

THE UNITED STATES, THE OAS, AND THE DILEMMA OF THE UNDESIRABLE REGIME

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I. INTRODUCTION

The experience of the United States and Latin America in coping with internal conflict certainly provides fertile ground for the student of dilemmas in international law. One that is of central importance derives from the fact that strict adherence to the principle of non-intervention and the international legal norms prohibiting the use of force may permit the consolidation and maintenance in power of regimes that one finds hard to accept, either because of their brutal repression and gross violations of fundamental human rights, or because they adopt a Marxist orientation which links them with the Soviet Union and other communist states. It is useful to maintain the distinction between these two types of "undesirable regimes" in order to highlight the different reasons we may find them undesirable, although it is certainly true that in a given case a Marxist regime may also engage in repression and the violation of fundamental human rights such as the rights to life, physical integrity of the person, and freedom from arbitrary detention.¹ Moreover, it is evident that different people find regimes repugnant for different reasons, as a close examination of attitudes toward Argentina from 1976 to 1980, and toward Nicaragua after July 1979, reveals.²

There is, therefore, an inherent tension between the international legal norms prohibiting intervention and the use of force, on the one hand, and the desire to have regimes which do not violate fundamental human rights or which are not Marxist, on the other. How is this dilemma to be resolved?

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¹ On the OAS human rights system, see generally T. BUERGENTHAL, R. NORRIS & D. SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS* (1982). On human rights in general, see R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

² See, e.g., Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34, reprinted in *HUMAN RIGHTS AND U.S. FOREIGN POLICY* 5-29 (H. Wiarda ed.) (1982).

As international lawyers, I would submit, we should look first to existing international law for guidance. There we find no legal prohibition against a regime adopting a Marxist orientation,³ and that all governments are bound under customary international law to respect the fundamental human rights mentioned above.⁴ While certain writers might disagree,⁵ most states have taken the view that the prohibition against the use of force does not give way to a unilateral right of armed intervention to bring human rights abuses to an end.⁶ Under international law, therefore, primacy is given to the prohibition against the use of force. Nonetheless, it is equally true that states may, and should, do everything within their power to strengthen the international legal machinery designed to guarantee the observance of human rights. In addition, states are legally free to take a variety of unilateral measures aimed at securing the observance of human rights by a given regime. These measures, however, do not include the use of force.⁷

A second dilemma results from the fact that while the international use of force and the protection of human rights are domains of action which are strictly separated by the international legal norms prohibiting armed intervention, internal strife and the abuse of human rights are at the same time inextricably entwined, in a causal sense, with international conflict involving the use of force. In short, despite the legal separation of these phenomena, there is often a close relationship between them in fact. We have seen this in Sarajevo (which was very far from Berlin and London), in the Spanish Civil War, in Nazi Germany, in Bangladesh, in

³ This proposition is a corollary of the fundamental principle of the sovereign equality of all states. See U.N. CHARTER art. 2, para. 1; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations]; Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, amended by Protocol of Buenos Aires, Feb. 27, 1967, art. 15, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter cited as OAS Charter]. References in the text to provisions of the OAS Charter are to the numbers of such articles currently in force under the revised OAS Charter. The reader should note that former articles 15 and 17 are now articles 18 and 20; that former articles 18 and 19 are now articles 21 and 22; that former articles 39 and 40 are now articles 59 and 60; and that the principles of former article 5 are now contained in article 3.

⁴ See, e.g., Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 115-37 (L. Henkin ed. 1981).

⁵ See *infra* notes 16-17 and accompanying text.

⁶ See *infra* note 18.

⁷ See, e.g., A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT* 583-84 (1976).

Uganda, and elsewhere. Most recently, we have seen the internal politics of Argentina and the shadow of responsibility for its human rights abuses operating in such a manner as to help spark the invasion of the Falklands.⁸ The dangers which result from this interrelationship are twofold. The first is that internal conflict may become internationalized, drawing in the major powers or other outside forces and leading to a major international conflict. The second is that internal strife may tempt leaders to engage in foreign aggression, either to maintain their grip on power or as a kind of natural sequel to the utter disdain for universal values and international law, particularly the international law of human rights, they may have acquired through their own use of internal repression. The second dilemma, therefore, is between the need to act to prevent domestic strife from developing in ways which lead to international conflict, and the fact that foreign military intervention aimed at halting or determining the outcome of civil strife is likely to lead directly to international conflict—the very evil that is to be avoided. How, then, is this second dilemma to be resolved?

The answer to this second dilemma, I believe, is also suggested by international law, and consists in placing a very high priority on national policies aimed at securing greater implementation of the international law of human rights. Given the relationship between internal and international conflict, perhaps the only solutions to the dilemmas described above are to be found in our active use of international law and institutions so that they minimize foreign intervention in civil strife, while at the same time strengthening the demand for accountability that might reduce violations of fundamental human rights. The emphasis on human rights and the need to strengthen international machinery for their protection is extremely important, not only in terms of the intrinsic value of securing their effective observance, but also in terms of preventing situations of internal strife from developing to the point where outside powers are tempted to intervene. While this article does not focus on the human rights aspects of the solution to these dilemmas, addressing instead the legal framework governing foreign intervention and related action by the Organization of American States (OAS), the fundamental importance of the former should be borne in mind.

⁸ See, e.g., N.Y. Times, Mar. 15, 1982, at 7, col. 5 (first kidnapping and assassination of the year); N.Y. Times, Apr. 4, 1982, § 4, at 2, col. 2; THE SUNDAY TIMES OF LONDON INSIGHT TEAM, WAR IN THE FALKLANDS 64-65 (1982) (March 30 riots the worst in 6 years).

II. THE LEGAL FRAMEWORK

Against the background of these introductory remarks, let us now examine the normative framework relevant to coping with internal conflicts in the Western hemisphere. The international legal framework relating to foreign intervention and OAS practice in this area consists of fundamental norms contained in the United Nations Charter,⁹ the OAS Charter,¹⁰ and the Inter-American Treaty of Reciprocal Assistance,¹¹ popularly known as the "Rio Treaty."

A. *The United Nations Charter*

The cornerstone of the United Nations and the postwar legal order is the prohibition of the use of force contained in article 2, paragraph 4, of its Charter. That provision, in language which is worth recalling, establishes the following: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The Charter provides for three exceptions to this comprehensive prohibition against the use of force across international frontiers. The first is "the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations," established in article 51. The second is action taken by the Security Council under articles 39-42 (chapter VII) of the Charter in order to maintain or restore international peace and security. Article 41 provides for the adoption of economic sanctions not involving the use of armed force, while article 42 provides for the adoption of military sanctions if necessary to enforce the decisions of the Security Council. No measures may be adopted, however, if one of the Permanent Members of the Council vetoes such action.

The third exception to the prohibition contained in article 2(4) is the adoption of measures by a regional agency such as the OAS.¹² Article 53(1) provides, however, that: "[N]o enforcement

⁹ U.N. CHARTER.

¹⁰ *Supra* note 3.

¹¹ Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838 [hereinafter cited as Rio Treaty].

¹² Particularly significant is the question of whether states which are Members of both the U.N. and the OAS must resort to the latter before taking their complaints to the U.N. Security Council. Those who argue that such recourse is required build their case on U.N.

action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council” Several questions have arisen in the past when cases involving regional enforcement action by the OAS have been considered by the Security Council. Does “authorization” mean prior authorization? Does enforcement action include economic sanctions such as those described in article 41, which an individual state would be free to take acting alone? Is the requirement of Security Council “approval” satisfied if the Security Council simply fails to disapprove the regional enforcement action in question (resulting, for example, from United States exercise of its veto power)? The United States and many Latin American states have traditionally answered these questions in a manner which gives the greatest latitude to the OAS.¹³ Given the text of article 53(1), however, great controversy surrounds each of these questions, and it is not at all clear that the American view would be upheld, for example, should the question be referred to the International Court of Justice for an advisory opinion.¹⁴ Both the Security Council and the General Assembly are authorized to request such an opinion.¹⁵

Some authorities have argued in support of two additional exceptions to the prohibition against the use of force contained in article 2(4). The first is the asserted right of intervention to protect nationals in danger of imminent harm and to evacuate them from the country in question. Such intervention has been supported as an extension of the right of self-defense.¹⁶ The second exception is

CHARTER art. 52, para. 2, which provides: “The Members of the United Nations entering into such [regional] arrangements shall make every effort to achieve pacific settlement of disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.” *But cf. id.* art. 52, para. 4 (does not impair articles 34 and 35); *id.* art. 24, para. 1 (Security Council has primary responsibility for maintenance of international peace and security); *id.* art. 39 (Security Council authority under chapter VII).

¹³ See, e.g., M. ETZIONI, *MAJORITY OF ONE: TOWARDS A THEORY OF REGIONAL COMPATIBILITY* (1970).

¹⁴ See, e.g., *id.* at 190; Jiménez de Aréchaga, *La coordination des systèmes de l'ONU et de l'Organisation des États Américains pour le règlement pacifique des différends et de la sécurité collective*, 111 *RECUEIL DES COURS* 423, 465-82 (1964-I) [hereinafter cited as Jiménez de Aréchaga, *La coordination des systèmes*]; Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 *RECUEIL DES COURS* 1, 139-42 (1978-I) [hereinafter cited as Jiménez de Aréchaga, *International Law*]; Akehurst, *Enforcement Action By Regional Agencies, With Special Reference to the Organization of American States*, 1967 *BRIT. Y. B. INT'L L.* 175, 185-97, 214-19 (1969).

¹⁵ U.N. CHARTER art. 96, para. 1. Cuba proposed that the Security Council make such a request in 1962. See, e.g., M. ETZIONI, *supra* note 13, at 183-90.

¹⁶ See, e.g., D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 91, 187-93 (1958); Note,

an asserted right of humanitarian intervention in order to bring to a halt fundamental violations of human rights and to protect individuals of any nationality, including nationals of the target state, from imminent harm. Humanitarian intervention is justified as not falling within the general prohibition of article 2(4).¹⁷ Despite the appeal of these additional exceptions in extraordinary cases, they are not accepted by a very large majority of states due to their inherent potential for abuse by powerful states and the risks of full-scale war their exercise might entail.¹⁸ The United States intervention in the Dominican Republic in 1965, for example, was at first justified as an exercise of the right to intervene to protect nationals.¹⁹

Finally, it should be noted that article 103 of the United Nations Charter expressly provides that the latter's provisions regarding the obligations of members shall prevail over any conflicting provisions contained in other international agreements.²⁰

B. *The OAS Charter and the Rio Treaty*

The second body of norms relevant to foreign intervention and OAS practice in this area is contained in the Charter of the OAS (as amended) and in the 1947 Inter-American Treaty of Reciprocal Assistance, or "Rio Treaty."

Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality Under International Law, 21 VA. J. INT'L L. 485, 512-13 (1981).

¹⁷ See, e.g., Riesman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167-95 (R. Lillich ed. 1973); Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29 (1980); Lillich, *A United States Policy of Humanitarian Intervention and Intercession*, in HUMAN RIGHTS & AMERICAN FOREIGN POLICY 278, 287-92, 296-98 (D. Kommers & G. Loescher eds. 1979); R. Lillich & F. Newman, *supra* note 1, at 496-523.

¹⁸ The absence of any reference to these two claimed exceptions in the General Assembly's 1970 Declaration on Friendly Relations, *supra* note 3, and its 1974 resolution, Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter cited as Definition of Aggression], is extremely revealing in this connection. *But see* RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §703 comment e (Tent. Draft No. 3, 1982). The possible acceptability of an emergency rescue operation to preserve Security Council jurisdiction is beyond the scope of the present discussion.

¹⁹ See Memorandum of the United States Department of State Legal Advisor (Legal basis for United States actions in the Dominican Republic (May 7, 1965)), reprinted in 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 1179-82 (1969).

²⁰ The precedence of U.N. Charter obligations over those obligations in the corresponding regional treaties is expressly recognized in OAS Charter, *supra* note 3, art. 102, and Rio Treaty, *supra* note 11, art. 10.

The prohibitions against the use of force contained in the OAS Charter are phrased in language that is even more categorical than that of article 2(4) of the United Nations Charter, reflecting the long and painful history of the Latin American states, particularly those in Central America and the Caribbean, which, through much of the 19th century and the first third of the 20th century, were subjected to repeated military intervention by the European powers and, particularly, the United States.²¹ Article 18 of the OAS Charter establishes, for example:

No state or group of states has the right to intervene, *directly or indirectly, for any reason whatever*, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and social elements (emphasis added).

This prohibition against intervention, first adopted in 1933,²² is of extreme importance to the Latin American states, particularly Mexico, which suffered the humiliation of the American intervention at Veracruz in 1914.²³

Article 20 of the OAS Charter prohibits the use of force in the most categorical of terms: "The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, *directly or indirectly, on any grounds whatever . . .*" (emphasis added). Given the recurrent reports of United States support for covert military action against and within Nicaragua,²⁴ it should perhaps be stressed that articles 18 and 20 clearly prohibit any such covert operations.²⁵

²¹ See, e.g., F. GIL, *LATIN AMERICAN-U.S. RELATIONS* 30-35, 64-116 (1971).

²² See Convention on the Rights and Duties of States, *done* Dec. 26, 1933, arts. 8, 11, 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19. See also Additional Protocol Relative to Non-Intervention, *done* Dec. 23, 1936, art. 1, 51 Stat. 41, T.S. No. 923, 188 L.N.T.S. 31.

²³ See F. GIL, *supra* note 21, at 110.

²⁴ See, e.g., N.Y. Times, Nov. 5, 1981, at 1, col. 2; N.Y. Times, Mar. 11, 1982, at 1, col. 4; N.Y. Times, Mar. 14, 1982, at 1, col. 5; Washington Post, Mar. 10, 1982, at 1, col. 6; Washington Post, Mar. 14, 1982, at 1 col. 5.

²⁵ Such actions also violate U.N. CHARTER art. 2, para. 4; Rio Treaty, *supra* note 11, art. 1. The latter provides: "The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this treaty." *Id.* The scope of article 2(4) of the U.N. Charter has been clarified by the unanimous adoption of two General Assembly resolutions. See Declaration on Friendly Relations, *supra* note 3; Definition of Aggression, *supra* note 18, art. 3(f)-(g). Both contain language which explicitly

The only exception to these comprehensive prohibitions is contained in article 22, which establishes: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20." Such measures include action taken pursuant to any of the three exceptions to article 2(4) discussed above, as well as diplomatic and economic sanctions to the extent, if any, these are not considered "regional enforcement action" under article 53(1). One final provision of the OAS Charter deserves mention, as it has been used in the past to circumvent the clear prohibitions of articles 18 and 20 without having to resort to the machinery of the Rio Treaty in accordance with article 22. That provision is article 59, which simply states that a meeting of foreign ministers may be held "in order to consider problems of an urgent nature and of common interest to the American States" This provision was used in 1965 to justify the creation of an Inter-American Force following United States intervention in the Dominican Republic.²⁶ Legally, that action was in violation of articles 18, 20, and 22 of the OAS Charter, and was acquiesced to by the Latin American states at least in part to gain some leverage over the United States, which already had its troops in the Dominican Republic.

The Rio Treaty provides in article 3 for collective self-defense in the event of an armed attack against an American state, in which case the parties undertake "to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations." It should perhaps be noted in passing that the 1975 Protocol of Amendment to the Rio Treaty,²⁷ not yet in force,²⁸ limits the

condemns the support of paramilitary operations against the territory of another state.

²⁶ See *infra* note 67 and accompanying text.

²⁷ Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance, July 26, 1975 [hereinafter cited as Protocol of Amendment to Rio Treaty], reprinted in 3 GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE: APPLICATIONS, app. A (1977); 1 F. GARCIA-AMADOR, THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS, PART II 359-72 (1983).

²⁸ In accordance with the Protocol of Amendment to the Rio Treaty, *supra* note 27, art. VIII, the protocol will enter into force when two-thirds of the signatories have ratified the agreement. Excluding Cuba, all 21 parties to the Rio Treaty have signed the protocol. To date only seven have ratified: Brazil, Costa Rica, Dominican Republic, Guatemala, Haiti, Mexico, and the United States. The United States ratification was deposited on September 20, 1979. GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATIES AND CONVENTIONS 86 (Treaty Series No. 9 Rev. 1980).

application of article 3 to cases where a State Party, not merely an American state, has been the victim of an armed attack.

It is interesting to note that, in the context of the Falklands crisis, Argentina has argued that the language of article 3 requires its Rio Treaty partners to render assistance in meeting the "armed attack" represented by Great Britain's attempt to retake the islands.²⁹ Given the obvious nexus between article 3 of the Rio Treaty and article 51 of the United Nations Charter, it is clear that Argentina's argument is untenable and would stand the Rio Treaty on its head, converting it into a collective aggression treaty.³⁰ It is beyond doubt that the armed attack referred to in article 3 of the Rio Treaty is an armed attack in violation of article 2(4) of the United Nations Charter, and that the collective measures of self-defense described in article 3 may be taken only in response to such an attack. Instead of constituting an "armed attack" under article 3, Great Britain's use of force is authorized under article 51 as a lawful response to Argentina's prior violation of article 2(4).³¹

Of particular significance in evaluating OAS practice regarding foreign intervention is article 6 of the Rio Treaty, whose intricate language merits particularly careful scrutiny. Article 6 provides:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent (emphasis added).

In the past, this provision has been used by the signatories to au-

²⁹ See, e.g., N.Y. Times, Apr. 27, 1982, at 4, col. 1 (OAS Meeting of Consultation).

³⁰ See Rio Treaty, *supra* note 11, art. 3. Article 3(1) refers specifically to assistance "in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the United Nations." Article 3(4) refers exclusively to "[m]easures of self-defense provided for under this Article." Cf. Definition of Aggression, *supra* note 18, arts. 2-3.

³¹ The consequences of accepting Argentina's interpretation of the Rio Treaty would extend far beyond the South Atlantic. See, e.g., North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243; Treaty of Friendship, Cooperation and Mutual Assistance, May 14, 1955, art. 4, 219 U.N.T.S. 3 (Warsaw Pact Treaty).

thorize the adoption of collective economic sanctions such as an arms embargo against the Dominican Republic in 1960,³² and the arms embargo imposed against Cuba in January 1962.³³ During the Cuban Missile Crisis, it was used to authorize the United States naval blockade which was imposed to prevent the further importation of war material into the island, and even to authorize the use of force to prevent the missiles in Cuba from becoming operational.³⁴ In short, article 6 has been used to support the imposition of OAS economic and even military sanctions against a signatory in situations where no armed attack has occurred and consequently no right to individual or collective self-defense exists under article 51 of the United Nations Charter.³⁵

Partially in response to such broad applications in the past, the 1975 Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance made a particularly significant change affecting the text of article 6. A new article was added, providing as follows: "Any assistance the Organ of Consultation may decide to furnish a State Party may not be provided without the consent of that State."³⁶ Upon a close analysis, this provision must be read to apply not only to decisions of the Organ of Consultation that are mandatory, but also to those that are recommendatory in nature.³⁷ In other words, collective sanctions may no longer be imposed under the authority of article 6 unless the OAS secures the consent of the state concerned, at least in cases where the latter is the perceived victim of outside subversion. If the 1975 Protocol of Amendment had been in effect in January 1962, for example, the arms embargo against Cuba could not have been imposed under article 6 without the latter's consent. While the new provision does not remove all ambiguity from article 6, it does seem to prevent the imposition of sanctions against a non-consenting state simply be-

³² See *infra* note 84 and accompanying text.

³³ See 2 GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE: APPLICATIONS 72-78 (3d. ed. 1973).

³⁴ See 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1069-73.

³⁵ The use of military force has been authorized under article 6 only once, in the Cuban Missile Crisis. See *supra* note 34 and accompanying text. Military force was used by the OAS in the Dominican Republic after the constitution of the Inter-American Force on May 23, 1965; however, this action was based not on article 6, but rather on a very liberal reading of article 59 of the OAS Charter. See *infra* note 67 and accompanying text.

³⁶ Protocol of Amendment to Rio Treaty, *supra* note 27, art. II. The revised version of current article 6 will become article 5 once the protocol enters into force, while the provision cited in the text will become new article 6. *Id.* arts. I-II.

³⁷ See Jiménez de Aréchaga, *International Law*, *supra* note 14, at 141-42.

cause the latter has adopted a Marxist orientation.

While the 1975 Protocol of Amendment has not yet received the fourteen ratifications required for its entry into force, it has been ratified by the United States and six other signatories.³⁸ The United States ratification is of particular significance since it may be bound under the principles embodied in article 18 of the Vienna Convention on the Law of Treaties "to refrain from acts which would defeat the object and purpose of a treaty" which has been ratified but not yet entered into force. Participation in the imposition of collective sanctions under article 6 of the original Rio Treaty under the conditions referred to above would appear to defeat the object and purpose of the 1975 Protocol, and thus may constitute a violation of article 18 of the Vienna Convention. While the United States has signed but not yet ratified the latter,³⁹ article 18 may still be binding if, as is very likely, it now represents customary international law.

In any event, the adoption of military and perhaps economic measures under the authority of article 6 does not dispense with the necessity of securing the approval of any such regional enforcement action by the Security Council. Such approval is required by article 53(1) of the United Nations Charter and raises all of the controversial questions referred to above.⁴⁰

It might be argued that the adoption of OAS economic or military sanctions against a signatory state does not violate article 53(1) or article 2(4) of the United Nations Charter, even when affirmative "approval" of such regional enforcement action by the Security Council is not forthcoming, on the theory that the state against which such collective measures are directed has granted its "consent" to norms and procedures which otherwise would be in violation of the prohibition of force contained in article 2(4).⁴¹ Such an argument lacks merit, however, due to the fact that under the accepted international law doctrine of *jus cogens* (peremptory law), there exist certain peremptory norms of international law from which there can be no derogation by agreement between

³⁸ See *supra* note 28.

³⁹ Vienna Convention on the Law of Treaties, art. 18, U.N. Doc. A/CONF. 39/27 (1969), reprinted in 63 AM. J. INT'L L. 875 (1969). The Convention entered into force on January 27, 1980, for those countries which had ratified it. L. HENKIN, R. PUGH, O. SCHACHTER, & H. SMIT, INTERNATIONAL LAW 580-81 (1980). See *id.* at 604.

⁴⁰ See *supra* notes 12-14 and accompanying text.

⁴¹ See, e.g., Wright, *The Cuban Quarantine*, 57 AM. SOC'Y INT'L L. PROC. 9 (1963).

states.⁴² Article 2(4) represents such a peremptory norm of international law, and consequently such consent cannot be invoked as excepting the actions in question from the basic prohibition of force contained in article 2(4). The United States has espoused this view most recently in arguing that even if the Afghanistan-U.S.S.R. Treaty of Friendship of 1978 authorized Soviet intervention (which it did not), such authorization would be void under international law.⁴³ With respect to the adoption of OAS economic sanctions, which may not violate article 2(4), the real question is whether they are included in the term "enforcement action" as that term is used in article 53(1). If they are included, it is clear that a state cannot waive its rights under article 53(1) by consenting to a regional agreement, for such an interpretation would render article 53(1) nugatory. Obviously, this analysis also applies in the case of military sanctions. In any event, whatever "consent" the target state might give, it could not release other states from their article 53(1) obligations. Nor could it overcome the express language of article 103 of the Charter.

III. THE UNITED STATES AND THE UNDESIRABLE REGIME: FOUR CASES

Despite the legal framework outlined above, including, in particular, the clarity of the legal prohibitions against the use of force across international frontiers, the United States has committed grave violations of these fundamental legal norms on at least four occasions since 1948. These cases are briefly summarized below.

A. Guatemala (1954)

In 1954 the United States government, acting through the CIA, sponsored a paramilitary invasion of Guatemala aimed at overthrowing the leftist government of Jacobo Arbenz.⁴⁴ Armed bands

⁴² See, e.g., A. VERDROSS & B. SIMMA, *supra* note 7, at 84-86, 262-67. The Vienna Convention on the Law of Treaties, *supra* note 39, has codified this principle in article 53. See also *id.* arts. 64, 66; Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 535-38 (1970); NGUYEN QUOC DINH, P. DALLIER & A. PELLET, *DROIT INTERNATIONAL PUBLIC* 190-97 (2d rev. ed. 1980).

⁴³ Memorandum to Acting Secretary of State Warren Christopher from the Legal Adviser, Roberts B. Owen (Dec. 29, 1979), reprinted in Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 418-20 (1980).

⁴⁴ See generally R. IMMERMANN, *THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION* (1982); S. SCHLESINGER & S. KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* (1982). Interestingly, the United States considered possible economic sanctions against Guatemala as early as 1949-1950. An apparent attempt to trans-

invaded the country on June 18, 1954.⁴⁶ Guatemala took its case to the Security Council on June 20. While the latter approved a resolution calling for "the immediate termination of any action likely to cause bloodshed" and for all United Nations members to abstain from assisting any such action, the United States effort to topple the Arbenz government pressed ahead. When Guatemala renewed its appeal to the Security Council on June 25, the United States successfully blocked inscription of the complaint on the agenda.⁴⁶ On June 27, the Arbenz government fell in a military coup by the Guatemalan army.⁴⁷

B. Cuba: *The Bay of Pigs* (1961)

On April 17, 1961, approximately 1400 Cuban exiles, organized and directed by the CIA, launched an amphibious invasion of Cuba at the Bay of Pigs. Unlike the case in Guatemala, however, the Cuban army remained loyal. Within two days the invaders were surrounded by 20,000 troops and were forced to surrender. The operation was a total fiasco.⁴⁸ On April 21, the United Nations General Assembly adopted a resolution calling on all parties to seek a peaceful settlement in accordance with the Charter and "to abstain from any action which may aggravate existing tensions."⁴⁹ During the period following the collapse of the invasion, the United States seriously considered moving directly against Cuba. The pressures within the government for such military action were initially very strong, but cooler heads prevailed.⁵⁰ Nonetheless, one consequence of the initial invasion was closer military and economic cooperation between Cuba and the Soviet Union. This attempt to repeat the 1954 success in toppling a leftist government may also have been an important factor in the Soviet decision to install missiles in Cuba in 1962,⁵¹ which led the world to the brink of nuclear war in

port arms to assist Guatemala's neighbors in an attempt to overthrow Arbenz was blocked in 1952. R. IMMERMANN, *supra*, at 109-10, 118-22.

⁴⁶ R. IMMERMANN, *supra* note 44, at 171-72. See generally C. BLASIER, *THE HOVERING GIANT* 151-77 (1976); W. KANE, *CIVIL STRIFE IN LATIN AMERICA: A LEGAL HISTORY OF U.S. INVOLVEMENT* 186-97 (1972); L. SOHN, *UNITED NATIONS LAW* 863-908 (1967) (Security Council debates).

⁴⁶ L. SOHN, *supra* note 45, at 877, 884, 907.

⁴⁷ R. IMMERMANN, *supra* note 44, at 174.

⁴⁸ See generally I. JANIS, *VICTIMS OF GROUPTHINK* 14-49 (1972); C. BLASIER, *supra* note 45, at 177-202; P. WYDEN, *BAY OF PIGS: THE UNTOLD STORY* (1979).

⁴⁹ M. ETZIONI, *supra* note 13, at 155-58; L. SOHN, *supra* note 45, at 938.

⁵⁰ See C. BOWLES, *PROMISES TO KEEP* 326-31 (1971).

⁵¹ See G. ALLISON, *ESSENCE OF DECISION* 238-40 (1971).

October of that year.⁵²

C. *The Dominican Republic (1965)*

On April 28, 1965, President Lyndon B. Johnson ordered United States marines to deploy in the Dominican Republic in order to prevent the consolidation of a revolutionary movement begun four days earlier, and which had as its stated objective the restoration to power of the democratically-elected government of Juan Bosch, who had been deposed by a military coup in September, 1963.⁵³ At the time of the United States intervention, military forces opposed to the revolutionary or "constitutionalist" faction were in disarray, and a complete constitutionalist victory appeared imminent.⁵⁴ United States officials, however, viewed the constitutionalist faction as infiltrated by, or subject to, the potential influence of communist or "Castroite" elements. Consequently, President Johnson ordered United States forces to intervene in order to avoid the possibility of a communist takeover.⁵⁵ In an operation foreshadowing the Kabul airlift of Soviet troops into Afghanistan in 1979, some 23,000 troops were landed in the Dominican Republic, mostly by air, within the next two weeks.⁵⁶

While the OAS was persuaded, over the vociferous opposition of most of its democratic members, to adopt a resolution on May 6 establishing an Inter-American Force (IAF) to be made up of contingents from member countries, the force was not constituted until May 23, and United States forces on the island remained under United States command until the Brazilian commander of the IAF arrived on May 29.⁵⁷ In the interim, United States forces moved on May 3—with the assent of a special OAS Committee on the scene—to open a military corridor which linked the United States forces near the embassies with those being flown into the San

⁵² See generally A. CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

⁵³ See generally A. LOWENTHAL, *THE DOMINICAN INTERVENTION* (1972); J. SLATER, *INTERVENTION AND REVOLUTION: THE UNITED STATES AND THE DOMINICAN INTERVENTION* (1970).

⁵⁴ A. LOWENTHAL, *supra* note 53, at 96-104; J. SLATER, *supra* note 53, at 29, 31, 42n., 44; Slater, *The Dominican Republic, 1961-66*, in *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 307 (B. Blechman & S. Kaplan eds. 1978).

⁵⁵ Slater, *supra* note 54, at 310-11; A. LOWENTHAL, *supra* note 53, at 116, 137-39; J. SLATER, *supra* note 54, at 31.

⁵⁶ A. LOWENTHAL, *supra* note 53, at 110-12; Slater, *supra* note 54, at 315.

⁵⁷ See 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1172-77; 4 *Organización de los Estados Americanos (OAS), Décima Reunión de Consulta de Ministros de Relaciones Exteriores, Actas y Documentos, OAS Doc. OEA/SER. F/III. 10 at 21-23 (1968)* [hereinafter cited as *Décima Reunión de Consulta*].

Isidro Air Base outside of town. Perhaps not coincidentally, this air base was the headquarters of a military junta formed at the United States' suggestion and opposed to the "constitutionalist" forces. The latter were cut in two by the May 3 operation, which cut off the strongest of the two components with their backs to the sea.⁵⁸ Beginning on May 13 and 14, United States troops allowed the junta's forces to cross its lines and attack the constitutionalists.⁵⁹ A week of bitter fighting ensued, and a ceasefire was not established until May 22.

An important aspect of the Dominican crisis was that the United Nations Security Council became actively involved, for the first time, in dealing with a conflict which the OAS itself was simultaneously seeking to resolve. The Council passed a ceasefire resolution on May 14, sent a representative of the Secretary General to the Dominican Republic, and contributed directly to the establishment of a permanent ceasefire.⁶⁰ This ceasefire was finally achieved on May 22 in response to both a Security Council resolution of that date and similar calls by the OAS in the preceding days. The United Nations action exerted considerable pressure on the OAS, which finally moved on May 22 to actually set up a unified command for the Inter-American Force.⁶¹

On June 2, the IAF was renamed the Inter-American Peace Force (IAPF) and placed under the supervision of a special three-member committee of the OAS which was in fact dominated by the United States member, Ellsworth Bunker.⁶² This committee, backed by the IAPF, secured the establishment of a provisional government on September 3 and free elections on June 1, 1966. Joaquín Balaguer was the winner, and the last contingent of the IAPF withdrew in September 1966.⁶³

D. *Legal Aspects of the Preceding Cases*

Both the Guatemalan and Cuban paramilitary invasions constituted violations by the United States of article 2(4) of the United

⁵⁸ A. LOWENTHAL, *supra* note 53, at 127-31, 139; J. SLATER, *supra* note 53, at 44, 82-83. See 4 Décima Reunión de Consulta, *supra* note 57, at 204; J. SLATER, *supra* note 53, at 61-66.

⁵⁹ See Slater, *supra* note 54, at 320, 322-23, 339; J. SLATER, *supra* note 53, at 55-57, 204.

⁶⁰ See generally L. SOHN, *supra* note 45, at 1025-72.

⁶¹ See *id.* at 1054-55; 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1208-14; 2 Décima Reunión de Consulta, *supra* note 57, at 169-329.

⁶² *Id.* at 333-47. See Slater, *supra* note 54, at 331-32.

⁶³ See Slater, *supra* note 54, at 325-31.

Nations Charter, articles 18 and 20 of the OAS Charter, and article 1 of the Rio Treaty. These are the fundamental provisions prohibiting the use of force across international frontiers upon which both the United Nations and OAS are founded. The 1965 intervention in the Dominican Republic was justified at first as intervention to protect nationals and other foreigners.⁶⁴ This, however, was not the true reason for the intervention of 23,000 United States troops, and the justification was in fact all but abandoned within a few days after the initial deployment of troops.⁶⁵ Even if the intervention had been limited to the protection of nationals and other foreigners, moreover, it would still have constituted a violation of the provisions referred to above.⁶⁶

Two other legal aspects of the Dominican intervention are worth noting. First, the IAF was established by a Meeting of Foreign Ministers under article 59 of the OAS Charter, using an "implied powers" rationale.⁶⁷ Such action, however, directly violated the specific prohibitions contained in articles 18, 20, and 22 of the OAS Charter, undercutting the argument that such action was authorized by "implied powers" contained in that instrument. Second, the use of military force by the OAS without the consent of the legally-constituted government of the Dominican Republic⁶⁸ (or even both factions in the conflict)⁶⁹ clearly constituted enforcement action within the meaning of article 53(1) of the United Nations Charter. Though the question of whether enforcement action includes economic sanctions remains unanswered, the use of military force clearly does constitute such action. This point was forcefully made in the Security Council debates and, while not resolved by votes on various resolutions, certainly influenced the readiness of a number of governments to support direct United Nations in-

⁶⁴ See 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1161 (Statement of President Johnson, April 28, 1965).

⁶⁵ See *id.* at 1168-70; see also *supra* note 19.

⁶⁶ See *supra* notes 16-18 and accompanying text.

⁶⁷ See Resolution of May 6, 1965, reprinted in 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1175-77.

⁶⁸ See, e.g., L. SOHN, *supra* note 45, at 1068 (Statement of Uruguayan representative in Security Council debates).

⁶⁹ Constitutional President Francisco Caamaño Deñó, in a letter of May 10 to the Meeting of Consultation, offered to accept an OAS force as soon as his government was recognized by the members of the OAS. The offer, however, was never accepted. 2 Décima Reunión de Consulta, *supra* note 57, at 180-83; 4 *id.* at 466-68. Indeed, in July, 1965, both factions were calling for the withdrawal of the IAPF. See J. SLATER, *supra* note 53, at 117-18; and Nanda, *The United States' Action in the 1965 Dominican Crisis: Impact on World Order* (Pt. 2), 44 DEN. L.J. 225, 266 (1967).

volvement in resolution of the dispute.

Finally, it should be noted that the OAS established the IAF by a bare two-thirds majority vote, including the vote of the junta's representative which was of highly questionable validity. It did not receive the support of most of the democratic members of the organization.⁷⁰

E. *Nicaragua (1981 to the present)*

Given reliable press reports that the United States has organized, financed, and coordinated paramilitary forces operating in Honduras and engaging in armed incursions into Nicaragua,⁷¹ it appears that a situation is developing which is in many ways comparable to the United States-sponsored overthrow of the Arbenz regime in Guatemala in 1954 and the rather less successful 1961 Bay of Pigs invasion of Cuba. At the same time, the United States has charged that Nicaragua supports the guerrillas operating in El Salvador. These developments signal a new and extremely grave crisis for the Organization of American States.

If Nicaragua has or is presently engaged in supplying significant quantities of arms to the Salvadoran guerrillas, its action violates article 18 of the OAS Charter. The appropriate response would be the convocation of a Meeting of Consultation under the Rio Treaty, first, to determine whether Nicaragua is indeed intervening in the internal affairs of El Salvador by supporting the guerrilla movement with arms and, second, to take appropriate action under article 6 of the Treaty. A Meeting of Consultation could assess the accuracy of the United States charges, encourage Nicaragua to cease any violation of article 18, and perhaps, should Nicaragua fail to comply with the Charter, impose economic sanctions under the authority of article 6 until such violations cease. Recourse to the appropriate procedures under the Rio Treaty is the proper way for the United States and El Salvador to deal with any Nicaraguan violation of article 18, and is also legally required by articles 2 and 6 of the Rio Treaty.⁷² The United States failure to pursue this course of action suggests an inability to muster sufficient support

⁷⁰ See 2 A. CHAYES, T. EHRLICH & A. LOWENFELD, *supra* note 19, at 1175-77.

⁷¹ See *supra* note 24. For more recent accounts, see *A Secret War in Nicaragua*, NEWSWEEK, Nov. 8, 1982, at 42-53; Washington Post, Apr. 17, 1983, at 1, col. 4 (comprehensive overview of U.S. decision-making and involvement).

⁷² See OAS Charter, *supra* note 3, arts. 23-28; Rio Treaty, *supra* note 11, arts. 1-2, 6. See also U.N. CHARTER arts. 2(3), 33, 37.

from parties to the Rio Treaty, possible weakness in the factual basis of United States claims regarding Nicaraguan arms shipments to El Salvador, and perhaps a reluctance to raise issues concerning "enforcement action" in the Security Council, where voting majorities are no longer as sympathetic as in the past.

Even if Nicaragua is guilty of shipping arms to El Salvador, neither the United States nor Honduras may legally organize and support the sending of armed paramilitary forces into Nicaragua. The only possible justification for such action would be if the Nicaraguan assistance to the Salvadoran guerrillas were so serious as to constitute an "armed attack".⁷³ Even then, however, El Salvador would have to request collective assistance under article 3 of the Rio Treaty, and all measures of collective self-defense would have to be reported immediately to the Security Council under the terms of article 5 of the Rio Treaty and article 51 of the United Nations Charter.⁷⁴ More importantly, the actions taken would have to meet the strict requirements of necessity and proportionality which are an integral part of the right of self-defense.⁷⁵ As far as is known, however, these steps have not been taken, while the evidence remains unpersuasive that Nicaraguan support of the Salvadoran guerrillas rises to the level of an "armed attack."⁷⁶ Consequently, whatever actions may be in progress against and within the territory of Nicaragua cannot be justified as an exercise of the right of collective self-defense.

What appears far more likely than the existence of an "armed attack" by Nicaragua against El Salvador is that the United States, Honduras, and perhaps other countries actively support paramilitary forces who have launched or are launching armed attacks against Nicaragua in an effort to destabilize or overthrow the Sandinista regime.⁷⁷ As it is the use of force, not the objective, which is prohibited by international law, such paramilitary action constitutes, in any event, a violation of the fundamental legal norms referred to above.

⁷³ See U.N. CHARTER art. 51.

⁷⁴ See Rio Treaty, *supra* note 11, arts. 3(2), 5; U.N. CHARTER art. 51.

⁷⁵ See, e.g., I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 261-64, 278-79, 434 (1964).

⁷⁶ See *id.* at 278-79. Cf. Declaration on Friendly Relations, *supra* note 3, paras. 8-9 (Principle Prohibiting Threat or Use of Force); Definition of Aggression, *supra* note 18, art. 3(g). Regarding the evidence of Nicaraguan involvement, see, e.g., N.Y. Times, Mar. 5, 1982, at 1, col. 1; *id.* Mar. 6, 1982, at 1, col. 2.

⁷⁷ See *supra* note 24 and accompanying text.

While United States presidents have in the past attempted to draw a distinction between the direct use of United States military force to overthrow a government and the use of foreign paramilitary forces to achieve the same objective,⁷⁸ such a distinction finds little support in international law.⁷⁹ Domestically, everyone knows that if an individual hires someone to kill an enemy, it is not merely the one who pulls the trigger who is legally responsible for murder. Somehow, on the international level, the analogous point does not seem always to be grasped by United States policymakers.

There exists, moreover, the risk or possibility that United States forces might become directly engaged in military action against Nicaragua. An attempt to justify such action could, for example, be based on a claim that Nicaragua had launched an armed attack against Honduras and that the United States was responding to a request from Honduras to act in exercise of the right of collective self-defense under article 51 of the United Nations Charter. Such a claim, of course, would be met with immense skepticism in view of apparent United States and Honduran support of armed attacks against Nicaraguan territory launched from Honduras. Such action would involve the Security Council at the earliest moment, and allegations concerning the facts of any Nicaraguan attack would be subjected to the most intense scrutiny. Furthermore, the United States would be legally required to invoke the machinery of the Rio Treaty and also report its actions directly to the Security Council. Finally, it should be recalled that the right of self-defense is strictly limited by the requirements of necessity to repel the attack and proportionality in the measures undertaken to achieve this objective. Consequently, even minor border crossings or artillery exchanges, for example, could not be used by Honduras and the United States to undertake major military actions against Nicaragua without violating these twin requirements. Given the attacks against Nicaragua which have occurred, any objective observer would be far more likely to conclude that the Nicaraguan actions themselves were taken in exercise of the right of self-defense.

In any event, as was clear in both the Guatamalan and the Bay of Pigs cases, such support of armed paramilitary attacks against Nicaragua constitutes a flagrant violation of article 2(4) of the

⁷⁸ See *supra* notes 44-52 and accompanying text.

⁷⁹ See U.N. CHARTER art. 2(4); OAS Charter, *supra* note 3, arts. 18, 20; see also *supra* notes 25 and 76.

United Nations Charter and articles 18 and 20 of the OAS Charter.⁸⁰ Significantly, this means that Cuban or Soviet forces might be legally justified in coming to the defense of Nicaragua in exercise of the right of collective self-defense under article 51 of the United Nations Charter. Such action, of course, could take the world to the brink of a nuclear confrontation. Were such a development to occur, moreover, the blatant illegality of United States actions would deprive the country of the type of support it received in the OAS, the United Nations, and from individual governments during the Cuban Missile crisis.⁸¹

IV. CONCLUSION

A. *The Dilemma of the Undesirable Regime*

Two basic dilemmas were noted at the beginning of this article. The first dilemma results from the fact that strict adherence to the legal principles prohibiting the use of force across international frontiers and other forms of intervention may lead to the accession to or maintenance in power of regimes which are undesirable (whether because they are Marxist, guilty of gross violations of fundamental human rights, or both). As manifested in a case involving the first type of regime, the dilemma is not really *in* but rather *of* international law. Dilemmas in international law (such as the proper interpretation of article 53(1) of the United Nations Charter, whether forcible intervention to protect nationals violates article 2(4), or the permissible breadth of interpretation which can be given to article 59 of the OAS Charter) have been mentioned above. Here, however, one is dealing with a dilemma of a different sort, a dilemma of international law itself. This is a dilemma of law observance, of whether to follow international law, or to violate its most basic prohibitions in order to overthrow or block the accession to power of a government which is, or is perceived to be, Marxist. As we have seen, the United States has chosen the latter course in Guatemala (1954), Cuba (1961), the Dominican Republic (1965), and now apparently in Nicaragua as well. The more indirect intervention of the United States in Chile, in attempting to block the accession to power of Salvador Allende in 1970, should also be noted.⁸²

⁸⁰ See *supra* note 79.

⁸¹ Regarding the support received in 1962, see A. CHAYES, *supra* note 52, at 74-85.

⁸² See, e.g., L. SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 246 (1981).

As manifested in a case involving the second type of regime, the dilemma is whether to violate fundamental legal norms in order to halt massive violations of the most basic human rights, or to observe international law with the potential result that such abuses will continue unabated.⁸³ In several cases which fall into this category, the decision has been to violate these norms. The United States openly threatened to use force, and with the OAS used stiff economic sanctions in pressuring the Dominican Republic to liberalize its government during 1960-62.⁸⁴ In the Nicaraguan civil war of 1978-79, a number of countries actively supported the Sandinista rebels in order to bring down the Somoza regime.⁸⁵

Whichever form it takes, therefore, the dilemma of the undesirable regime remains. Should states act in ways which strengthen and support the fundamental legal norms of the international system, or act in ways which, however successful in achieving immediate objectives, weaken the legal norms and institutions upon which international peace and security ultimately depend?

B. *The Dilemma of Inaction and Eventual War*

The second dilemma mentioned in the Introduction results from the fact that inaction may permit human rights abuses and internal strife to develop in ways which either invite military intervention by foreign powers or embolden domestic leaders, disdainful of international law, to launch aggressive wars.⁸⁶ Military intervention to avoid these evils, however, may lead other powers to intervene and to the risk of major war. Whatever the choice, international conflict may well result. Nevertheless, there are cogent reasons why military intervention, even in this type of situation, should be avoided. First, it is of great importance who commits the first illegal use of force, both in terms of the need for consistent national policies in support of article 2(4) of the United Nations Charter, and in terms of a state's ability to mobilize collective responses aimed at restoring international peace and security. Second, these are situations in which chapters VI and VII of the Char-

⁸³ See *supra* note 8 and accompanying text.

⁸⁴ See, e.g., Slater, *supra* note 54, at 290-300.

⁸⁵ In 1979, this assistance reached an extraordinary level. Booth reports, for example, that from May to July, 1979, Costa Rican civilian transport planes made 21 flights from Havana to Liberia, a city in northern Costa Rica, funneling a total of some 320 tons of arms to the FSLN in Nicaragua. J. BOOTH, *THE END AND THE BEGINNING: THE NICARAGUAN REVOLUTION* 152 (1982).

⁸⁶ See *supra* note 8 and accompanying text.

ter authorize the Security Council to act.⁸⁷ The unilateral use of force in such circumstances will inevitably reduce the Security Council's ability to deal effectively with problems of this type, a development which can hardly be accepted without abandoning Security Council effectiveness as a goal. Third, states retain a great ability to characterize and distort facts in any given situation, and to permit such action would open further the doors leading to aggressive military actions cloaked in the best of expressed intentions. Finally, even if the risk of eventual international conflict is great, war may always be avoided at the last minute, whether through effective recourse to the Security Council or through the application of strong bilateral pressures by a number of governments. The foregoing arguments are of a practical nature. Legally, it is clear that such unilateral military intervention violates article 2(4) of the Charter.⁸⁸

In both of the preceding dilemmas, therefore, the ultimate question is whether states should act so as to observe and support international law and its most basic norms. To put the matter differently, can an international legal order be constructed through policies and actions which violate its most basic precepts?

C. *Suggested Responses*

1. *Strengthening International Machinery for the Protection of Human Rights*

As suggested in the Introduction, there remains much that can be done to ease the two dilemmas discussed above. If, at a given point of choice,⁸⁹ the decision may be the stark one of law observance or law violation, there are nonetheless steps that can be taken in the meantime to provide additional legal alternatives which may reduce the temptation to resort to force. The most promising measures that might be taken appear to be those which would strengthen international legal machinery for the protection of human rights. The routine acceptance of on-site investigations

⁸⁷ See U.N. CHARTER arts. 33-51.

⁸⁸ See *supra* notes 9-19 and accompanying text.

⁸⁹ For a provocative analysis of how international law is relevant to such decisions, see R. FISHER, *POINTS OF CHOICE* (1978). See also R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* (1981). The reference in the text, however, should not be read to mean that questions of international law can be reduced to a single decision. Rather, international law can best be viewed as influencing numerous perceptions and actions within a continuous flow of events and decisions. See, e.g., A. CHAYES, *supra* note 52, at 100-05.

by bodies such as the Inter-American Commission on Human Rights, for example, would help to limit abuses by keeping governments accountable for their actions.⁹⁰ Similarly, the existence of compulsory jurisdiction before the Inter-American Court of Human Rights in individual cases, as well as the admissibility of state party complaints, would provide legal avenues for reducing internal conflict, thereby diminishing the temptation of outside powers to intervene with force. Had the United States taken the lead in ratifying the American Convention on Human Rights and accepting the optional clauses, legal mechanisms might now exist which would permit it to effectively pursue its claims of human rights violations by the government of Nicaragua.⁹¹

The effective use of human rights machinery, moreover, can have quite a significant impact on many governments. Publicization of widespread abuses may be highly embarrassing to a nation's leaders, and help to mobilize both internal and external forces which can induce governments to take human rights seriously. Among the most significant impacts produced by the actions of official bodies such as the IACHR, for example, is a shift in the level of decision-making from the local precinct station or army barracks to the foreign minister, the cabinet, and the president of the country involved. Moreover, domestic leaders are induced to realize that international law can produce strong negative effects, both internally and internationally, especially when nations seek loans, trade, technology and other benefits. That realization may nurture a healthier respect for provisions such as article 2(4) of the United Nations Charter.

2. *United States Intervention in Nicaragua: The Critical Choices*

As "covert" military action organized and supported by the United States apparently continues against and within the territory of Nicaragua, government officials, Congressmen and Senators, and individual citizens face a number of critical choices. A few of these may be briefly mentioned here. The first and perhaps the most important is the basic choice as to the role that the

⁹⁰ See Norris, *Observations In Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. at 46-95 (1980); T. BUERGENTHAL, R. NORRIS & D. SHELTON, *supra* note 1, at 149-65.

⁹¹ See American Convention on Human Rights, Nov. 22, 1969, arts. 45, 62, OAS Doc. OEA/Ser.K/XVI/1.1/Rev.1/Corr.1, Doc. 65 (1970), reprinted in 9 I.L.M. 101 (1970).

United States is to play in the world community: whether it will pursue actions designed to strengthen international law and organizations, or act as an international outlaw which openly flouts the fundamental norms prohibiting the threat or use of force across international frontiers upon which not only the postwar legal order but also the very concept of international order itself depends. Open violations of these norms by a superpower do considerably more damage to the international order than do similar violations by smaller and less important states. Violations by the United States may do the most harm of all, for something more is expected of this country than of the Soviet Union. The United States is a leader of other nations, and its example will surely be followed. The most important choice, therefore, is whether the United States will continue efforts to construct a viable international legal order in which the use of force is reduced to a minimum (a process in which the United States has played a leading role in the past, whether in pushing for the creation of the League of Nations, in sponsoring the 1928 Kellogg-Briand Pact outlawing war, or in building the United Nations on a Charter whose cornerstone is the prohibition of the threat or use of force). Or will the United States abandon this effort, and seek to ensure its own security primarily by reliance on military force?

Related to the first is a second choice: Will the United States proceed by its actions against Nicaragua to establish a dangerous precedent which would lower the costs to others of violating Article 2(4) of the United Nations Charter? Such a harmful precedent would weaken the ability of the United States to mobilize its allies and others to join in collective responses against the Soviet Union should it invade Poland or Iran, would dilute the effect of pressures for Soviet withdrawal from Afghanistan, and, generally, would reduce the broad range of political and other costs to the Soviet Union, particularly among the developing and smaller countries, for engaging in illegal military action. Such a precedent would also weaken the ability of the United States to influence its allies. It might, for example, have the effect of encouraging Venezuela to seize territory from Guiana which it claims, or of tempting Argentina to resume the Falklands conflict or settle the Beagle Channel Islands dispute with Chile by resort to force, including in the future, perhaps, the use of nuclear weapons. Finally, such a precedent would be hard to distinguish from Somali support of rebels in the Ogaden region of Ethiopia, Libyan support of rebels in northern Chad, or even potential Cuban support of paramilitary

exile forces attempting to invade and overthrow the government of Haiti.⁹² The issue, therefore, is whether the superpower most closely identified with the struggle for effective international law and institutions will act in ways which weaken restraints against actions such as those described above.⁹³ Or will the United States act in a manner which establishes the sort of precedent which would not harm United States interests if it were to be followed by other nations?

A third choice is also closely related to those above. Which way do we wish students and future leaders in the Third World to look, East or West? For every Nicaraguan soldier killed, United States-

⁹² Assistance provided by outside countries to Afghan rebels following the Soviet invasion of Afghanistan in 1979 can be distinguished from the cases cited in the text, as it is closely analogous to, if indeed it does not constitute, assistance provided in exercise of the right of collective self-defense under Article 51 of the U.N. Charter. To the extent such assistance is necessary and proportionate to the need to secure the withdrawal of Soviet troops from Afghanistan, it can best be viewed as consistent with Article 51 and thus not in violation of Article 2(4) of the Charter. The reporting requirement of Article 51 should be complied with, but even if it is not, such a failure, in a situation where a country has been invaded and had its government overthrown by foreign troops, would not seem to constitute a serious violation of the basic norms of the Charter.

⁹³ United States support of covert operations in Nicaragua also raises the issue of whether the United States government will observe the requirements of domestic law. In December, 1982 the so-called Boland Amendment became law as part of a continuing appropriations act for 1983. It 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 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 provoking a military exchange between Nicaragua and Honduras.

P.L. 97-377 §793; 96 Stat. 1865. Moreover, the Neutrality Act establishes the following:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.

18 U.S.C. §960 (1976). See Note, *Non-Enforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982).

Both of the foregoing provisions of the United States domestic law must be interpreted in a way which is consistent with international law, including treaties to which the United States is a party. This means that any ambiguity in the language of either provision must be interpreted so as to be consistent with art. 2(4) of the U.N. Charter and arts. 18 and 20 of the OAS Charter. In the words of Chief Justice Marshall, "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §134 (Tent. Draft No. 1, 1980). See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3(1) and comment j (1965).

supported military intervention or direct United States military action against Nicaragua may create hundreds of hard-line Marxist recruits in not only Central America but also Mexico, the Caribbean, South America, and countries in other parts of the world. This choice brings us back, perhaps, to the first, and may be put as follows: What is the essence of the American character, today, and what, in fact, does the United States stand for? Individual Americans will ask this question of themselves, but it will also be asked by influential citizens in developing and other countries. The cooperation of the latter will be required to meet common challenges in a broad range of international "games" or arenas in the future.

In shaping or responding to United States policies and actions toward Nicaragua, therefore, individuals in the United States and other countries will have to ask what their own country stands for, and what role it should play not only in dealing with an "undesirable" regime, but also in constructing a viable international order based on the legal prohibition of the threat or use of force.