to a modern and sophisticated intelligence network to conceal the nature of the attacks. And that network — emanating from totalitarian regimes — has not been subject to scrutiny by the national media or other democratic checks.

Before 1980, the Salvadoran guerrillas were few, disorganized, and feuding, and were armed only with pistols, hunting rifles, and shotguns purchased largely on the world market. In December 1979 and May 1980, Castro hosted meetings in Havana to organize competing Salvadoran insurgent factions into a Unified Revolutionary Directorate (DRU) controlled by Moscow-oriented Marxist-Leninists. In late 1980, the Farabundo Marti National Liberation Front (FMLN) was formed as the coordinating body of the guerrilla organizations, and a front organization, the Revolutionary Democratic Front (FDR), was created to attract international political support.

From approximately September or October 1980, large shipments of arms and equipment began flowing to the FMLN through Cuba and Nicaragua. Huge quantities of arms and ammunition were "surged in" during this period, so rapidly in fact, that guerrilla leaders complained to Managua that they could not absorb them.

But the January 1981 FMLN "final offensive" in El Salvador did not succeed. A principal factor is that in El Salvador the FMLN, unlike the insurgents against Mr. Somoza, has never been able to generate significant popular support. In contrast to Nicaragua, El Salvador had already had a reformist revolution in 1979. Although severe polarization and violence on the far left and far right were endemic, there was no "Somoza."

The subsequent free and democratic elections in 1983 and 1984 culminating in President Jose Napoleon Duarte's strongly reformist and democratic leadership, dealt a severe political blow to the FMLN — which, lacking popular support, has consistently refused to participate in elections.

At roughly the same time, a major secret war has also been conducted against Guatemala, with the active participation and support of the comandantes as well as Cuba.

There have also been attacks on Honduras involving insurgent groups trained in Cuba and Nicaragua and, to a lesser extent, terrorist attacks and subversion efforts against Costa Rica. Since early 1981, Nicaragua and Cuba have sought to build an insurgent infrastructure in Honduras by recruiting Hondurans for training in the two countries and infiltrating the recruits back into Honduras as armed insurgents. These attacks and subversion efforts against Honduras are continuing.

In short, since mid-1980 Cuba and Nicaragua have been waging a secret war against neighboring Central American states, particularly El Salvador. The attack on El Salvador is neither temporary nor small-time. It fields forces roughly one-sixth the size of the Salvadoran Army and has resulted in thousands of war casualties and more than \$1 billion in direct war damage to the Salvadoran economy.

The evidence of this secret attack comes from many sources, which include highly classified intelligence reviewed by both the Carter and the Reagan administrations; conclusions of the Senate and House intel-

ligence committees after careful review of the intelligence data; conclusions of the bipartisan Kissinger Commission after careful review of the entire record and extensive inquiry in the region; statements and reports of Central American leaders and nations; reports by independent media and scholars; public statements by defectors; publicly available Cuban, Nicaraguan, and FMLN positions (though to a lesser extent, for obvious reasons); and, most ironically, testimony of witnesses for Nicaragua in its pending case before the World Court.

U.S. peace efforts

The United States and the attacked nations of the region have made, and continue to make, every effort to resolve the Central American conflict peacefully. Still seeking constructive relations, the Carter administration as late as September 1980 certified to Congress that Nica-

ragua was not giving assistance to international terrorism, so as to be able to continue American economic aid that would by law be terminated if a finding of such assistance were made. In view of the evidence at that time, this certification was controversial within the administration. By December 1980, the intelligence on Sandinista involvement was overwhelming. Shortly thereafter, the Carter administration suspended AID and PL-480 sales to Nicaragua and resumed military assistance to El Salvador.

During 1981-1982, the Reagan administration made two major diplomatic efforts to bring about a peaceful end to the secret attacks from Nicaragua. Assistant Secretary of State Thomas O. Enders visited Managua in August 1981 and offered to renew economic assistance in exchange for an end to Sandinista support for the guerrillas.

The offer was tied solely and explicitly to an end by the Sandinistas of attacks against El Salvador and neighboring states. The Sandinistas never responded to the Enders offer, and their ambassador to the United States, Arturo Cruz, resigned shortly thereafter in frustration at these developments. In April 1982, the United States made an eight-point proposal reiterating the August offer and emphasizing international verification of arms limitations and reaffirmation by Nicaragua of its OAS commitments to support pluralism, free elections, and a mixed economy.

In October 1982, the United States joined eight democracies of the region in drawing up the San Jose Declaration, which outlined essential conditions for peace. The Sandinistas refused both to meet with the group's designated spokesman, Costa Rican Foreign Minister Fernando Volio Jimenez, and to discuss the San Jose principles.

The United States supported efforts begun by Colombia, Panama, Mexico, and Venezuela in January 1983 at Contadora, Panama, to mediate a regional settlement. These "Contadora" talks, which were supported by the OAS, produced agreement on a 21-point Document of Objectives whose verifiable implementation would have met U.S. concerns. Since late 1984, the Contadora discussions have focused on resolving differences between a Sept. 21 draft supported by Nicaragua — which Nicaragua insists be accepted without change — and prepared amendments by Honduras, El Salvador, and Costa Rica, as well as on efforts to strengthen verification.

It has frequently been suggested that the United States resort to the Organization of American States. To date, however, the OAS has clearly

preferred not to be involved and has pointedly endorsed the Contadora process. Even more importantly, Nicaragua has viewed the OAS as a hostile forum and has sought to prevent it from considering the issues.

'Contras' develop spontaneously

There was no significant military opposition to the Sandinistas until the spring of 1982. That was over a year and a half after the sustained secret attack began on El Salvador in mid-1980 and more than six months after Mr. Enders's effort to resolve the attack peacefully — indeed, to resume economic assistance to the Sandinistas if they would simply cease their attack — went unanswered.

It seems clear from press and first-person accounts that the armed military opposition to the Sandinistas developed spontaneously and independently. These same press reports and open congressional discussion also suggest that, in response to the continuing Sandinista attacks, the United States and some other nations began providing assistance to the opposition. The U.S. objectives have been to assist in interdicting the attacks through direct assaults on weapons-shipment points and through the diversion of Nicaraguan resources to internal concerns.

Most importantly, the "contra" policy seems intended to convince Nicaragua it should cease the armed attacks on its neighbors.

U.S. assistance to the groups variously known as "contras" or "democratic resistance forces" has been carefully controlled. Under the Boland amendment, Congress insisted that the U.S. objectives not be to overthrow the government of Nicaragua, despite its secret armed attack on neighboring states, but solely to protect neighboring states from these attacks.

The contrast between the all-out Cuban-Nicaraguan support for the

FMLN and the cautious, on-again, off-again United States support for the "contras" is striking. Even though assistance to the "contras" is a defensive response to an armed attack, Congress has restricted U.S. actions to make it clear that such support is not to be given for the purpose of overthrowing the government of Nicaragua, and it has prohibited small-scale mining of harbors. For a substantial period, all assistance was terminated, and since its renewal, it has consisted only of non-lethal humanitarian aid that may not be administered by the Department of Defense or the CIA.

In contrast, Cuba and Nicaragua have provided unstinting political and military support to the insurgents in El Salvador; the very purpose of their attack is to overthrow the democratically elected government of EL Salvador. No Boland amendment, fund cutoffs, or other limitations hamper their attacks. They provide a full range of support services to the insurgents, have stepped up the indiscriminate use of land mines, and would certainly regard as laughable any suggestion that their assistance should be limited to non-lethal humanitarian aid.

Despite these differences in kinds and levels of support, the FMLN insurgency has decreased in number from approximately 9,000 to 6,000 and, according to Nicaragua's own testimony before the World Court, the "contra" groups have grown from approximately 7,000 at the end of 1983 to nearly 11,000 by late 1985. It should be noted that during much of the period when this significant growth of the democratic resistance took place, the United States by law provided no assistance. The principal difference seems to be that the FMLN has little political support in El Salvador, as that country has made a successful transition to a reformist democracy, while opposition has been dramatically mounting in Nicaragua as the comandantes move toward totalitarianism.

Misinformation Campaign

For the democracies, one of the most dangerous — and puzzling — elements of the current assaults by radical regimes is that their covert nature makes them difficult to accept. To make acceptance more difficult, they are frequently masked by a cloud of misinformation and propaganda. Substantial evidence suggests that attention is concentrated on this political front in such assaults. The secret attack against El Salvador and

neighboring Central American states is no exception. As Philip Taubman wrote in *The New York Times* in 1982: "In recent months, with increasing sophistication, the leaders of the guerrilla movement in El Salvador have mounted a public relations campaign directed at world opinion in general, and at American public opinion in particular." Today the FMLN operates more than 60 offices in 35 countries to support its attack against the government of El Salvador. Nicaragua has worked to create a network of "solidarity committees" within the democracies, particularly the United States, the Western European countries, Canada, and Australia.

As part of their propaganda effort, the comandantes have encouraged a sophisticated and extensive political campaign in the United States featuring trips for Americans to Nicaragua, public appearances by Nicaraguan spokesmen before American audiences, films, and even direct phone lobbying by Daniel Ortega of individual American congressmen before key congressional votes. The comandantes have hired a Washington law firm to lobby for them in the United States and to represent them before the World Court.

Cuba has also played an active role in the propaganda war. Earl Young, an intelligence expert on the Central American conflict, writes: "Recent defectors from various Cuban government departments have stated that this propaganda effort [on behalf of the guerrillas in El Salvador] is conducted by Soviet-trained Cuban specialists with Eastern European support." The propaganda has focused on denying that insurgents in neighboring states were being assisted, making exaggerated human rights charges against the government of El Salvador and the "contras," supporting the FMLN as a "democratic alternative," attacking the "contras" as "Somocistas," denouncing the U.S. response as ideological anti-Communism rather than collective

defense, and characterizing the U.S. withdrawal from the Nicaragua case [in the World Court] as "proof" of the illegality of U.S. actions.

Legal Issues

The Cuban-Nicaraguan secret war against the neighboring states constitutes an armed attack justifying the use of force in collective defense under Article 51 of the U.N. Charter and Article 3 of the Rio Treaty.

Article 51 provides: "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. . . ." Article 3 of the Rio Treaty incorporates this right into the inter-American system, declares that an attack against any American state — such as El Salvador — is an attack against all American states, including the United States, and goes beyond the Charter in creating a legal obligation on the United States and all other American state parties to assist in meeting the armed attack.

This obligation is parallel to that owed by the United States to NATO under Article 5 of the NATO Treaty in the event of an attack on a NATO

Continued

member, or under Article 5 of the Mutual Defense Treaty with Japan in the event of an attack on Japan.

The right of an individual and collective defense embodied in Article 51 of the Charter applies to secret or "indirect" armed attack as well as to open invasion.

The United Nations Definition of Aggression unambiguously recognizes that aggression may include indirect aggression. Thus, Article 3(g) characterizes as acts of aggression "(t)he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above (invasion, military occupation, use of weapons, etc.), or its substantial involvement therein."

As for fundamental community goals underlying the Charter, the requirement of "armed attack" under Article 51, like the requirement of "necessity" under customary law, is largely designed to restrict the right to the defensive use of intense coercion to situations that threaten fundamental values. By such verbal tests, contemporary international law establishes that minor encroachments on sovereignty, political disputes, frontier incidents, the use of non-coercive means of interference and, generally, aggression that does not threaten fundamental values such as territorial and political integrity may not be defended

against by a major resort to force against another state.

But where a major military assault is made against such fundamental values as self-determination and political integrity, it is irrelevant whether that assault is indirect and denied or direct and acknowledged.

The secret Cuban-Nicaraguan attack against four neighboring states is not a minor border incident or political disagreement. Nor does it consist of overenthusiastic, but minor, assistance to an insurgent faction or even isolated acts of terrorism or subversion. It is an intense and sustained secret war employing sophisticated modern weapons and inflicting thousands of casualties in an all-out assault on governmental institutions and political integrity. It has resulted in over a billion dollars in damage to El Salvador alone and in the creation of refugees and social dislocation on a massive scale. It is being contained — but not yet ended — only by a major military buildup that is stifling the development hopes of states in the region.

Its success would mean loss of self-determination for the attacked states and possibly even incorporation into a greater Nicara-

gua. It is being pursued by an alliance that used the same formulas to take control of Nicaragua and that has openly and repeatedly pledged forcibly to install like-minded governments in neighboring states. To treat such a setting as a non-"armed attack" or one lacking any "necessity" for response would be to ignore what may well be the most serious generic threat to the contemporary Charter system — the deliberate secret or "indirect" war against territorial and political integrity.

Under the Charter, a defensive response must be not only necessary but also proportional.

The values to be conserved in El Salvador and neighboring Central American states are among the most basic guaranteed to all states by the U.N. Charter: the rights to territorial integrity, political independence, and self-determination. The Charter

is not a suicide pact. It does not condemn an attacked state to perpetual attack but, instead, permits reasonable responsive coercion against the attacking state as necessary in defense.

In this case, U.S. assistance to the "contras" has been instrumental in reducing the level of that attack. It has certainly not been an unnecessary overreaction, since the secret attack against El Salvador and neighboring states is continuing.

Nothing could more quickly doom the Charter to irrelevance than to limit defensive options against serious armed attack solely to those of the least military and political effectiveness. Response solely within the attacked state leaves the military advantage to the attacker. An equivalent response in kind against the attacking state, however, shifts the military multiplier effect against the aggressor, permits direct action against weapons transshipment points, and creates a persuasive incentive not to engage in an endless secret war.

Proportionality, correctly perceived, is not so much an exercise in matching levels of force between attacker and defender as, rather, a relation between lawful objectives in using force and the effective pursuit of those objectives in the way least destructive of other values.

Nevertheless, a comparison of levels of force provides one contextual feature in assessing the proportionality of the response. In its attack against El Salvador and neighboring states, Nicaragua supplies command and control, training, funding, weapons, and logistical assistance. It seeks the overthrow of the democratically elected government in El Salvador, supports terrorism and efforts to destabilize

three other neighboring states, and does not suffer from any apparent constraints on its activities, other than a thoroughgoing effort at concealment.

The United States, in contrast, has not responded with bombing or invasion. It is difficult to see how the considerably more restrained U.S. response against Nicaragua can be

disproportionate to Nicaragua's determined and continuing attacks against four Central American states.

There is no prohibition under the Charter — apart from the general requirement of proportionality — against covert action as part of a defensive response to an armed attack. A response in defense may lawfully be overt, covert, or — as in virtually every conflict in which the United States has fought in this century — both.

The United States also has not violated any national law concerning the use of force, such as the War Powers Resolution, the neutrality acts, and the Boland amendment. Despite the invocation of these national laws in the usual polemics surrounding any war/peace issue, there is no serious scholarly opinion to the contrary.

Peace palace goes to war

On April 9, 1984, Nicaragua instituted proceedings before the international Court of Justice alleging that the United States was unlawfully using force against Nicaragua and intervening in its internal affairs.

The complaint, which precipitated a highly visible dispute in the United States about providing assistance to the "contras" for the small-scale mining of Nicaraguan harbors, was a propaganda coup. On May 10, 1984, the court decided in a provisional order that the United States "should immediately cease and refrain from any action restricting, blocking, or endangering access to or from Nicaraguan ports" and that "the right to sovereignty and to political independence . . . of Nicaragua . . . should be fully respected and should not in any way be jeopardized by the principles of international law."

On Nov. 26 the court decided that it had jurisdiction on the merits in a decision that, in its most important dimension, was decided by 11 votes to 5. After a careful review, the United States subsequently announced that "with great reluctance, [it] had decided not to participate in further proceedings in this case."

Once the court decided to go forward to the merits, I believe the United States would have been better advised to pursue the proceedings. U.S. withdrawal could only hand the Sandinistas a propaganda windfall by further confusing world opinion about the Cuban-Nicaraguan secret war against neighboring states.

As a special counsel for the United States in the *Nicaragua* case, I am convinced that Nicaragua's principal objective in going to the court was to reap a propaganda victory and to move away from genuine multifaceted regional negotiations.

Misperceptions

Quite a few factual and legal misinterpretations about the Central American conflict occur with sufficient frequency to deserve separate comment. These can be characterized as: the "invisible attack" syndrome, the anemic right of defense, the comandantes (and FMLN) as "aggrieved plaintiffs," the alleged "American Brezhnev Doctrine," and misrepresentation of human rights issues in the conflict.

One of the most dangerous aspects of clandestine attacks by radical regimes using terrorism and insurgency is that such attacks may be broadly treated internationally as non-existent. Through the use of sophisticated covert means, a major politico-military threat can be created without receiving much more public attention than the everyday global background noise of terrorist incidents and guerrilla activity.

The sponsors of such attacks support them through incessant propaganda and effective political action coordinated with a sympathetic network of radical regimes and "solidarity committees." The sponsors thus succeed in focusing attention on alleged (and, in some cases, quite real) political or human rights shortcomings of the attacked entity and on the permissibility of any defensive response.

The impact on world order is devastating, as the great principle of the Kellogg-Briand Pact and the U.N. and OAS Charters is turned upside down. Armed aggression becomes politically invisible; armed response to that aggression is transmogrified into the condemned armed attack. It is as though the immune system of international law had gone haywire and begun methodically to attack defensive response while ignoring the virus of aggression.

The secret war in Central America presents a chilling example. A Sandinista radical leadership that systematically participates in full-scale covert armed attacks

against one of its neighbors and in terrorism and subversion against at least three others — and does so despite major efforts at good relations and massive economic assistance from the democracies — lies about its covert activities — and goes to the World Court to seek to halt the defensive response. The international community, only vaguely aware of the extent of the attack, reacts with indignation at the highly publicized defensive response. Like the im-

mune system gone haywire, the reaction is vigorous, but the target has been converted from the attack into the response.

Few who have seriously reviewed the evidence — from the attacked governments in Central America to the congressional intelligence oversight committees and the bipartisan Kissinger Commission — doubt that the root of the world-order problem in Central America is a serious ongoing secret war directed from Cuba and Nicaragua against neighboring states, particularly El Salvador. The "contra" response is just that: an effort by the democracies to defend against that attack and to create a meaningful incentive for the perpetrators to stop.

A recurrent misperception that frequently accompanies the "invisible attack" syndrome results from defining the right of defense so narrowly as effectively to destroy it. In this connection, three arguments are most frequently advanced in the Central American context: first, that no defensive response may be undertaken against the attacking state until the Organization of American States has authorized such an action; second, that any defensive response must be confined to the territory of the attacked state; and third, that assistance to insurgents in the attacking state cannot be a proportional response.

The Rio Treaty (the basic defense treaty of the inter-American system) like the NATO Treaty and every other significant defense agreement, was structured to permit immediate response to an attack, as allowed under Article 51 of the U.N. Charter "until the Security Council has taken measures necessary to maintain international peace and security." The main purpose of the Rio Treaty, like all mutual defense treaties, is to go beyond the U.N. Charter in creating an obligation to assist in meeting an attack.

It is not only incorrect, it is politically naive in the extreme to suppose that the members of the OAS — or of any other defensive alliance system — would have given up their traditional right of individual or collective defense against armed aggression when the very purpose of such an alliance is to strengthen their defensive capability.

A second argument is that any defensive response to "indirect," as opposed to "direct," aggression must be confined to the territory of the attacked state. This argument was advanced by some critics of American actions in Vietnam.

As a policy matter, the only purpose of such a rule would be to seek to reduce conflict by reducing the potential for territorial expansion. The rule might be more likely, however, to encourage conflict and "indirect" aggression by convincing states that such aggression is free from substantial risk: if it works, they will win; if it fails, there is no significant risk and they can try again. As this possibility suggests, the right of defense under customary international law and the Charter is a right of effective defense — that is, a right to take such actions as are reasonably necessary to end the attack promptly and protect the threatened values.

Why should El Salvador and other Central American states be required to accept an endless secret war against them? Does anyone doubt that the United States would respond directly against Cuba and Nicaragua if under the same circumstances they were supporting within its territory an armed insurgency fielding forces one-sixth the size of a rapidly increased U.S. Army? Does anyone doubt that the Soviet Union, France, India, Brazil, or Nigeria would so respond in similar circumstances?

A third argument sometimes advanced is that assistance to insurgents in the attacking state cannot be a proportional response or, specifically, that any U.S. assistance to the "contras" would not be proportional in the Central American conflict. Again, however, there is no such general rule of international law. As to proportionality (which is a requirement), it is difficult to understand how a response in kind that is considerably more restrained than the attack and that has not yet stopped the attack is somehow disproportionate. As we have seen, Cuba and Nicaragua are not bound by any such constraints as limit the U.S. response. Most importantly, the "contras" response meets the test of proportionality, for it has blunted the attack but not yet ended it.

By pursuing their attack on neighboring states secretly, the comandantes have been able to posture before much of the world — except, notably, Central America — as aggrieved plaintiffs. Like the childhood bully, they seek to persuade the world that "it all started when he hit me back." There are at least six reasons why such a posture is not credible.

First, and most importantly, it is the comandantes who initiated the

attack. Assistance to the "contras" is a defensive response that did not begin for well over a year after the most intense phase of the attack against El Salvador and after the Sandinistas were unambiguously offered economic assistance if they would halt their attacks.

Second, even if all the arguments restraining the right of defense were accepted and assistance to the "contras" were illegal, the comandantes' assistance to insurgent groups in neighboring states would remain illegal under numerous fundamental legal principles.

Third, the comandantes who are complaining about assistance to insurgent groups against them were themselves insurgents who came to power through massive outside assistance, including external financing, training, weapons supply, and coordination of military tactics, and the direct participation of foreign nationals as combatants and military advisers.

The point is not to argue for a general international legal right of assistance to insurgencies against regimes that have come to power with major foreign assistance. It is rather that a regime whose legitimacy is based solely on a seizure of power with foreign assistance, in seeking as plaintiff to make a case against such assistance, is relying on a principle that it has violated itself.

Fourth, this tenuous case of the regime as plaintiff is made even more tenuous by its failure to adhere to the internationally established conditions for its recognition. The comandantes, contrary to their pledge to the OAS and contrary to the OAS-established conditions for their recognition, have failed to hold free elections (after six years) and are moving toward totalitarian controls at home and alignment with aggressive regimes abroad.

Fifth, the comandantes' posture as plaintiff is called into question by the disrespect for international law shown in the discrepancy with known facts in their sworn affidavits and testimony to the World Court.

Finally, it is surely relevant in considering the posture of the comandantes as plaintiff — at least in moral terms — that their regime has denied broadly accepted international

human rights and refused any genuine test of self-determination through free elections, while the democratic resistance has explicitly sought as its objectives human rights guarantees and free elections under international supervision.

Alleged 'American Brezhnev Doctrine'

A centerpiece of the Sandinistas' allegations to the World Court is that the purpose of the United States is not to respond to armed aggression against Nicaragua's neighbors, but rather to overthrow a government in Managua with which it disagrees.

Typically, the "proof" offered for this argument is found in press conferences in which the U.S. president stressed the need for the comandantes to keep their pledge to the OAS and restore democratic rule and — on one occasion — stated that the United States would persist until the Sandinistas said "uncle." Statements of individual "contras" are also cited to support the proposition that the "contras" objective is to overthrow the government in Managua rather than to interdict weapons supplies to the FMLN insurgents in El Salvador. This argument implies that the United States is pursuing a hemispheric "American Brezhnev Doctrine" or, more broadly, a global policy of "war of national liberation." There are at least five reasons why the argument is erroneous.

First, as has been seen, the United States vigorously sought good relations with the comandantes, even though it was evident that they were Marxist-Leninists.

Second, neither presidential press conferences nor other statements by U.S. officials support the argument of the Sandinistas unless generous innuendo is supplied.

Third, U.S. policy in Central America and elsewhere is governed by applicable national legal restraints. The Boland amendment, which qualifies any United States assistance and is accepted as binding by the president, provides:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the government of Nicaragua or provok-

ing a military exchange between Nicaragua and Honduras.

This legal condition remained strictly in force following the congressional decision to renew non-lethal humanitarian assistance to the "contras." It is hardly consistent with the thesis of an American doctrine of "wars of national liberation," or "Brezhnev Doctrine."

Fourth, the policy of the "contras," or democratic resistance, has not been to seek the forcible overthrow of the Sandinista government. Despite some personal statements to the contrary, the resistance groups and their leaders have made it clear that they seek a negotiated end to hostilities and that they seek to participate in internationally observed free elections in accordance with the OAS conditions.

Finally, even if the objective of the United States were to overthrow the government of Nicaragua — which it is not — in a setting of an ongoing armed attack against neighboring states by a government that refuses to cease those attacks and is engaged in a massive military buildup to support them, such an objective would be a lawful defensive objective; that is, it would be both necessary and proportionate to overthrow an attacking government that refuses to halt its aggression.

Strengthening world order

The secret war in Central America illustrates the danger to world order — and to the legal order itself — posed by the assaults of radical regimes. In Nicaragua three small and unrepresentative Marxist-Leninist factions came to power through focused Cuban economic and military assistance during a genuine and broad-based revolution against Mr. Somoza.

Subsequently, the nine leaders of these factions joined with Cuba in a secret war against neighboring states. That war is conducted through assistance in organizing Marxist-Leninist-controlled insurgencies; the financing of such insurgencies; the provision and transshipment to them of arms and ammunition; training the insurgents; assistance in command and control, intelligence, military and logistics activities; and extensive political support. It also includes terrorist attacks and subversive activities preliminary to and supportive of an all-out covert attack.

Arrayed in support of this secret war is a diverse conglomeration of radical regimes and insurgent movements from the Soviet Union and Soviet-bloc nations such as East Germany, Bulgaria, Czechoslovakia, Cuba, Vietnam, Ethiopia, and North Korea to Libya, Iraq, Iran, and the Palestine Liberation Organization.

The nine comandantes have also made Nicaragua available as a more generalized sanctuary for radical terrorist attacks. Non-Central American groups currently operat-

Continued

ing from Nicaragua include: Colombia's M-19 (the terrorist group that recently took hostage the Colombian Supreme Court, which resulted in the deaths of 11 members of the court), the Argentine Montoneros, the Uruguayan Tupamaros, the Basque ETA, the Palestine Liberation Organization, Italy's Red Brigades, West Germany's Baader-Meinhof gang, and the Irish Republican Army.

The strategy of covert and combined political-military attack that undergirds this secret war is a particularly grave threat to world order. By denying the attack, the aggressors create doubts as to its existence; and by shielding the attack with a cloud of propaganda and misinformation, they focus world attention on alleged (and sometimes real) shortcomings of the victimized state and the permissibility of defensive response. The result is a politically "invisible attack" that avoids the normal political and legal condemnation of aggressive attack and instead diverts that moral energy to condemning the defensive response.

In a real sense, the international immune system against aggressive attack becomes misdirected instead to defensive response.

Aggressive attack — particularly in its more frequent contemporary manifestation of secret guerrilla war, terrorism, and low-intensity conflict — is a grave threat to world order, wherever undertaken. That threat is intensified, however, when it is a form of cross-bloc attack in an area of traditional concern to an opposing alliance system. That is exactly the kind of threat presented by an activist Soviet-bloc intervention in the OAS area.

The remedy for strengthening world order is clear: return to the great vision of the founders of the U.N. and OAS Charters. Aggressive attack, whether covert or overt, is illegal and must be vigorously condemned by the world community, which must also join in assisting in defense against such attack.

At a minimum, it must be understood that an attacked state and those acting on its behalf are entitled to a right of effective defense to end the attack promptly and protect self-determination.

World order — and the Charter system — is not an equilibrium mechanism like global climate. It can be preserved only if governments and international institutions, and the men and women behind them, have the vision to understand its importance and the courage and tenacity to fight for its survival.

John Norton Moore is a professor of law at the University of Virginia law school and formerly served as a counselor on international law for the State Department. He was a member of the presidential delegation that observed the elections in El Salvador, and served as special counsel for the U.S. in the Nicaragua case at the World Court.

This article is excerpted from a draft of Mr. Moore's forthcoming monograph, *The Secret War in Central America and the Future of World Order*, to be published in the near future. A lengthier condensation of the monograph appears in the current issue of *The American Journal of International Law*.