THE ROLE OF INTERNATIONAL LAW IN US FOREIGN POLICY DECISION-MAKING

INTERVENTION IN GRENADA & NICARAGUA

by

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ABSTRACT

Relations among states are permeated by basic legal concepts which comprise the international legal system. The existence of this system helps maintain some level of international order. So long as states feel that it is in their interest to act according to the norms of international law, order is preserved. When a state believes, however, that it is to its advantage to disrupt the order, then the international legal system can do very little to prevent that state from acting contrary to the norm and, for instance, resorting to the use of force to achieve its goal.

The actions of the United States, as a major power, are very significant in this respect since many smaller countries look at the United States as a role model. Yet, in many cases, the United States has acted in a manner which seems to contradict the established norms of international law. To determine to what extent international law is a factor in US policy making, it is best to focus on the relations of the US with countries of one specific region in order to avoid sweeping generalizations.

The relationship of the US with Central American countries

has always been a matter of controversy because the United States sees itself as the protector of these states. On numerous occasions, the US has intervened (directly and indirectly) in Central America to secure its own perceived interests. Two of the most recent examples of US intervention occurred during the Reagan Administration. They are: the 1983 invasion of Grenada, and intervention in Nicaragua from 1981 to 1984.

After the decisions to intervene were made, United States' officials offered legal justifications for their actions. A close look at these explanations, however, reveals that the Reagan Administration was not truly concerned with the norms and principles of international law. The Administration believed that it had the military and political power to circumvent into international legal obligations without the fear of sanctions. The real rationale for the interventions lies in the fact that the US had the opportunity to try to overthrow an adversarial regime which was seen as a threat to hemispheric security and solidarity.

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I. INTRODUCTION

The ever increasing interdependence of states, along with the growing number of interactions of people across national boundaries, has raised countless concerns and questions regarding the legality and lawfulness of many acts and activities. Recently, for example, the question of lawfulness has been raised with respect to Iraq's invasion of Kuwait. On that, the world community -- almost unanimously -- decided that Saddam Hussein's acts were contrary to the norms of international law. But rarely does a state act in such blatant violation of international law, and the response of other states is usually not so uniform.

Law and lawfulness are extremely important in international relations because the relations of one state with another, as soon as they begin, are permeated by legal concepts. Recognition, sovereignty, and respecting others' territorial integrity are a few examples of the basic legal concepts which comprise the modern state system. By subscribing to these concepts, a state gives up a certain degree of its autonomy and independence. In return, it enjoys membership in the international society, and can have peaceful relations with

other states.

If states always acted in accordance with these legal concepts, then Iraq's resort to force should not have come about. The primary concern of states is almost always national interest. Usually, one element of national interest is maintaining international order; at other times, on the other hand, it may be in the states' perceived interest to disrupt international order to achieve a higher goal. Consequently, states accept or reject law based on this interest. One cynical view that emerges from this hypothesis is that international law is capable of sustaining international order so long as it is in the states' interest to maintain such order. International law sets up the rules of conduct, but it cannot prevent states from acting contrary to the norm and committing, for instance, acts of aggression when it is supposedly to their advantage to do so.

When a state such as Iraq acts in contradiction to the norms of international law, then the situation may be remedied more easily than when the United States or the Soviet Union does so. The Gulf War forced Iraq out of Kuwait relatively quickly; but the Soviets remained in Afghanistan for years until the culmination of a number of smaller pressures led them to the decision to leave. A powerful state's actions (such as the US') have a greater impact on international law than would a smaller state's actions. Conversely, precisely because of this power and importance, international law may have a smaller role to play in the decision of the US about what course of action it

should follow.

To determine whether the above hypothesis is true or not, the following discussion is based on the extent to which international law plays a role in American foreign policy decision-making involving the use of force. Two specific cases involving small Central American countries have been chosen. By doing so, conclusions can be reached regarding US relations with countries of one specific geographic region, and the role that international law plays in those relations.

The cases that have been selected are the direct US military invasion of Grenada in 1983, and the intervention in Nicaragua after the Sandinista National Liberation Front (FSLN) came into power in 1979. The cases will be looked at in detail in terms of the events that led to President Reagan's decision to intervene. Also, the particulars of the intervention will be discussed thoroughly. The internal decision-making process of the United States, however, will not be analyzed. After action was taken, the US government offered several justifications for its actions. These will be examined carefully in order to conclude to what extent international law plays a role in the decision-making process of the United States.

Before beginning the study of the cases, several preliminary issues have to be discussed. First, since the role of "international law" in US decision-making is being analyzed, it is crucial to explain what this term means. Second, it is necessary to realize that intervention is normally and usually

contrary to the norms of international law. For this reason, the norm of non-intervention will be looked at in some detail. Next, a review of the long history of US intervention in Latin America will provide a broader framework, in which the cases of Nicaragua and Grenada will fit in easily. Finally, these two cases will be looked at in considerable detail; then the legal justifications that were offered by the Reagan Administration regarding each intervention will be discussed. In both cases, the Reagan Administration claimed that it had acted according to the norms and principles of international law. A close look at the facts and the justifications offered will show the true extent to which norms of international law were a factor and concern in US decision-making.

II. WHAT IS INTERNATIONAL LAW?

Before discussing what role international law has played in US foreign-policy decision-making in the Reagan Administration, one has to define what international law is. Unfortunately, this is not a very easy task since almost every authority and scholar has his own definition and description of the term. For example, in the *Case of the S.S. Lotus* in 1927, the Permanent Court of International Justice explained that:

> International law governs relations between independent States. The rules of law binding upon States therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to achievement of common aims[1].

Almost half a century later, Hedley Bull defined international law as "a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law"[2].

The main differences between these two definitions should

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[1]The *Case of the S.S. Lotus*, [1927] P.C.I.J., ser. A. No. 10 at 18.

[2]Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (N.Y.: Columbia Univ. Press, 1977) at 127.

be pointed out. First, the Permanent Court of International Justice did not include the relations between non-state actors in its definition of international law and only considered the relations between independent states. States can no longer be considered as the only subjects of international law. In the 19th century, individuals had no legal rights or duties in international law. Today, however, individuals play a role in making and modifying the law, and they have acquired some degree of international legal personality[3]. Furthermore, the importance of other non-state actors should not be ignored. An international organization, for instance, can enjoy legal personality under the municipal laws of its member states and fulfil other legal functions. Although the powers of individuals and other non-state actors are still quite limited, it is necessary to realize their existence.

Bull, on the other hand, failed to take into account the free will and independence of states and gave "international law" the "status of law". One of the basic tenets of the international system is its horizontal structure of theoretical authority. In such a system, states are free to pursue their national interests. Governments act according to this interest in the sense that they will not recognize any norm which will

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[3]Michael Akehurst, *A Modern Introduction to International Law* (London: George Allen & Unwin Ltd., 1987 6th ed.) at 70.

not further their interests[4]. Most of the time, the maintenance of international order is an element of the state's national interest; only to that extent are norms of international law acknowledged and accepted.

Generally, therefore, no state is bound by any proposed norm or regulation without its consent, though consent once given is binding and ordinarily cannot be withdrawn at will or arbitrarily. This rule, embodied in the maxim of *pacta sunt servanda*, is a fundamental rule of public international law. There is one major exception to this rule which should be noted. The formation of customary law does not require the expressed consent of all states. The practice followed by a small number of states may be sufficient to create a customary rule if there is no contradictory practice. States that do not wish to conform with the rule must consistently reject it from the very beginning; otherwise, their silence would imply acceptance[5].

A situation may arise when a state believes it is in its interest to break an agreement, or to act contrary to an established norm of international law. For instance, the

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[4]There are, in reality, cases in which a strong state forces a weaker state into accepting an agreement which it would not have otherwise entered into. The general law in this area is that agreements entered into by force or coercion are not binding on the states involved. This, however, does not account for cases in which the weaker state does not make it obvious that it had been coerced, or cases in which there had been a "trade-off". It is beyond the scope of this discussion to examine these cases; it is crucial, nonetheless, to be aware of their existence. See ibid, at 134-35 for more detail.

[5]See ibid, at 25-34 for a detailed discussion of customary law.

government of one country may choose to invade another in order to guarantee its own perceived national security. The invader, however, may use legal arguments and exceptions to the norm of non-intervention to justify its actions, often times successfully. The international legal system functions in such a way that it sometimes does allow states to give their own interpretation or application to certain rules. Generally, the more powerful a state is in the international arena, the higher the chances are that its interpretation will be accepted by others.

There can be no doubt, however, that there are certain rules and regulations which states and other agents in the international arena regard as binding on one another. It is the existence of these rules and regulations that maintains some level of order in society. Whether or not these rules have the status of law, on the other hand, is a matter of controversy. Some legal scholars have argued that international law is not "law" because "law" is properly so called on the grounds that one of its essential features is that it is the product of sanctions, force, or coercion[6]. The difference between municipal law and international law is that law within the modern state is backed up by the authority of a government, including its power to use or threaten to use force; international law, on the other hand, lacks this property.

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[6]S. A. Williams and A. L. C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada* (Canada: Butterworths, 1987) at 6-7.

The argument that international law is, in fact, "law" branches out in two different directions. First, scholars such as Kelsen have argued that international law, even though it operates in the absence of a world government, does rest on sanctions, force and coercion[7]. In the international society, sanctions are applied by individual members of the society according to "the principle of self-help". The second branch of this argument asserts that law does not necessarily involve sanctions, force or coercion. Hart, for example, argues that the concept of law as "orders backed by threats" is inapplicable even to domestic law in a number of ways[8]. He explains that there are varieties of municipal law which confer legal powers to adjudicate or legislate. These cannot properly be categorized as law backed by threats.

The controversy on the status of international law has led to an ongoing academic debate which is very difficult to resolve. This debate is significant to the present discussion in so far as it helps to establish the status of international law in states' decision-making processes. If international law is truly "law", then the United States, for example, should always abide by the rules. Acting contrary to the norms should be heavily sanctioned. If, on the other hand, international law is anything less than "law" (such as a code of morals or

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[7]Hans Kelsen, *The General Theory of the Law and State* (U.S.A.: Harvard Univ. Press, 1946).

[8]H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

ethics), then every time that the US acts according to this code, it should be commended. It is expected that states will act in agreement with the law; a code of morals or ethics, on the other hand, is something that they subscribe to voluntarily.

The following is a study of the role of law in international relations. More specifically, the role of international law in the relations of the Reagan Administration with Nicaragua and Grenada will be examined. If, in making the decisions to intervene in Nicaragua and Grenada, the Reagan Administration concerned itself with norms and regulations, then international law was a part of US decision-making, at least in these two situations. Before beginning this discussion, however, "intervention" has to be defined in more precise terms. Furthermore, the norm of non-intervention and its exceptions have to be looked at in some detail.

III. TRADITIONAL NORM OF NON-INTERVENTION

Today, the existence of the norm of non-intervention cannot be disputed, even though the occasional practice of states may suggest otherwise. The norm of non-intervention arose from the conception of an international system comprised of equal and sovereign states. Each state's powers were defined territorially, and external interference was seen as an encroachment upon these powers. In this section, a brief review of the development of the norm of non-intervention, along with some exceptions and limitations to this norm, will be presented.

It should first be mentioned that there is a lack of consensus on the definition of intervention. For instance, many external policies of one state are directed at blocking the success of the external policies of another state. Every time a state engages in this type of conduct, however, it cannot be said that it is truly "intervening" in another's affairs. Meyer has produced a definition of intervention in the political process which provides a reasonably clear interpretation of the term: Intervention is the "manipulation of a state's power processes to achieve political ends in that state's authority

structure"[9]. According to von Glahn, intervention means "*dictatorial* interference by one state in the affairs of another state for the purposes of either maintaining or changing the existing order of things", rather than mere interference *per se*[10]. The main point that can be inferred from these definitions is that intervention is in opposition to the will of the state that is the object of such action and is directed at the internal nature or character of that state. There are many forms which intervention can take including, but not limited to, coercion, military action, and economic subversion.

Before the United Nations Charter came into effect, the two main instruments which limited the use of force by states were the Covenant of the League of Nations and the Kellogg-Briand Pact. The Covenant, drafted in February 1919 by the Commission of the League of Nations of the Peace Conference, considerably limited the large amount of freedom that states had had in resorting to force. There were, nevertheless, still many circumstances in which force could be used. For instance, war was recognized as a means of settling disputes. States simply undertook certain obligations <u>not</u> to resort to war[11].

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[9]Ray Meyer, "The Limits of International Law in the Political Process: The Role of the United States in El Salvador" (Winter 1983) 7 ASILS Int'l L. J. 89 at 90.

[10]Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law* (N.Y.: Macmillan Publishing Co., 1981) at 160. Emphasis included.

[11]Covenant of the League of Nations, Preamble (Part I of the Treaty of Peace Between the Allied and Associated Powers and Germany); Martens, 9 N.R.G., 3rd ser., at 323 [hereinafter

The Kellogg-Briand Pact of 1928 was an attempt to narrow the scope of acceptable use of force under the Covenant[12]. In Article II of the Pact, parties agreed

> that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means[13].

Although war was generally prohibited, it remained lawful in certain circumstances[14]. First, war outside the span of the reciprocal relations of the contracting parties remained lawful. Freedom of war was preserved among contracting and non-contracting parties. This, nonetheless, was not that significant because, before World War II, there were only four states which were not bound by the provisions of the Treaty[15]. Second, war remained lawful as an instrument of "international policy". War waged as a reaction against a violation of international law was not war as an instrument of national policy and was justifiable[16]. Third, the Pact did not incorporate a provision specifically addressing self-defence.

Covenant].

[12]The General Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand pact of Paris), *1929 Treaty Series*, no. 29. Signed on August 27, 1928.

[13]Ian Brownlie, *International Law and the Use of Force by States* (U.S.A.: Clarendon Press, 1963) at 75.

[14]Yoram Dinstein, *War, Aggression and Self-Defense* (Cambridge: Grotius Publications, Ltd., 1988) at 81-83.

[15]Brownlie (1963), supra note 13, at 75.

[16]Ibid, at 89.

The parameters of self-defence were not set out, and no competent body was established to determine whether a state had, in fact, acted in self-defence. In short, many avenues were open for a state to intervene in the affairs of another. The Covenant of the League of Nations and the Kellogg-Briand Pact were successful only as long as the major powers remained strong enough to deter smaller states from unilateral treaty denunciation and resort to armed force.

The outbreak of World War II completely destroyed the old system. It was clear by that time that a new regime of collective peace enforcements had to be instituted. The efforts of the Western Allied states were then concentrated in the drafting of the Charter of the United Nations, and the creation of the United Nations (UN) itself as a forum for the peaceful resolution of conflicts.

The prime object of the United Nations was to prevent the occurrence of another war as devastating as the one that had just ended. To this aim, the UN had to redress the shortcomings of the previous arrangements. Peace was no longer an exclusively political or military concern; social, economic, and humanitarian issues all had an important role to play in the UN Charter. The "Purposes and Principles" of the UN included the following:

> 1. To maintain international peace and security ...;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ...;
> 3. To achieve international co-operation in solving international problems of economic, social, cultural,

> or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.[17]

The United Nations was designed to serve as a forum where these purposes could be co-ordinated and accomplished; also, the structure of the Permanent International Court of Justice was updated so that states could have an improved means of resolving disputes peacefully.

The International Court of Justice (ICJ) was established in 1945 as an integral part of the United Nations Organization. The Court was meant to serve as the "principal judicial organ" of the UN[18]. The Statute of the Court, however, contained the so-called "optional clause" which has been the main source of the weakness of the Court. Article 36 of the Statute states that the Court exercises jurisdiction in cases over states on a purely consensual basis[19]. Since states are reluctant to unconditionally accept the Court's jurisdiction, the ICJ has played a relatively minor role in resolving international disputes.

The Charter of the United Nations also contained a general statement against the use of force. Article 2(4) states, in full:

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[17]Charter of the United Nations, Article 1 [hereinafter Charter].

[18]Ibid, Article 92.

[19]Statute of the International Court of Justice, Article 36.

> 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[20].

The term "force", as used in Article 2(4), covers and transcends the term "war"; thus, measures short of war are also prohibited. This, along with the inclusion of "threats" to use force, was a major step forward. At first glance, it seems as though Article 2(4) was the ideal rule against the use of force. But, there were a number of factors which undermine the effectiveness of this article.

First, Chapter VII of the Charter makes provision for collective action by the Security Council "to maintain or restore international peace and security" when a threat to the peace or an act of aggression occurs[21]. This was a very ambitious task for the Security Council to achieve since, from the outset, it was obvious that very rarely would the permanent members of the Council vote unanimously on a resolution. The Security Council, therefore, could not act effectively as the principal peacekeeping organ of the world.

Article 2(4), furthermore, failed to take into account the realities of modern warfare[22]. For instance, encouraging guerrilla movements within another state does not fit into the

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[20]Charter, Article 2(4).

[21]Charter, Article 39.

[22]Thomas M. Franck, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States" (1970) Am. J. Int'l L. 809 at 812-22.

conventional category of "armed attack". Yet, this type of use of force is more common today than is "war" in the traditional sense.

The last phrase in Article 2(4) (namely, "or in any other manner inconsistent with the Purposes of the United Nations") has to be read in the context of the entire document. The first and foremost purpose of the UN as set out in Article 1 (1) is to maintain international peace and security[23]. The Preamble, moreover, enunciates the determination of the UN "to save succeeding generations from the scourge of war"[24]. The obvious interpretation of the Charter seems to be that any threat or use of force by states against each other is prohibited. There are, however, several exceptions to the norm of non-intervention.

The first exception is set out in Chapter VII of the Charter and it gives the Security Council of the UN the authority to take or to authorize enforcement action. Article 39 of Chapter VII provides the Security Council with the power to define what a threat to peace is, and to decide what measures shall be taken in response. It may seem peculiar at first that the Security Council can define the term "threat to peace". This, however, is the only realistic approach that could have been taken; otherwise, each state would have its own definition and a consensus would never be reached. It should be mentioned that aside from the authority given to it in Chapter VII, the UN

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[23]Charter, Article 1(1).

[24]Charter, the Preamble.

is prohibited under Article 2(7) from intervening in the domestic affairs of member states[25].

Some scholars have also argued that when a state commits a gross breach of international law, then others have the right to intervene in order to maintain a minimum international order[26]. In other words, members of the international community may interfere with the internal affairs of a state which threatens the international order. Williams and de Mestral suggest that in some cases this argument can be extended to cover situations of humanitarian intervention. When a state subjects its own people to substandard treatment and denies them their fundamental rights, then other members of the community can, individually or collectively, intervene to remedy the situation[27].

There are three other general exceptions to the rule of non-intervention. These need to be covered in more detail because they play a major role in the case studies which follow.

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[25]It was just mentioned that these powers are not used very often or very effectively by the Security Council.

[26]Williams and de Mestral, supra note 6, at 50; von Glahn, supra note 10, at 162; J. H. Leurdijk, *Intervention in International Politics* (Netherlands: Eisma B. V., Publishers, 1986) at 60.

[27]Williams and de Mestral, supra note 6, at 50. Humanitarian intervention will be discussed in detail later.

A. INTERVENTION UPON INVITATION:

The first case is when the lawful government of a state has formally invited the intervenor. If there is no internal revolt with the aim of replacing the government, then it is justifiable to offer assistance to that state. In this case, the term "intervention" loses part of its meaning since it is justified by the consent of the state aided. The main requirement for the invitation to be valid in this case is that it must be extended by the legal representative of the state. The legal representative can easily be identified if the state is not suffering from civil conflict.

On the other hand, if there is a rebellion or a domestic war, it is usually difficult to identify the legal representative of the state. In cases of massive uprising or revolt, the government can no longer hold itself out to speak for the people. In this type of situation, the general principle that should be adopted is that neither the government nor the insurgents receive foreign aid[28]. A rigid policy of non-intervention should be adopted by other countries since interference in the internal affairs of a state will deny its sovereignty and independent existence. A state which accepts aid from countries under these circumstances becomes dependent on that aid for its security and ceases to be a free and

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[28]Oscar Schachter, "The Right of States to Use Armed Force". (April. May 1984) 82 Mich. L. Rev. 1620 at 1642.

sovereign entity[29]. In addition, to give outside support to either side would be contrary to the right of the people to freely choose whatever form of government they like.

In reality, however, intervention in the internal affairs of other countries is not infrequent in international relations. In a large number of circumstances, states give aid to either the government or the insurrectionists. This intervention serves as a pretext for the other side to request foreign assistance. For example, one state may offer equipment and training to the rebels of another state in their attempt to overthrow the ruling elite. In this case, the government of the latter state is being subjected to a form of intervention. Outside states, consequently, are permitted to give military aid to this government. Such counter-intervention may be justified by the fact that the state was subjected to an armed attack.

Furthermore, if the insurgents need outside assistance to overthrow the government, then it may be that they do not have popular support, since in most cases a massive uprising is sufficient to topple the government. In short, it is advisable that states do not intervene on either side in a civil war; otherwise, help given by a state to one side may provoke another state to support the opposition. The result may be more chaos and a larger conflict than was originally intended.

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[29]Brownlie (1963), supra note 13, at 323.

B. SELF-DEFENCE:

Self-defense is another exception to the norm of non-intervention. The legal basis for such a right can be found in Article 51 of the United Nations Charter which provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security[30].

The meaning of this article can best be understood when it is read in conjunction with Article 2(4) of the Charter.

There are several necessary conditions which have to be met before a state can invoke the right of self-defence. These conditions were best formulated by Daniel Webster in the *Caroline* case. Webster confined self-defence to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation"[31]. Webster's formulation was quoted in the Security Council in 1981 as authoritative customary law. After bombing a nuclear reactor in Iraq in 1981, Israel claimed that

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[30]Charter, Article 51.

[31](1837), 11 Moore 409. Quoted in Schachter (April/May 1984), supra note 28, at 1635.

it had acted in self-defence because the reactor was intended for a nuclear strike against Israel. In the Security Council, members stated that the right to use force in self-defence is valid only when there is "no moment for deliberation"[32].

Another limitation on the right of self-defence is that the force used by a state to defend itself must be reasonably "proportionate" to the danger that is to be averted[33]. The main problem with this requirement is that there is no effective mechanism in place for deciding whether or not the state's response was in fact proportional to the threat. Even if independent outside judges, such as an international court or tribunal, were to make such a finding, in view of the time element, any such determination would assume an *ex post facto* character. In short, there is very little incentive for a state to react proportionally to the original threat. There may be more to gain from acting decisively and stopping the aggressor before the conflict gets completely out of hand.

The next point which needs to be noted is that the attack which gives rise to the right of self-defence need not necessarily be against a state's territory. Article 2(4) of the Charter uses the phrase "against the territorial integrity or political independence of any state". Clearly, this is a wider term than the "physical" territory of a state. Furthermore, in the *Corfu Channel* case, the ICJ held that British warships,

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[32]36 UN SCOR (2285-88th mtg.), UN Docs. S/PV 2285-88 (1981).

[33]Schachter (April/May 1984), supra note 28, at 1637-38.

attacked while exercising their right of innocent passage, were entitled to return fire in self-defence[34]. According to Brownlie, Article 51 refers only to "armed attack" because it was inserted for the purpose of clarifying the position of collective defence treaties which are only concerned with external attack. Being specific, in this sense, Article 51 does not preclude the broader right as set out in Article 2(4)[35].

In fact, the opening phrase of Article 51 mentions the "inherent" right of self-defence. Such a word shows that the right of self-defence is not based on the Charter, but that it is a normal right of states under international law which pre-dates the Charter and goes at least as far back as the *Caroline*. Many writers believe that states have a right to use force in self-defence <u>until</u> the Security Council has acted[36]. If this view is adopted, then Article 51, in effect, is a limit on the inherent right of self-defence.

Next, the concept of collective self-defence requires some explanation. Bowett has argued that a right of collective self-defence "is merely a combination of individual rights of self-defence; states may exercise collectively a right which any of

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[34]*Corfu Channel Case* (Merits) [1949] I.C.J. Reports, p. 4 at 30-1.

[35]Brownlie (1963), supra note 13, at 269.

[36]von Glahn, supra note 10, at 132.

them might have exercised individually"[37]. In other words, no state can defend another state unless the former could have first exercised a right of individual self-defence. Professor von Glahn, on the other hand, defines the term "collective self-defence" as "defence, by one state or a group of states, of another against attack"[38]. In this sense, collective self-defence refers to any independent use of armed force by states on behalf of another state.

The final point which should be discussed is that the phrase "if an armed attack occurs" may suggest to some that the right of self-defence may be invoked only after the attack has occurred. It is a fact, however, that customary law permitted anticipatory action in face of imminent danger[39]. It is a very demanding criterion to expect a state which is the object of an attack to wait until it has actually occurred. By that time, the state may not have the capability to defend itself.

It should be mentioned, nevertheless, that the right of anticipatory self-defence is open to many objections. First, the state has to establish the certainty of the attack. This involves a determination of another state's objectives. Needless to say, this is a very difficult -- if not impossible -

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[37]D. W. Bowett, *Self-Defence in International Law* (N.Y.: Manchester University Press, 1958) ch. 10. Also, see Akehurst, supra note 3, at 224.

[38]von Glahn, supra note 10, at 133.

[39]Brownlie (1963), supra note 13, at 257. Webster recognized this right in the *Caroline* if the necessity of self-defence was "instant" and overwhelming". See supra note 31.

- task. Even when one state can firmly establish another state's intention to attack, the latter has the chance to change its mind until the moment that the attack actually takes place. Furthermore, a state which wants to defend itself has open to it many options short of commencing an attack. For example, not only are the organs of the UN competent at dealing with these situations, but they were created with exactly this idea in mind.

Finally, although the requirement of proportionality in the use of force is relevant to the right of anticipatory self-defence, the two are not entirely compatible. The force used, in this case, will not be proportional to the threat since the original threat did not actually involve force. The UN Charter, and these objections, have influenced states to assert the right of anticipatory self-defence less and less[40]. Striking the first blow may be justified only after appeals to the UN have proved futile, and the threat, if it were allowed to be carried out, would have completely destroyed the state rather than merely damaged it. The onus of proof under these circumstances is, of course, on the state taking pre-emptive action[41].

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[40]Brownlie (1963), supra note 13, at 260.

[41]Williams and de Mestral, supra note 6, at 49-50.

C. HUMANITARIAN INTERVENTION:

There is considerable support for the view that when intervention is for humanitarian purposes, then it may be justifiable. There are two categories which fit into this classification. The first is when a state complains that the citizens of another state are being grossly mistreated in their own country and that their fundamental rights are being denied. To impose liability in such a case, the complainant has to show that the matter is not entirely within the sphere of discretion which international law regards as sovereignty and that it does not fall exclusively within the domain of domestic jurisdiction[42].

The Preamble of the Charter expresses the determination of the peoples of the world "to reaffirm [their] faith in fundamental human rights" and "in the dignity and worth of the human person". There is also a commitment "to ensure ... that armed force shall not be used, save in the common interest ...". These statements strongly suggest that the use of force for humanitarian purposes is still lawful. The repeated interest of the drafters of the Charter in human rights indicates that the use of force for the urgent protection of such rights is also authorized.

The lawfulness of the intervention will depend on the

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[42]Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1990 4th ed.) at 552.

urgency of the case, the absence of feasible alternatives for helping the victims, the proportionality of the coercion used, and the damage caused to the state which was the object of the operation[43]. The operation of this doctrine has almost always been subject to abuse. First, only powerful states can undertake police measures necessary to carry out such an operation. Second, the intervention must be for the limited purpose of saving people. Finally, the intervening state must have no selfish motives.

Whether the right to intervene for humanitarian purposes exists today is open to debate[44]. Schachter has stated that governments are reluctant "to legitimize foreign invasion in the interest of humanitarianism"[45]. The main reason for this is that if Article 2(4) is opened to such a broad exception, instances of abuse by powerful states may increase.

A different position, however, has been taken when a state has acted to protect its <u>own</u> nationals who were in imminent danger in another state. There are various lines of reasoning which attempt to justify such an intervention. First, it has been held that nationals are an extension of the state. Any attack on them, therefore, equates an attack on the state itself. If this view is adopted, then intervention to save

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[43]Myres S. McDougal and W. Michael Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community* (N.Y.: The Foundation Press Inc., 1981) at 874.

[44]Brownlie (1963), supra note 13, at 34.

[45]Schachter (April/May 1984), supra note 28, at 1629.

nationals abroad may simply be seen as a derivative of the right of self-defence, which is legitimized by Article 51 of the Charter.

The Israeli rescue efforts in Entebbe are the clearest example of a state acting to protect its nationals. The capture of the Israelis was a direct attack on the state of Israel. Furthermore, there is no doubt that the Israeli captives were in imminent danger. The rescue was designed for the limited purpose of saving the Israelis, and there was no political interference in Uganda. Even though the rescue mission temporarily violated the territorial integrity of Uganda, the Israeli action met with the tacit approval of most states. For this reason, it may be implied that, in limited situations, states do recognize the existence of the right to intervene to save one's own nationals.

The issue now becomes whether Article 51 and the theory of self-defence can be used in support of humanitarian intervention. If one adopts a restrictive view of Article 51 then this question has to be answered negatively. Many of the writers who believe in a narrow interpretation of Article 51 believe that it is unlawful to use force to protect nationals abroad. According to them, force can only be used to protect a state's nationals against their own government[46]. The main logic behind this reasoning is that Article 51 is an exception

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[46]Michael Akehurst, "Humanitarian Intervention" in Hedley Bull, ed., *Intervention in World Politics* (Oxford: Clarendon Press, 1984) 95 at 107 [hereinafter Akehurst in Bull].

to the general rule set out in Article 2(4). Exceptions to rules have to be treated narrowly in order not to undermine the general rule.

A second line of reasoning may be presented by arguing that there is a state of emergency and necessity such that immediate action is required[47]. Although Chapter VII of the UN Charter authorizes the Security Council to act under such circumstances, when lives of its people are in danger, a state should not be expected to wait for the UN to take appropriate measures. By then, lives may be lost.

Finally, Article 2(4) is used to support the right of intervention to save nationals from danger. If Article 2(4) is interpreted narrowly, then it may argued that the use of force for certain purposes does not infringe upon the "territorial integrity or political independence" of other states, and is not inconsistent with the purposes of the UN. If the use of force for the protection of nationals does not involve the separation of part of the state which is the object of the intervention, and if the intervening state's forces remain there for only a limited time, then intervention may be justifiable. The use of force, in such a case, is contrary to the inviolability of the state which is the object of the intervention. The Charter, however, does not set out to protect inviolability, but only the

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[47]Natalino Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Netherlands: Martinus Nijhoff, Publishers, 1985) at 4.

territorial integrity and political independence of the state[48].

Such arguments are not fully convincing because any humanitarian intervention, however limited in scope and duration, constitutes a temporary violation of the target's political independence. The measures taken will be against the target state's wishes, and for a specific period of time, that state's territory is occupied by the intervenor's forces. Admittedly, more than the state's territorial inviolability is damaged in such a case.

Clearly, non-intervention is a well-established legal norm. The United Nations Charter, and Article 2(4) in particular, was drafted for the specific reason of maintaining peace among states. There are, however, exceptions to the norm of non-intervention. As was seen, the most significant of these are the right to take action in self-defence, the right to intervene upon invitation by the government of another state, and humanitarian intervention.

The next chapter is a historical survey of American interventionist policies in Central America. The purpose of the following section is to establish a long and consistent history of US intervention in that region. By doing so, it will be seen that Grenada and Nicaragua were chosen from a long list of similar cases; they are not anomalies.

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[48]Ibid, at 1.

IV: PRIOR US INTERVENTION IN LATIN AMERICA

During the past century, the relationship that has evolved between the US and Latin America has been a matter of controversy. The US sees itself as the protector of a collection of neighbouring states whose security is vital to its interests. Many Latin American countries, on the other hand, see the United States as a domineering country that is always eager to become involved in other states' internal affairs. Perhaps it is because of this disagreement on the role of the US in Latin America that, on numerous occasions, their relationship has been put to a test by US invasion and intervention.

In fact, US intervention in Latin America is not a new policy. The US has been trying, for a very long time, to ensure the security of the region in order to protect its own perceived vital interests. As early as 1845, for example, James K. Polk was engaged in a war with Mexico which ended three years later when the US acquired one-third of Mexico's territory. In 1911, the US government intervened directly in the region once more to replace British influence with its own. In the 1930s, moreover, the US managed to gain almost total control over Guatemala's transportation, communications, and exports. These are only a

few examples of a long list of US interventions in Central America. Each presidential administration presented its own policies on this topic and acted according to a different plan of action.

This section provides a broad overview of those policies which have had a greater impact on Central America. Furthermore, several cases have been focused on in order to establish a long-standing pattern of US intervention in Central America. These cases are: US intervention in Guatemala during the Eisenhower Administration; the Bay of Pigs invasion in Cuba; and the invasion of Guatemala in 1965. The next chapter will then involve an in-depth study of the two particular cases which are the main focus of this study: the US invasion of Grenada in 1983, and intervention in Nicaragua by the Reagan Administration.

A. THE MONROE DOCTRINE:

The "Monroe Doctrine", announced in 1823 by President Monroe, was the first political expression by the US of the idea of spheres of influence. Originally, the Monroe Doctrine contained three branches[49]. The first branch included a declaration that the American continent would no longer be the

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[49]J.G. Starke, *Introduction to International Law* (London: Butterworths, 1989 10th ed.) at 107.

subject of future colonization by the European powers. This declaration arose out of the threats to the Western Hemisphere from czarist Russia which at the time owned Alaska, and was expanding its claims southward into the Pacific Northwest. Also, the Holy Alliance of Russia, Austria, Prussia, and France was seen as a threat. Furthermore, there were rumours that a combined French-Spanish fleet would sail to the New World and recapture the newly independent countries[50].

The second branch of the Monroe Doctrine was a declaration of the absence of American interest in European wars or affairs. Finally, and most significantly, the third branch contained a declaration that any attempt by the European powers to extend their system to any portion of the American continent would be regarded as "dangerous" to the "peace and safety" of the US[51]. This declaration was directed against any intervention on the part of the European powers to restore the authority of Spain over the Latin American countries which had gained independence with the support of the US.

By the end of the 19th century, the Monroe Doctrine had helped bring the US into the mainstream of international politics and identified the US as a growing world power. The Doctrine had become the basis for the US claimed right to

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[50]Howard J. Wiarda, *The Democratic Revolution in Latin America: History, Politics, and U.S. Policy* (U.S.A.: Holmes and Meiner Publishers, Inc., 1990) at 95.

[51]Starke, supra note 49, at 107; Isaak Dore, "The U.S. Invasion of Grenada: Resurrection of the "Johnson Doctrine"?" (Spring 1984) 20 Stan. J. Int'l L. 173 at 177.

intervene in any part of the American continent if and when its vital interests were threatened. One outcome of this claim was that Latin America was able to try to grow and prosper since European powers were kept at a distance. By the mid-20th century, the Monroe Doctrine was transformed into a collective understanding among all the American states to preserve continental security under the auspices of the Organization of American States (OAS). A doctrine that was originally directed against intervention has now been transformed into a theory justifying it.

Following the Monroe Doctrine, US administrations proclaimed numerous other policies. For instance, during the period prior to the Civil War, it was argued that it was the destiny of the US to expand. Expansion was to be westward to the Pacific Ocean, northward into Canada, and south toward Mexico, Central America, and the Caribbean[52]. Any northerly expansion into Canada was checked by a compromise settlement with Great Britain in 1846; the expansion into the south, however, resulted in a war with Mexico which deprived that country of one-third of its national territory.

The most important reinterpretation of the Monroe Doctrine was embodied in the "Roosevelt Corollary" to the doctrine[53]. In

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[52]For a discussion of the theory of "Manifest Destiny", see Wiarda, supra note 50, at 95-7.

[53]Federico G. Gil, "The Kennedy-Johnson Years" in John D. Martz, ed., *United States Policy in Latin America: A Quarter Century of Crisis and Challenge* (U.S.A.: Univ. of Nebraska Press, 1988) 3 at 4-5.

1905, President Theodore Roosevelt announced that henceforth the US would use its power to maintain order in the region, particularly in the Caribbean[54]. President Roosevelt believed that an inter-American system that would promote US economic and political interests had to be constructed. This line of reasoning supported US interventionism because of the need to protect the increasing economic and strategic stakes of the US in the Caribbean. As surplus of capital was accumulating in the US, American corporations were investing more and more in Latin America. The building of the Panama Canal, furthermore, had important economic and strategic implications for the US.

During World War II, maintaining the status quo was an important objective of the Franklin Roosevelt Administration, even if this meant supporting the most undemocratic governments. This policy of supporting stable regimes, regardless of their nature, was followed well into the Cold War. Secretary of State John Foster Dulles believed strongly in this policy and he helped put it in action during the 1954 intervention in Guatemala.

B. GUATEMALA:

In the view of the Eisenhower Administration, the inter-

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[54]Walter LaFeber, *Inevitable Revolutions: The United States in Central America* (N.Y.: W. W. Norton and Company, Inc., 1984) at 37.

American system had to become an anti-communist alliance. The Administration worried that communism had infiltrated every Latin American country. In 1953 and 1954, in particular, they feared that Soviet agents were planning to subvert Guatemala and turn it into a base for Soviet imperialist operations in the Western Hemisphere. That was the main reason why, in 1954, the United States supported the invasion of Guatemala by the army of Colonel Castillo Armas from bases in Nicaragua and Honduras, overthrowing the leftist government of Jacobo Arbenz Guzman.

Guatemala's history has been characterized by political repression and economic stagnation. For a century, Guatemala was led by personalist leaders. Arbitrary, excessive, and tyrannical regimes were the norm, until March 1951, when the first peaceful transition of power took place, and Jacobo Arbenz assumed the presidency[55]. President Arbenz accelerated the rate of change in Guatemala. He pledged to create an economically independent, modern and capitalist state.

One of his most important undertakings was agrarian reform. In mid-1952, the legislature enacted a bill that empowered the government to expropriate uncultivated portions of land for the purpose of redistribution. The reforms, however, were moderate and modest since, for example, the reform bill left untouched estates of up to 670 acres, if at least two-thirds of the land

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[55]Stephen G. Rabe, *Eisenhower and Latin America: The Foreign Policy of Anti-Communism* (U.S.A.: The Univ. of North Carolina Press, 1988) at 44.

was cultivated[56]. Landowners, furthermore, were compensated by interest bearing Guatemalan bonds. The main purpose of these measures was to create a nation of individual landowners.

This modest process of change, nevertheless, was perceived to threaten US economic and strategic interests in Guatemala. For one thing, the largest landowner in Guatemala and the country's chief private employer was the United Fruit Company of Boston, Massachusetts. The *Compania Agricola de Guatemala*, a wholly owned subsidiary of the United Fruit Company, owned 550,000 acres of land, 85 percent of which was uncultivated. Between 1952 and 1954, the government expropriated about 400,000 acres of the Company's land. In return, it offered approximately $3 an acre in the form of guaranteed twenty-five year bonds bearing three percent annual interest[57].

On April 20, 1954, the Department of State presented the Government of Guatemala with a formal claim for $15,854,849. The claim had been filed with the Department by United Fruit in connection with the expropriation of the lands. The Eisenhower Administration believed, by then, that what had started as a middle-class reform effort had been transformed into a radical political movement that threatened US interests in both Guatemala and the entire region. In a news conference on June

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[56]Ibid, at 45.

[57]The $3-an-acre figure was arrived at by taking United Fruit's declaration of the value of the land for taxable purposes. United Fruit rejected this valuation, claiming that the land was worth at least $75 an acre. Ibid, at 46.

8, 1954, Secretary Dulles stated that although Guatemala wanted to present the problem as one between Guatemala and the US relating to the United Fruit Company, the real concern was the presence of Communist infiltration in Guatemala[58].

Prior to the revolution in Guatemala, a number of public declarations were made by the US government against communism. In the Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against International Communist Intervention, for instance, the American Republics declared that "international communism, by its anti-democratic nature and its interventionist tendency is incompatible with the concept of American freedom"[59]. In another statement, Secretary Dulles reiterated the belief that domination and control of political institutions of American states by communism "would constitute intervention by a foreign political power and be a threat to the peace of America"[60].

The US government was aware of the fact that communists in Guatemala constituted a small minority. They believed, however,

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[58]"Formal Claims Filed Against Guatemalan Government" (May 1954) 30 Dep't St. Bull. 678 at 678; "U.S. Policy on Guatemala" (June 1984) 84 Dep't St. Bull. 950.

[59]"Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against International Communist Intervention" (March 1954) 30 Dep't St. Bull. 420.

[60]"Intervention of International Communism in the Americas -- Statement of March 5 by Secretary Dulles at Caracas, Venezuela" (March 1954) 30 Dep't St. Bull. 419.

that the minority acted to gain positions of power[61]. This belief was reinforced by the fact that Guatemala was the only American nation to be the recipient of a massive shipment of arms from behind the "Iron Curtain"[62]. These developments led the US government to believe that the situation in Guatemala required immediate attention.

The actual "invasion" of Guatemala began on June 18,1954 when the forces of Lieutenant Colonel Carlos Armas, an army officer in exile, crossed into Guatemala from Honduras. Armas and his 200 followers were trained by the Central Intelligence Agency (CIA) in Honduras[63]. The invasion itself was quite limited in scope and it left the Guatemalans unimpressed; the CIA, however, supplemented the attack by the massive use of radio broadcasting from Honduras. This gave the impression to Guatemalans that the fighting was intense and widespread, and it left a psychological impact on the population. The CIA further added to the hysteria by having its pilots bomb the capital city[64]. Finally, on June 27, Arbenz fell from power and the Eisenhower Administration successfully completed what it had set out to do.

The invasion of Guatemala was significant for a number of

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[61]"Communist Influence in Guatemala" (May 1954) 30 Dep't St. Bull. 873.

[62]Ibid. Also, "Arms Shipment to Guatemala from Soviet-Controlled Area" (May 1954) 30 Dep't St. Bull. 835.

[63]Rabe, supra note 55, at 56.

[64]Ibid.

reasons. First, US-supported forces managed to overthrow the constitutionally elected government of Guatemala. By most standards, the invasion was "successful". The US' objectives were achieved and a threat to American interests was removed. Second, prior to 1954, the Monroe Doctrine was based on the principle that the Americas had to be protected from outside (mostly European) influence. The situation in Guatemala was different since the perceived threat came from inside the system. The ideas and practices of a Central American country were the main source of concern. Finally, the 1954 intervention occurred at a time when the US was still trying to establish a post-World War II security order. Through the successful intervention in Guatemala, the US maintained order in the region. For these reasons, the operation in Guatemala is one of the more important episodes of US' Cold War policies.

C. CUBA:

When Fulgencio Batista first came to power in the 1930s, he was thought of as a populist and a nationalist who could save his country. His wide base of popular support led to considerable support from the US which was sometimes expressed in the form of military assistance. In the 1950s, however, he became more and more repressive and lost all his support. The United States was also no longer able to support such an

unpopular regime. Military aid to Cuba was cut off in a symbolic move; and relations between the two countries became hostile[65]. As support for Batista was declining, Fidel Castro's revolutionary movement was gaining more popularity.

The victory of Fidel Castro's guerrilla forces in Cuba on January 1, 1959 was a major concern for the US in the years to follow. The US was compelled to develop a new approach regarding Central America; the policy of watchful waiting was no longer very effective. Coincidentally, the foreign policy of the Soviet Union underwent a shift at almost the same time. Moscow was prepared to extend aid to revolutionary movements even when they were not of communist origin, and embarked upon a program of substantial economic aid to the under-developed countries[66].

Soon after the Cuban revolution, Castro took decisive steps to redistribute private land holdings, expropriate American-owned businesses, and implement policies designed to redress working class grievances. Aside from being concerned with Castro's communist policies, the US government was unhappy with the turn of events because the American business community was suffering as well. American businesses had developed a working relationship with the Batista government, and were eventually able to invest heavily in the island's sugar and tourist industries.

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[65]Wiarda, supra note 50, at 218.

[66]Gil in Martz, supra note 53, at 218.

Although Castro was not initially regarded in hostile fashion, by mid-1960, US relations with Cuba had become very sour. President Eisenhower cut off all imports from Cuba in an attempt to discourage Castro's move towards the Soviet Union. This, however, pushed Castro closer to the Soviet Union and China. Finally, President Eisenhower decided to break all formal ties with Cuba and to end diplomatic relations[67].

When John F. Kennedy moved into the Presidential office in January 1961, Cuba's relations with the Soviet Union were seen as a serious threat. Tolerating Castro's communist tendencies may have been, on their own, bearable; the main problem was that he was providing Latin America with a viable option to the democratic system that the US had supposedly been promoting. There was, consequently, great domestic pressure on President Kennedy to act quickly.

Upon taking office in 1961, President Kennedy was told of plans made by the CIA, under Eisenhower's direction, to stage an invasion of Cuba. Eisenhower had made this decision on March 17, 1960, and it had been put into action immediately. The result was a CIA document, "A Program of Covert Action Against the Castro Regime", which presented a four-part program of attack:

(1) "creation of a responsible and unified Cuban opposition to the Castro regime located outside Cuba";
(2) "a powerful propaganda offensive" against Castro;

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[67]Michael J. Kryzanek, *U.S. -- Latin American Relations* (N.Y.: Praeger Publishers, 1985) at 51.

(3) creation of a "covert action and intelligence organization within Cuba", responsive to the exile opposition;
(4) "the development of a paramilitary force outside of Cuba for future guerrilla action"[68].

After this document was drafted, administration officials focused on how they could harm Castro's regime.

President Kennedy was advised of this plan and was told that the anti-communist rebels were to be trained in Guatemala and Nicaragua and would invade Cuba from the south at the Bay of Pigs[69]. The CIA analysis showed two points that were vital to the success of the operation: First, that the Castro regime was vulnerable to such a surprise attack; and second, that once the rebels were on Cuban territory, others would rise up and join them in the fight. Furthermore, the US had promised considerable air support to the rebels.

The plan seemed flawless, and President Kennedy gave the go-ahead. On April 17, 1961, about 1,500 rebels landed in Cuba at the Bay of Pigs. The rebels faced great resistance from the local militia, there was no local support for them, and President Kennedy refused to provide the air cover that had been promised. The invasion ended disastrously within hours with the capture of 1,200 of the rebels. The result, ironically, was that the Castro regime became even more popular and stronger -- both within and outside Cuba.

On numerous occasions, both prior and after the invasion at

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[68]Quoted in Rabe, supra note 55, at 129.

[69]Kryzanek, supra note 67, at 51.

the Bay of Pigs, President Kennedy and his officials insisted that the US has never had (and never will have) the intention to militarily intervene in Cuba[70]. A letter written by Khrushchev to Kennedy on April 18, on the other hand, claimed that the US was directly responsible for and involved in the invasion[71]. The armed bands that invaded Cuba were prepared, equipped, and armed in the US; the planes which bombed Cuban towns belonged to the US; and even the bombs themselves were American.

Other official statements took the position that, although the US has never committed an act of aggression against Cuba, Cuban freedom-fighters will always have the support and the sympathy of the United States. The US "is committed to the proposition that all people should have the right to freely determine their own future by democratic processes", and communism, of course, has never been "installed in any country by the free vote of its people"[72]. President Kennedy took this image one step further himself by speaking of the rebels as a "small band of gallant Cuban refugees" and "gallant men and women fighting to redeem the independence of their homeland"[73].

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[70]See, for example, Kennedy's letter to Khrushchev on April 17 in "United States and Soviet Union Exchange Messages in Regard to Events in Cuba" (May 1961) 44 Dep't St. bull. 661. Also see Statement of April 15 by U.S. Representative Adlai Stevenson in the U.N. in "U.N. General Assembly Debates Cuban Complaint" (May 1961) 44 Dep't St. Bull. 667.

[71]Ibid, at 662.

[72]Ibid, at 664.

[73]"The Lesson of Cuba" (May 1961) 44 Dep't St. Bull. 659.

Whatever the US may have said after the invasion, the result was that Castro's strength and power increased. First, the Kennedy Administration realized that it had underestimated both the strength of the regime and people's support of it. Second, when the role of the US and the CIA became obvious, it became even harder to justify the intervention. In short, the Bay of Pigs episode was nothing short of a disaster for the Kennedy Administration.

Almost one month prior to the Bay of Pigs invasion, President Kennedy had announced the "Alliance for Progress" proposal. This policy was to assist democratization in Latin America through socio-economic aid, and thus inhibit the spread of communism[74]. The goals of the US -- stability and anti-communism -- had not changed; only the means were slightly different. The Alliance was one of the most noble US policy efforts toward Latin America because it was based upon a set of Latin American needs. The origins of the program were derived from the need to modify the obsolete social systems of Latin America, and to accelerate economic development and eradicate poverty. Unfortunately, the US lacked the adequate experience and the required skills to successfully implement a program of such magnitude, and the Alliance soon failed.

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[74]Wiarda, supra note 50, at 104-6; Gil in Martz, supra note 53, at 9-17.

D. DOMINICAN REPUBLIC:

Lyndon Johnson came into office in November of 1963, after President Kennedy's assassination. The new Johnson Administration turned its attention inward toward domestic issues, and the momentum for change in Latin America initiated by President Kennedy began to weaken. When President Johnson did venture into Latin American affairs, it was not to further the Alliance for Progress goals. Rather, his main concern was to prevent the communist infiltration of the Western Hemisphere. The US could not allow the emergence of "another Cuba" at any cost. Against this backdrop of beliefs and ideas, the events of 1965 unfolded.

The intervention in the Dominican Republic in 1965 was the first instance in recent history in which the US carried an open invasion of another state in order to preserve hemispheric solidarity. The revolution that deposed the rightist military regime of President Juan Bosch on April 24, 1965, was believed to be a threat to the American citizens who were living in the Dominican Republic. President Johnson sent 23,000 American troops into the Dominican Republic to bring the civil war under control and, supposedly, to ensure the safety of the Americans living in that country[75].

On Saturday, April 24, revolution erupted in the Dominican

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[75]Michael J. Kryzanek, "The Dominican Intervention Revisited: An Attitudinal and Operational Analysis" in Martz, supra note 53, 135 at 135 [hereinafter Kryzanek in Martz].

Republic and elements of the military overthrew the government. The rebels, however, were themselves divided and fighting broke out amongst them. Some wanted to restore former President Bosch; others opposed this movement. Until Wednesday afternoon, the US did not intervene, except for urging the revolutionaries to accept a cease fire[76]. Around 3 p.m. on that day, the President received a cable from US Ambassador Bennett who had been informed by the Dominican chief of police and governmental authorities that the safety of US citizens could no longer be guaranteed. Ambassador Bennett urged President Johnson to order an "immediate" landing of American forces to rescue the US nationals[77].

On April 28, 400 Marines had landed in the Dominican Republic[78]. This decision was made before either the UN or the OAS were contacted. In fact, it was not until the following day that the US representative to the UN, Adlai Stevenson, informed the Security Council that President Johnson had ordered American troops to the Dominican Republic[79]. On April 30, the US representative to the OAS, Ambassador Ellsworth Bunker, met with the members of the OAS and asked the Council of the OAS to direct an appeal for a cease-fire to all sides involved in the

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[76]"U.S. Acts to Meet Threat in Dominican Republic" (May 1965) 52 Dep't St. Bull. 738 at 744.

[77]Ibid, at 745.

[78]Ibid, at 738.

[79]Ibid.

conflict[80].

By that day, about 2,400 citizens of the US and of other nations were evacuated, and about the same number were still left in the Dominican Republic[81]. Meanwhile, the OAS had adopted a resolution calling for cease-fire, and the US forces in the Dominican Republic had created an international neutral zone of refuge in Santo Domingo[82]. The excuse of having to establish such a zone allowed the President to send two additional battalions of about 1,500 men and additional detachments of Marines to the Dominican Republic on May 1.

Statements made by President Johnson in the following days clearly revealed the real goal of the US. The safety of US citizens was no longer the dominant issue. Instead, the President stated that the goal of the US was to permit the people of the Dominican Republic "to freely choose the path of political democracy, social justice, and economic progress"[83].

The following day, on May 2, the President made another statement. This time he explicitly mentioned the communist element of the revolution. The revolution, according to him, had begun as a popular democratic movement. It was soon taken over, however, by Cuban-trained Communist conspirators who were

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[80]Ibid, at 740.

[81]Ibid, At 742.

[82]The resolution was adopted by a vote of 16 to 0, with 4 abstentions (Chile, Mexico, Uruguay, and Venezuela). See ibid, at 741.

[83]Ibid, at 743.

determined to lead the country. The goal of the US in this mission was then said to be preventing the creation of another Communist state in the Western Hemisphere[84].

President Johnson ordered 2,000 extra men to proceed immediately to the Dominican Republic. He also issued instructions to land an additional 4,500 men at the earliest possible moment[85]. The Johnson Administration was determined to destroy the "Communist conspirators" because if they had seized power, then the process would have been irreversible, and the "declared principles of the OAS" would have been frustrated[86]. It was much easier for the US to crush the Communist movement under conditions of civil disorder and chaos than to try to remove an established regime.

The Dominican intervention was, of course, much more complex than is presented here. The major factor which clearly stands out, however, was the threat of communism to hemispheric solidarity. American forces were sent to the Dominican Republic to insure that "another Cuba" would not be created, and to show that, from here on, the US would stand up to Communist expansionism. After six months, US troops left the Dominican Republic, and there was a return to normalcy -- on the surface at least, since the involvement of the US in Dominican affairs

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[84]Ibid, at 742.

[85]Ibid, at 746.

[86]"Secretary Discusses Situation in Dominican Republic" (May 1965) 52 Dep't St. Bull. 842.

during the post-intervention period appeared to be low key.

During the presidencies of Nixon and Ford, comparatively less attention had to be paid to Central America. The region was relatively calm and settled and no major crises developed. The threat of Soviet expansionism in Latin America was unlikely, especially after Khrushchev's ouster in 1964. Nixon and Kissinger believed that Latin America and Africa were, at least for the time being, safe from Soviet infiltration. Nixon knew, furthermore, that in the wake of the Vietnam War, the US could no longer act as sheriff in the world[87].

To considerably simplify the policies of Nixon and Ford, it can be said that, generally, Latin American issues were dealt with at two levels. If the matter was perceived as having no East-West aspects, then it was handled by the Department of State bureaucracy. Individuals who had the furtherance of good relations between countries as their highest priority, and who were willing to make substantial concessions in order to assure cordial relations would deal with such matters. If, on the other hand, the issue had Cold War importance, then it received the attention of Kissinger and Nixon, and they were not willing to compromise at all[88]. In this category, the goal of good

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[87]LaFeber, supra note 54. This policy, in fact, was the "Nixon Doctrine" of 1969.

[88]See Michael J. Francis, "United States Policy Toward Latin America During the Kissinger Years" in Martz, supra note 53, 28 at 28-60, for a detailed discussion of the "Kissinger Years".

relations with Latin American countries was not very important because at stake was competition with the Soviet Union.

E. THE REAGAN ADMINSTRATION:

During his presidency, Carter's Central American policy was mostly preoccupied with human rights issues. President Carter believed that the US had a duty to protect Central Americans from the arbitrary power of the state[89]. He set out to improve the living conditions of Central Americans through slow, conservative reform. One problem with this policy was that Central American countries were traditionally used to receiving military aid as an incentive to comply with US demands. Carter, however, could not use military aid as leverage for reducing human rights violations when, in most cases, increased military strength led to more human rights violations. Although toward the end of his presidency Carter was acting more decisively, the in-coming Reagan Administration believed that he had not taken measures that were forceful enough with respect to countries such as Nicaragua and Iran.

President Reagan was determined that he was not going to be put in a position of compromise. During the presidential campaign of 1980, Reagan warned that, with respect to the threat of growing Marxist subversion in Central America, "[w]e are the

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[89]LaFeber, supra note 54, at 210.

last domino"[90]. He believed that a "hands-off" posture in Central America would inevitably result in an adverse domino effect.

In his attempt to further US interests, President Reagan pressured the international legal system into changing in a manner that was beneficial to the US. New rules were made up, and old ones were revised or reinterpreted. For instance, the Reagan Administration claimed a broad right of self-defence, relied less and less on international bodies such as the UN, and placed heavy emphasis on the right of a state to preserve its national interests. All these claims led to what can be labelled as the "Reagan Doctrine".

From one point of view, the Reagan Doctrine can be viewed as an amended version of the Monroe Doctrine. The Monroe Doctrine declared that no foreign government or expansionist ideology should be able to impose its system on the Western Hemisphere. The Reagan Doctrine takes this declaration one step further by asserting a right to give military assistance and aid to Latin American countries whose territorial integrity and political independence is being violated by forces perceived to be Marxist aggressors.

Furthermore, the issue is no longer mere containment because assistance will be given to insurgencies opposing Marxist governments. According to the Reagan Doctrine,

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[90]Robert A. Friedlander, "Confusing Victims and Victimizers: Nicaragua and the Reinterpretation of International Law" (Spring/Summer 1985) 14 Den. J. Int'l L. and Pol'y 87 at 91.

communist ideology *per se* threatens American security. The United States must, therefore, commit itself to resisting Soviet and Soviet-supported aggression wherever it arises, and to rolling back communism by helping anti-communist movements. If the United States fails to prevent the advance of communism worldwide, then its allies and neutrals will realign with the Soviet Union.

The Third World was to be the critical battleground in the war against communism. In the Third World, no region is more critical to US strategic interests than Central and Latin America. Mexican and Venezuelan oil, the Panama Canal, and the Caribbean sea-lanes -- if taken collectively -- are vital to US security. In order to preserve its security, Reagan was willing to put aside post-Vietnam insecurities and rely on military intervention as a prominent instrument of foreign policy.

Humanitarian intervention was initially offered as a legal basis for the Reagan Doctrine. It was assumed that an undemocratic government is far more likely to commit basic human rights violations than a democratic government. Thus, President Reagan was convinced that it is better to intervene sooner, rather than later, in an effort to prevent a non-democratic government from seizing the reins of power and then perpetuating itself by its monopoly of armed power against its own people[91].

President Reagan put his ideas about humanitarian

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[91]Anthony D'Amato, "Nicaragua and International Law: The 'Academic' and the 'Real'" (July 1985) 79 Am. J. Int'l L. 657 at 660.

intervention into action in the cases of US intervention in Grenada and Nicaragua. The focus of the remainder of this discussion, in fact, will be on the Reagan Administration's decision to intervene in Nicaragua and Grenada. These two countries have been chosen as subjects of a more detailed study for several reasons. First, in both cases, the decision to intervene was made by the same administration, and the cases are close to each other. There is, therefore, a strong basis for comparison, and valid conclusions may be drawn. Second, these decisions are more recent than others and they reflect more immediate US policies toward Latin America[92].

The third reason for focusing on these cases is that by studying these two major decisions, a relatively clear sense of Reagan's foreign policy toward Latin America can be obtained. Finally, since this is a discussion of the role of international law in US decision-making, it is wise to confine the study to one administration. Different presidents may have had different views regarding international law or, more importantly, norms and principles of international law may have changed through time. Focusing on the Reagan Administration allows one to reach a conclusion, at least, with respect to one administration.

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[92]It should be noted that policies of the Bush Administration could not, and should not, be studied due to a lack of available information and material.

V. CASE STUDIES

A. GRENADA

Grenada was granted independence from British colonial rule in 1974 and functioned under a parliamentary government until 1979. In March 1979, Maurice Bishop's New Joint Endeavour for the Welfare, Education, and Liberation (JEWEL) Movement ousted then-Prime Minister Sir Eric Gairy and his Mongoose Gang in a near bloodless coup. Prime Minister Bishop's People's Revolutionary Government expanded social services and, at least initially, seem to have had a strong base of popular support. Bishop and his Deputy Prime Minister Bernard Coard were trying to construct a socialist democracy on a relatively weak and technologically backward foundation. The New JEWEL Movement was meant to represent a new base on life and signify the new direction in which the society should advance[93]. The Bishop regime, however, indefinitely suspended elections, ended freedom of the press and other political freedoms, and became increasingly repressive. By 1983, there was strong evidence of

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[93]Selwyn R. Cudjoe, *Grenada: Two Essays* (N.Y.: Calaloux Publications, 1984) at 10.

torture of political prisoners and other human rights abuses. The violation of international human rights standards, however, elicited little international attention outside the small Caribbean community[94].

By 1983, Grenada had built-up an army of approximately 600 regular Cuban-trained troops and an armed reserve militia of 2,500-2,800, and had active plans to add twelve more battalions[95]. This military build-up exceeded the combined military forces of the six other states in the Organization of Eastern Caribbean States (the other OECS members are St. Vincent and the Grenadines, St. Lucia, Dominica, Antigua/Barbuda, St. Kitts/Nevis, and Montserrat). Grenada's militarization, furthermore, was accompanied by the increasing influence of the Soviet Union and Cuba in the small island. In the 1982 session of the United Nations General Assembly, more than 92 percent of Grenada's votes were cast with the Soviet bloc, including one of the few votes in favour of the Soviet invasion of Afghanistan[96]. Cuban advisers held positions in all key ministries and were active in virtually every aspect of the army. In fact, in 1983, regular and paramilitary Cuban forces in Grenada out-numbered

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[94]J. Norton Moore, "Grenada and the International Double Standard" (Jan. 1984) 78 Am. J. Int'l L. 145.

[95]Ibid.

[96]Departments of State and Defense, *Grenada: A Preliminary Report* 15-17 (1983); cited in ibid, at 146.

the active strength of the Grenadan Army[97].

The approach adopted by Bishop was hardly consistent with the strong non-interventionist tradition of the members of the OECS Although the Bishop regime posed no immediate threat to the region, the US was not pleased with the developments. Grenada's move towards Cuba and the Soviet Union was seen as a threat to US interests and security.

Prime Minister Bishop's pro-Marxist regime was toppled by Deputy Prime Minister Bernard Coard on October 12, 1983. A series of events between October 12 and October 25, 1983 led to a decision by the United States' President Ronald Reagan to invade Grenada. By October 30, the invasion had been completed, and "order" was restored in the island. The following is a detail of the events that led to President Reagan's decision that military force was required.

Sometime during the night of October 13, 1983, Maurice Bishop was placed under arrest by a dissident faction led by Coard. A period of political confusion, riots, curfews, breaking down of authority and increasing threats to civilians followed Bishop's arrest. On October 16, the head of Grenada's army and its Ambassador to Cuba, Major Liam Omo Cornwall, announced in a radio statement that the army had seized control

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[97]"Excerpts of US President Ronald Reagan's Televised Speech on Grenada and Lebanon, on October 27, 1983", reprinted in S. F. Lewis and D. T. Mathews, eds, *Documents on the Invasion of Grenada, October 1983* (Puerto Rico: Institute of Caribbean Studies, 1984) at 27.

of the nation and deposed Prime Minister Bishop[98]. This statement was the first confirmation of reports, circulating during the previous two days, that Bishop was under some form of detention, and that Coard was in charge of the country.

On October 19, Bishop, three members of his cabinet (including Education Minister Jacqueline Creft), and union leaders were executed. At least eighteen people died, including women and children, when the coup forces opened fire on a crowd of Grenadans protesting their actions[99]. That same day, Radio Free Grenada broadcast a statement by Army Commander General Hudson Austin who announced the dissolution of the Government and, the installation of a sixteen member Revolutionary Military Council (RMC). The RMC imposed a five day "24-hour shoot-on-sight curfew" on civilians which, in reality, had the same effect as putting the entire population under house arrest.

Since Bishop's coup in 1979, the US had felt uneasy about Grenada. The Caribbean was perceived as crucial to America's security since three fourths of all US oil imports transit the area -- that is, more oil than transits the Strait of Hormuz[100]. It was believed, however, that Grenada had become a Cuban satellite that was moving more and more towards Moscow and

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[98]"Chronology" (Dec. 1983) 83 Dep't St. Bull. 86 at 87.

[99]Norton Moore, supra note 94, at 146.

[100]M. Adkin, *Urgent Fury: The Battle for Grenada* (U.S.A.: Lexington Books, 1989) at 109.

Havana[101]. Bishop's execution was a fleeting opportunity for the US to act dramatically in the Caribbean. The chance for inflicting military defeat on a rigid Marxist regime and establishing a "democratic" government would exist for a few days only, and this was an opportunity that the US could not easily ignore.

On October 13, an inter-agency group was formed in Washington to discuss the growing unrest in Grenada and to examine the possible dangers it might pose to the security of US citizens living or studying in Grenada. The following day, this group met again to review unconfirmed reports of Bishop's arrest. According to Langhorne A. Motley, Assistant Secretary for Inter-American Affairs, the State Department began to review the standard evacuation plans for Grenada. The office of the Joint Chiefs of Staff, meanwhile, was asked to review the contingency evacuation plans[102]. On October 17, Motley chaired a special inter-agency meeting to review all available

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[101]Apparently, after the invasion, US forces found proof of Grenada's move towards the Soviet Union and Cuba. In a statement to the U.N. General Assembly on November 2, 1983, Ambassador Kirkpatrick stated that documents of secret military assistance agreements between Grenada and the Soviet Union, Cuba, and North Korea had been found. The agreements were executed between 1980 and 1982, and provided for, among other things, the training of Grenadan soldiers, and the free delivery of military supplies to Grenada. "Ambassador Kirkpatrick's Statement, U.N. Security Council, Oct. 27, 1983" (Dec. 1983) 83 Dep't St. Bull. 74 at 77. These documents supposedly proved, albeit after the fact, that US worries regarding Grenada's alliance with the Communist countries was justified.

[102]Langhorne A. Motley, "The Decision to Assist Grenada" (March 1984) 84 Dep't St. Bull. 70 at 70.

information and examine preparation for a possible evacuation of US citizens. From that day forward, the planning took place in an inter-agency forum with representatives of all relevant agencies participating on a daily basis[103]. The President and the Vice-President were kept informed of all developments that occurred in these meetings.

On October 18, concern for the safety of American citizens in Grenada had apparently peaked and, as a result, a formal request for assurances of the well-being of the US citizens was sent to Grenada via Barbados[104]. The United States, as is its policy with small countries, did not have an embassy in Grenada and relations between the two countries were handled through the United States Embassy in nearby Bridgetown, Barbados. The next day, Grenada responded to the request for the safety of Americans. The response read, in part, that

> ... the interests of US citizens are in no way threatened by the present situation in Grenada which the Ministry [of External Affairs] hastens to point out is a purely internal matter[105].

Motley, however, interpreted this response as containing no assurances, no concrete measures to safeguard foreign residents,

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[103]Ibid. Unfortunately, no information is available on which agencies were involved in these meetings.

[104]Ibid, at 71. There were about 1,100 US nationals on the island, 650 of whom were students at St. George's University, School of Medicine.

[105]Ibid.

"just a bland assertion and a blunt slamming of the door"[106]. He claimed, furthermore, that on the 19th, the US Embassy in Bridgetown attempted to send two Foreign Service officers to Grenada to make an assessment of the situation. Their plane was turned back, and not until three days later were US officials permitted to travel to the island[107]. The delay in ascertaining the safety of the Americans on the island was a great source of concern for the Reagan Administration that did not want another Teheran-type hostage situation.

A second occurrence on the 19th that considerably worried the officials was the murder of Bishop and members of his cabinet. State Department received a warning from Ambassador Milan D. Bish (US Ambassador to Barbados) that the necessity for a sudden evacuation might arise at any time[108]. This day marked the beginning of serious planning for the possibility that evacuation of the Americans, without the permission of the Grenadan government, would prove necessary.

On Thursday October 20, as more information about the developments in Grenada was arriving in Washington, the President asked Vice President George Bush to chair a meeting with National Security advisers reviewing the events to date. Subsequent to that meeting, and on the recommendation of that

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[106]Ibid.

[107]Ibid.

[108]Ibid.

group, the government made a public expression of its "grave concern" at the events[109]. The President, furthermore, decided to divert some naval ships, that were headed toward Lebanon, in the direction of Grenada. This was only a precautionary measure so that if the situation became worse, or the non-permissive evacuation of the Americans became inevitable, the US would have the capability to act quickly and decisively[110].

On October 21, Barbados (although it is not a member itself) hosted a meeting of the states of the OECS. Jamaica, though it is not a member either, was also invited by the members of the OECS to be present at the meeting. The United States was not present at the meeting; President Reagan was, however, informed of the decisions made by the OECS states immediately afterwards. Grenada, a member state of the OECS, on the other hand, was not asked to participate on the basis that it lacked an apparent government[111]. After considerable discussion (and the voicing of doubts on the part of Antigua)

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[109]F. Ambursley and J. Dunkerley, *Grenada: Whose Freedom?* (G.B.: Latin American Bureau, 1984) at 77. Unfortunately, more information on the deliberations in this meeting is not available.

[110]Lewis and Mathews, supra note 97, at 20.

[111]Motley, supra note 102, at 72. Even though Grenada was not invited to this meeting, it will become significant later that the O.E.C.S. did not suspend Grenada's membership in the Organization. On October 23, the heads of state of CARICOM (the overall Caribbean Community), however, suspended Grenada's membership. See "Statement Prepared for Presentation Before the House Committee on Foreign Affairs on Nov. 2, 1983 by Deputy Secretary of State Kenneth W. Dam", reprinted in M. Nash Leich, "Contemporary Practice of the US Relating to International Law" (Jan. 1984) 78 Am. J. Int'l L. 200 at 207.

the Caribbean states decided, because of their inability to confront the military strength of Grenada alone, to request the assistance of the United States, Jamaica and Barbados[112]. A statement released by the OECS on October 25 stated that decision to take action was made when, after considering the state of events, they became "deeply concerned" that the situation would worsen and that there would be "further loss of life, personal injury and a general deterioration of public order"[113].

The next day, October 22, the US received a confirmation of the OECS request. The message, which came in from Barbados, reached Secretary of State George Shultz in Augusta at 2:45 a.m., and he discussed it with Robert C. McFarlane (Assistant to the President for National Security Affairs). About half-hour later, Vice President Bush convened the key National Security advisers in Washington[114]. After that meeting, Reagan signed orders to prepare for a broader mission to restore order in Grenada in co-operation with the Caribbean forces[115]. Until then, according to Motley, the Administration had been planning unilaterally by focusing on the safety of the Americans in Grenada. When the member states of the OECS approached them,

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[112]Ambursley, supra note 109, at 80.

[113]"Chronology", supra note 98, at 88. The complete text of the OECS statement can be found in "Grenada: Collective Action by the Caribbean Peace Force" (Dec. 1983) 83 Dep't St. Bull. 67.

[114]Lewis and Mathews, supra note 97, at 20.

[115]Motley, supra note 102, at 70.

however, the decision-making process shifted into a multilateral mode.

That same day, General Austin drew up a statement declaring that the RMC was to be a strictly temporary government, that a civilian administration was to be appointed within twelve hours, and that a team would be appointed to investigate the events of October 19, the day of Bishop's execution. This statement was transmitted to Washington and London over the week-end, although neither government admitted receiving it until after the invasion[116]. Over the week-end, Austin agreed to meet with the Premier of St. Lucia, John Compton. From midday on Saturday October 22, all the signals from Grenada pointed to a growing disposition to negotiate[117].

United States officials finally reached the island on Saturday October 22. They unanimously assessed the position of those officials they were able to meet as "obstructionist" and "unco-operative". No coherent government seemed to be functioning or even forming[118]. This assessment, however, contradicts the statement that was made by Austin on the same day. Furthermore, the Department of State reported that on October 21, General Austin invited a delegation from Barbados to look into the safety of US and United Kingdom nationals on the island. The delegation included two US diplomats representing

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[116]Ambursley, supra note 109, at 83.

[117]Ibid.

[118]Motley, supra note 102, at 71.

the Ambassador to Barbados and a representative to the British High Commissioner[119]. On Sunday October 23, some British and Canadian citizens as well as a small number of US students left Grenada in chartered aircraft, which were in no way impeded from flying by Grenadan authorities[120]. If Austin and other officials had really been unco-operative, then it becomes very difficult to explain or understand these developments.

On October 23, Ambassador McNeil and General Crist secretly visited Barbados, and confirmed the widening scope of the crisis. They met with the leaders of the Caribbean countries, and carefully explored all the information available to them. Throughout these meetings, Washington was informed of any developments by telephone. Planning for peaceful evacuation, however, continued in parallel with the other plans. The possibility of using a Cunard-line ship that was in the vicinity was explored. It soon became apparent that conditions on the island would not permit evacuation by civilian aircraft. Subsequent information revealed that the same Cunard ship was fired at by Grenadan anti-aircraft guns[121].

Sunday night, President Reagan received news of the 230 US marines that had been killed by a bomb that destroyed their barracks in Beirut. The difficulties and losses suffered by the

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[119]"Chronology", supra note 98, at 88.

[120]Ambursley, supra note 109, at 84.

[121]Motley, supra note 102, at 71. Statement by Ambassador Motley, Assistant Secretary for Inter-American Affairs -- before the House Armed Services Committee on January 24, 1984.

US contingent in Beirut had already led to much domestic criticism of the Reagan government. The invasion of Grenada may have offered a chance to restore United States' reputation as a world power and provide substance for the claim that the Administration was combatting the "Soviet-Cuban conspiracy".

Late Sunday night, the President made "a tentative decision" to respond to the request of the OECS[122]. On Monday October 24, as plans were being made and the forces organized, a message arrived from the Prime Minister of Barbados informing the United States that he had received a confidential appeal from the Governor General of Grenada, Sir Paul Scoon, for assistance to restore order on the island[123]. The President met in the afternoon with the Secretary of Defence and the chiefs, and at the conclusion of the meeting made "a sort of semifinal military decision"[124]. The directive of the President to proceed was signed at about 6:00 p.m. on October 24.

President Reagan, in a letter dated October 24, wrote to the Speakers of the House and Senate that the objectives of the United States were: (1) to join the OECS collective security forces in assisting the restoration of conditions of law and order; and (2) to facilitate the evacuation of US citizens[125].

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[122]Lewis and Mathews, supra note 97, at 21. Statement by Secretary Shultz.

[123]Motley, supra note 102, at 73.

[124]Lewis and Mathews, supra note 97, at 21. Again, quote from Secretary Shultz.

[125]Motley, supra note 102, at 70.

It should be pointed out that no reference was made to the request made by Governor General Scoon; nor was any reference made to Soviet or Cuban involvement in the crisis. These points will be of significance in later sections.

After informing the British Government and the congressional leadership that immediate military action was necessary, Reagan ordered US participation in the operation to proceed. Concern for the safety of the Americans and for the success of the operation caused the US to refrain from informing the OAS, the UN, and European allies of the decision to take action. Also, the decision was hidden from Cuba and the Soviet Union until the morning of October 25 so that they could not interfere with the success of the operation[126].

On October 25, at about 5:00 a.m. Eastern Daylight Time, approximately 1,900 US Army and US Marine Corps personnel began landing in Grenada. They were supported by elements of the US Navy and the US Air Force. Member states of the OECS, along with Jamaica and Barbados, provided approximately 300 personnel[127]. The next day, evacuation of the Americans began. During the hostilities, 599 Americans were evacuated. Citizens of Canada, the United Kingdom, East Germany, and other nations were also voluntarily evacuated on official US aircraft[128].

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[126]Ibid, at 71.

[127]Ronald Reagan, "Letter to the Congress" (Dec. 1983) 83 Dep't St. Bull. 68 at 69.

[128]Motley, supra note 102, at 72.

On the morning of October 25, after US forces had actually landed in Grenada, the President announced, in a news conference, that action had been taken. He stated that there were three reasons for ordering this "decisive action":

> First, and of overriding importance, to protect innocent lives, including up to a thousand Americans, whose personal safety is, of course, my paramount concern. Second, to forestall further chaos. And third, to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada ...[129]

Eugenia Charles, Prime Minister of Dominica and Chairperson of the OECS, was secretly flown in a US government plane to Washington the day before so that she could make an appearance alongside Reagan at the announcement of the invasion[130]. Viewed as a hard-hitting, uncompromising anti-communist, she was a great success. In fact, when she was asked if she had any information that the Soviets and the Cubans were behind the takeover in Grenada, she answered that in the days before the revolutionary council took power, there was "obviously a conduit" of movements "between the Soviet Embassies and known activists and the activists' return to Grenada"[131]. In short, she answered "yes".

In an afternoon new conference, held by Secretary Shultz, the issue of Soviet and Cuban involvement in Grenada was raised

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[129]Ronald Reagan, "President's Remarks, Oct. 25, 1983" (Dec. 1983) 83 Dep't St. Bull. 67.

[130]Adkin, supra note 100, at 113.

[131]"Chronology", supra note 98, at 88.

again. Shultz said that although the US had no direct information on whether or not the Soviets or Cubans were involved in any way in the overthrow of the Bishop government, the OECS states "feel that such is the case". He emphasized, however, that US action was not based on this "feeling"[132]. Shultz was also asked about the United Kingdom recommendation that the US should not proceed with taking military action. Mrs. Thatcher had said in Parliament that her government advised against the US decision and could not support it. Secretary Shultz answered by reminding the news reporters that Grenada is no longer a British colony, and can make decisions independently. The US was asked to help, and because "each state has to take its own decision", the President made one for the United States[133].

Democratic leaders in Congress, on October 26, held that the Reagan Administration had not complied with the "War Powers Resolution" in its invasion of Grenada[134]. Under the measure, the President would have to withdraw US troops within sixty days unless he could obtain permission from Congress to keep them there longer. Since it was not Reagan's plan to keep the troops there that long, the objection by the Democrats caused him little concern. As a matter of fact, that same day, hundreds of

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[132]Lewis and Mathews, supra note 97, at 30.

[133]"Secretary Shultz's News Conference" (Dec. 1983) 83 Dep't St. Bull. 69 at 71.

[134]"Chronology", supra note 98, at 88.

paratroopers were flown to Grenada to bolster the force already there. By October 28, Admiral Wesley L. McDonald (the commander of US forces in Grenada) said that there were about 6,000 US troops on the island[135].

The Governor General broadcast a radio message to the population of the island, on October 28, reassuring them that the crisis was almost over and noting that:

> The people of Grenada ... have welcomed the presence of the troops [of the US/Caribbean security force] as a positive and decisive step forward in the restoration not only of peace and order but also of full sovereignty[136].

On the same day, a United Nations Security Council resolution, by a vote of 11-1 (US veto) with three abstentions (Togo, Zaire, and the U.K.), deeply deplored the armed intervention into Grenada which it called "a flagrant violation of international law and of the independence , sovereignty and territorial integrity" of Grenada. It also called for the immediate cessation of the intervention and withdrawal of the foreign troops[137].

Finally, on November 2, the armed conflict came to an end. According to Motley, 45 Grenadans were killed, and 337 were wounded. Furthermore, 18 US soldiers were killed in action, and 116 were wounded. Since the resistance was led by Cuban military and construction personnel, of the approximately 800

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[135]Ibid, at 89.

[136]Motley, supra note 102, at 72.

[137]"Chronology", supra note 98, at 89.

Cubans in Grenada, 24 were killed and 59 were injured[138].

[138]Motley, supra note 102, at 70.

B. NICARAGUA:

The United States intervention in Nicaragua has a much more complicated history than that of Grenada. The "intervention" was begun by the Carter Administration and lasted into Reagan's second term in office. As was previously mentioned, the period that is of direct concern to this study is 1981 to 1984. First, however, a concise look at the events prior to Reagan's inauguration are required.

The Sandinista Front for National Liberation (FSLN) was formed in 1961 by several young Marxists who wanted to overthrow the Somoza government. In the 1960's, their guerrilla activities were relatively unsuccessful; in the 1970's, however, they gained popularity and support as Somoza's rule became more abusive and corrupt. Finally, after an eighteen-month war, which cost Nicaragua around 50,000 lives[139], Somoza's army was defeated and the FSLN came to power in 1979. During the first year after the revolution, Jimmy Carter was the President of the United States and although he was not pleased with the Sandinista victory, he had decided not to raise the issue publicly. He offered economic aid with strings attached in the hope of pressuring the Sandinistas away from Cuba and the

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[139]T. W. Walker, ed., *Reagan versus the Sandinistas: The Undeclared War on Nicaragua* (U.S.A.: Westview Press, 1987) at 3.

Soviet Union and towards the US. In his last week in office, however, Carter suspended all US economic aid to the Sandinistas and sent $10 million in arms and equipment, as well as nineteen military technicians, to El Salvador[140]. Because United States policy in Central America was not a very controversial issue at that time, Carter was able to do this without much publicity.

In fall 1980, the election of Ronald Reagan as President signalled a new phase. Ten days before Reagan's inauguration, leftist guerrillas, hoping to duplicate the success of Sandinistas in Nicaragua, launched what they called "the final offensive" in El Salvador. The Farabundo Marti National Liberation Front (FMLN) was hoping that its offensive would succeed, and President-elect Reagan would be presented with a *fait accompli*. By January 12, 1981, the Salvadoran government pronounced the offensive a clear failure[141]. As a result of this FMLN failure, Central America became a "front-burner" issue in American foreign policy just as Reagan came into office. Even though the Carter Administration had expended $1 million in covert funds to organize and bolster internal opposition groups in Nicaragua, these efforts to manipulate Nicaragua were considered insufficient. The new administration was going to support a much harder stand against the Sandinistas -- whose

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[140]Roy Gutman, *Banana Diplomacy: The Making of American Foreign Policy in Nicaragua, 1981-1987* (U.S.A.: Simon and Shuster, 1988) at 22-23.

[141]H. Sklar, *Washington's War on Nicaragua* (Boston: South End Press, 1988) at 53.

very existence was perceived as a threat to US security and hegemony in the Western Hemisphere[142].

One of the hardliners of the Reagan Administration was Secretary of State Alexander Haig who, in early meetings of the National Security Council, called for "a determined show of American will and power" and "a high level of intensity at the beginning"[143]. Haig ordered then-State Department Adviser Robert McFarlane to draw up an options paper, entitled "Taking the War to Nicaragua", that would weigh the possibility of the open use of force against Cuban ships and planes, as well as a naval blockade against Nicaragua[144]. He hoped that by presenting this paper his case that the US needed to go to the source of the revolution in Central America (i.e., Nicaragua) would be bolstered.

Most of the President's advisers (including Vice President George Bush, Secretary of Defence Caspar Weinberger, and the Joint Chiefs of Staff) vetoed Haig's call to war[145]. They believed that any overt use of force will conjure up images of "another Vietnam" in the mind of the public, divert resources from more important battlefields in Europe and the Middle East, and jeopardize the Administration's efforts to garner

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[142]Walker, supra note 139, at 21.

[143]Quote from Haig's memoirs Caveat, p. 129. Cited in Ibid, at 22.

[144]Ibid.

[145]Ibid.

congressional support for its domestic and foreign policy agenda[146]. It was against this backdrop of the "Vietnam Syndrome" that the CIA operations emerged as the centrepiece of a low-intensity warfare strategy that incorporated economic destabilization, psychological operations, and diplomatic pressures.

After terminating economic assistance to Nicaragua, the Administration began to allow anti-Sandinista paramilitary training camps to operate openly in Florida, California, and the Southwest. In 1981, a group of CIA-backed counter-revolutionaries emerged in Nicaragua as "the contras". Parallel to the operations of the CIA, the Administration was following a policy of imposing economic sanctions against Nicaragua. In February 1981, a $9.6 million sale of wheat was suspended until March, when it was completely cancelled[147]. Furthermore, in March, the Reagan Administration blocked the remaining $15 million of the $75 million in foreign aid credits extended to Nicaragua by the previous administration[148].

On February 23, the State Department released a White Paper entitled *Communist Interference in El Salvador*[149]. In this

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[146]President Reagan, however, did act on one of Haig's recommendations and, two days after taking office, he froze economic aid to Nicaragua, and terminated all financial aid and access to loans from the U.S. See Sklar, supra note 141, at 65.

[147]Ibid.

[148]E. B. Burns, *At War in Nicaragua: The Reagan Doctrine and the Politics of Nostalgia* (N.Y.: Harper and Row, 1987) at 30.

[149]Sklar, supra note 141, at 68.

paper, the Administration set the agenda by placing both El Salvador and Nicaragua within a cold war context, and by ensuring that mainstream debate would be restricted to the means to be used in achieving the goal of stopping "communist aggression" before it completely got out of control. Two weeks later, on March 9, Reagan authorized covert military actions against the government of Nicaragua that were supposedly designed to interdict Nicaraguan supplies to El Salvador[150]. Reagan submitted his first "Presidential Finding on Central America" to Congress and obtained an authorization to provide $19.5 million for the CIA to expand its operations[151]. At the same time, the Reagan Administration cut off all aid to Nicaragua, including food shipments. This was the official start of "The Project", as the covert war was known within the intelligence community.

During the spring of 1981, the contras began to receive training at camps run by Cuban exiles in Florida, as well as Honduras, and other countries. The media was alerted of this activity in March and the first accounts of contra training in the US were published[152]. The publicity, however, did not

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[150]Marlene Dixon and S. Jonas, eds, *Nicaragua Under Siege* (U.S.A.: Synthesis Publications, 1984) at 117.

[151]Walker, supra note 139, at 23.

[152]Sklar, supra note 141, at 75. It should be noted, however, that the first extensive account of US participation in the war against Nicaragua was not published until November 8, 1982 when Newsweek carried a special report "America's Secret War -- Target Nicaragua".

cause the Administration any worry. In May, the CIA provided $50,000 to Argentine military intelligence officials to be funnelled to the incipient contras as an incentive to unite under one anti-Sandinista banner. By this time, even though contra leaders refused to comment on whether or not they were receiving CIA and/or Pentagon support, Washington was openly sanctioning the existence of paramilitary training camps for Nicaraguan exiles in the United States[153].

In August 1981, the CIA began to draw up contingency plans for clandestine operations in Washington, D.C. The Director of the CIA, William Casey, appointed Duane Clarridge to oversee CIA operations against the Sandinistas. Clarridge joined Assistant Secretary for Inter-American Affairs Thomas Enders, General Paul Gorman, and Lt. Colonel Oliver North to form a Restricted Inter-agency Group, also known as the "Core Group"[154]. Enders went to Managua to meet with Junta Co-Ordinator Daniel Ortega and other officials. The major issue in these meetings was Nicaragua's alleged export of revolution. The Nicaraguans were not able to convince Enders that they had no such plans. Despite the fact that they had closed down a clandestine FMLN radio station and curtailed the shipment of weapons to El Salvador, the US terminated all aid to Nicaragua[155].

In November, the Core Group presented an option paper to

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[153]Walker, supra note 139, at 24.

[154]Ibid.

[155]Sklar, supra note 141, at 91.

the National Security Council to organize a "500-man commando force" which was approved on December 1 by President Reagan[156]. At the same time, Reagan signed National Security Decision Directive 17 on November 23, authorizing the CIA to spend $19.8 million to create an exile paramilitary force in Honduras to harass Nicaragua[157]. The 500-person paramilitary force, combined with a 1,000-man force being trained in Argentina, was supposed to bring about widespread opposition to the Sandinista government. The force was meant to be restricted in numbers, was to be comprised of Cuban and Nicaraguan exiles, and the primary targets were supposed to be Cuban support structures in Nicaragua and arms supply lines to Salvadoran guerrillas[158]. After Reagan's secret war was well under way, Casey reported to the House and Senate Permanent Select Committees, in December, that there was, in fact, a covert war going on.

By spring 1982, the covert war was successfully under way and the Sandinistas were under increasing pressure[159]. Between April and June, there were 106 contra attacks on Nicaragua,

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[156]Dixon, supra note 150, at 117. Compare with Walker, supra note 139, at 24: Reagan signed National Security Decision Directive 17 on November 23.

[157]Walker, supra note 139, at 6. Also see Sklar, supra note 141, at 100. According to the Washington Post, the figure was exactly $19,950,000. See Washington Post, Mar. 10, 1985, at A1, col. 5.

[158]The CIA proposals are cited in Washington Post, May 8, 1983, at A10, col.3.

[159]See the NSC document, "United States Policy in Central America and Cuba Through FY 84, Summary Paper", reprinted in New York Times, Apr 7, 1983, at A16, col. 1.

including sabotages of economic targets[160]. The economic war against Nicaragua was proceeding as planned, as well. The US by using its central position in the World Bank and Inter-American Development Bank, had managed to cut off the flow of badly needed multilateral loans to Nicaragua[161]. The only loans that were made to Nicaragua were private sector loans which were officially out of the reach of the government. In August, however, the Nicaraguan government rejected the continuing private sector aid because the agreements had political motivations designed to destabilize the country[162].

At the end of the year, in December, the CIA informed Congress that the 500-man operation, originally authorized in the previous year, had grown to a force of 4,000[163]. As a result, an additional $30 million was allocated to the program[164]. The contras had begun daily raids into Nicaraguan territory from their bases in Honduras. Obviously, the Honduran government was closely co-operating with the CIA. The raids also proved that the goal of the contras was not simply to stop the shipment of arms to El Salvador. Their position was becoming more and more defensive, and it was becoming clear that their main objective was to overthrow the Sandinista government.

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[160]Dixon, supra note 150, at 117.

[161]Walker, supra note 139, at 6.

[162]Sklar, supra note 141, at 66.

[163]Washington Post, May 8, 1983, at A11, col. 1.

[164]Ibid.

The US public did not approve of the obvious role and support of the CIA in this operation. The result was the passage by Congress of the Boland-Zoblocki bill of December 8 adopted (by a vote of 411 to nil) in the House and later incorporated by the Joint Conference Committee. This bill prohibited the US from giving aid to paramilitary groups for the purposes of overthrowing the Nicaraguan government or promoting a war between Nicaragua and Honduras[165]. Nevertheless, covert US aid to the counter-revolutionaries continued.

On July 19, 1983, on the anniversary of the Nicaraguan Revolution, Daniel Ortega announced a six-point peace proposal[166]. The FSLN proposed that the heads of the Central American states start the immediate discussion of the following points:

> 1) A commitment to end any prevailing situation of war through the immediate signing of a non-aggression pact between Nicaragua and Honduras;
> 2) The absolute end to all supplies of weapons by any country to the forces in conflict in El Salvador so that the people may resolve their problem without foreign interference;
> 3) The absolute end to all military support, in the form of arms supplies, training, use of territory to launch attacks, or any other form of aggression, to forces adverse to any of the Central American governments;
> 4) Commitments to ensure absolute respect for the Central American people's self-determination, and non-interference in the internal affairs of each country;
> 5) The end to aggression and economic discrimination against any country in Central America; and
> 6) No installation of foreign military bases on Central American territory, and the suspension of

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[165]New York Times, Dec 23, 1982, at A1, col. 3.

[166]Dixon, supra note 150, at 102.

> military exercises in the Central American region which include the participation of foreign armies[167].

The United Nations was charged with supervising and guaranteeing compliance with the proposals set forth in the plan.

The Reagan Administration promptly rejected the peace proposal because, according to Motley, it was "one-sided"[168]. The Reagan Administration wanted a plan which dealt with democratization, Soviet and Cuban aid to Nicaragua, and foreign military advisers in Nicaragua. Although Ortega's proposal explicitly stated that there would be no foreign military bases on any Central American country, this was not what Reagan wanted. A general ban like that would have possibly prevented the United States from installing military bases in the region in the future. By now, the CIA mercenary force had grown to 10,000 men[169]. In September, Reagan authorized a further expansion to 12,000 - 15,000 men, and a shift in tactics to emphasize destruction of vital economic targets[170]. An additional $24 million was appropriated to finance these activities[171].

On September 27, in a speech to the 38th General Assembly of the United Nations, Ortega tried, once again, to convince the

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[167]Ibid.

[168]Langhorne A. Motley, "Is Peace Possible in Central America?" (March 1984) 84 Dep't St. Bull. 67.

[169]Washington Post, July 14, 1983, at A1, col. 6.

[170]Wall Street Journal, March 6, 1985, at A20, col. 1.

[171]Time, April 23, 1984, at 19.

United States that it did not have any expansionary ambitions[172]. As a matter of principle, Nicaragua would never attack another country. He acknowledged that US military presence in the region had been increasing -- openly in El Salvador and Honduras, and covertly in Costa Rica. Ortega concluded by reminding the United Nations that Nicaragua had a "right to choose its own internal system, its own brand of democracy", and this is "a right of [the Nicaraguan] people that cannot be negotiated, cannot be discussed, and must be respected"[173]. The United States -- as was its usual practice by this time -- instead of listening to what Ortega was saying, criticized him for using the United Nations forum for propaganda purposes.

Not only did the US reject Ortega's attempts at negotiations, but the following month, in the wake of the US invasion of Grenada, the Reagan Administration gave an explicit warning to Nicaragua. A State Department official was quoted in the *New York Times* for saying: "if [Nicaragua] had any doubts about our willingness to use force under certain circumstances, those doubts should be erased"[174]. Shortly thereafter, the CIA increased the pressure on the Sandinista government.

In January 1984, Washington began mining Nicaragua's harbours -- an action which happens to be an act of war under

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[172]Dixon, supra note 150, at 104.

[173]Ibid, at 109.

[174]New York Times, Nov. 7, 1983, at A1, col 2.

international law. Reagan approved the mining on the recommendation of McFarlane, and was briefed on and approved even the minor operational details. Mines were deployed in the ports of Corinto, Puerto Sandino, and El Bluff from January through March 1984[175]. A variety of mines were used, most reportedly products of the CIA weapons Group in Langley, Virginia, assisted by the Mines Division of the US Navy Surface Weapons Centre in Silver Spring, Maryland. CIA weapons specialists in Honduras did the final assembly[176]. The mines were deployed in Nicaragua's harbours from a mother ship positioned off the coast of Nicaragua, by US military and intelligence personnel, including Latin American commandos from third countries hired and trained by the CIA[177].

The *Wall Street Journal* reported that between February 25 and March 28, five international ships hit mines, with serious damage to a Dutch dredger and a Cuban freighter; also, at least four small Nicaraguan patrol boats were sunk by the mines[178]. The Administration, however, justified the mining as an act of self-defence. The argument was that since Nicaragua was responsible for some form of aggression, namely supporting the guerrillas in El Salvador, then mining its ports was an act of

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[175]Sklar, supra note 141, at 165.

[176]Ibid. Also see New York Times, June 1, 1984, at A4, col. 3.

[177]New York Times, April 16, 1984, at A4, col. 5.

[178]Wall Street Journal, March 6, 1985, at A20, col. 1.

self-defence, just like any other use of force[179].

Nicaragua did not retaliate; instead, it took its case to the United Nations. On April 4, 1984, the Security Council drafted a resolution condemning the mining of the ports of Nicaragua, affirming the right of free navigation and commerce in international waters, and calling for all states to refrain from any further hostile action. The vote on the resolution was thirteen to one (the US vetoed), with Great Britain abstaining[180]. Nicaragua then decided to take its case to the ICJ. By the week-end of April 8, the news leaked out that Nicaragua had hired a well-known American international lawyer, Abe Chayes, along with Ian Brownlie, a well-respected professor of international law at Oxford University, to file proceedings against the US.

Immediately after receiving this news, the Reagan Administration announced that it was withdrawing from the jurisdiction of the ICJ, for a period of two years, any disputes concerning the US and Central America. The announcement also stated that the withdrawal was effective as of April 6, 1984[181]. The following day, as the US had expected, Nicaragua filed the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. US)* at The Hague, asking the Court

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[179]Sklar, supra note 141, at 166.

[180]Robert A. Friedlander, "Mr. Casey's 'Covert' War: The United States, Nicaragua, and International Law" (Winter 1985) 10:2 U. Dayton L. Rev. 265 at 284.

[181]New York Times, April 9, 1984, at A1, col.2.

to declare that the US actions had caused great loss of life and property in Nicaragua, had essentially been aimed at overthrowing the government, and were contrary to international law[182].

The *Nicar. v. US case* covered such actions as the presidential authorization of the covert activities, US military maneuvers in Honduras aimed at intimidating Nicaragua, and mining the harbours and other economic targets[183]. Nicaragua challenged US claims of self-defence and charged that US actions violated the charters of the U.N. and the O.A.S. as well the US Constitution. Article 15 of the O.A.S. Charter, for example, states that:

> No state or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed forces but also any other form of interference ...

The U.N. Charter, of course, contains the same basic principle of non-intervention.

The US withdrawal from the Court's jurisdiction was widely denounced as illegal and unacceptable. The US had accepted the Court's compulsory jurisdiction in 1946, and it had agreed to give a six-month notice if jurisdictional recognition were to be

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[182]*The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Provisional Measures, Order of May 10, 1984, I.C.J. Reports 1984, p. 1.

[183]Sklar,supra note 141, at 169.

withdrawn[184]. The purpose of this proviso was specifically to prevent the US from rejecting its obligation to the Court in the face of an unpleasant proceeding. The withdrawal, assuming it were otherwise valid, would have been effective six months after is tender. In other words, the withdrawal could not immediately keep the Court from hearing the case.

The US decision, furthermore, was irrational since in 1980 the US had gone to the Court with a case against Iran for holding American hostages. When Iran refused to accept the Court's jurisdiction, and the US received a favourable ruling, it insisted that the Court's decision was legal and binding. When Nicaragua went to Court, however, Ambassador Kirkpatrick went so far as calling the Court "a semilegal, semijuridical, semipolitical body, which nations sometime accept and sometimes don't"[185].

The Court's decision, announced on May 10, did not reach the merits of the case. The Court issued a provisional restraining order which granted protection to Nicaragua. It was held by a vote of 14 to 1 that the parties in the dispute must refrain from any military or paramilitary activities that are prohibited by international law[186], and unanimously determined that no action of any kind be taken that could aggravate or

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[184]Ibid, at 168.

[185]Ibid, at 170.

[186]The US judge cast the only negative vote. See supra note 182, at 29.

widen the dispute[187]. By another unanimous vote, the Court mandated that no further action be taken by either party that might prejudice the rights of the other party until the Court had a chance to rule on the substantive issues of the case[188]. The US was ordered, *inter alia*, to immediately stop any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines[189]. In fact, the US only stopped the mining.

After the announcement of this decision, the US presented two fresh new arguments against the Court's jurisdiction[190]. First, the US argued that, since it had already suspended its consent to the compulsory jurisdiction of the Court, there was no need to carry the case any further. The second argument that was presented by the US was highly technical, and it was cast aside almost immediately. The US claimed that Nicaragua had no right to plead before the ICJ because it never filed instruments of ratification to officially accept the Court's jurisdiction. The United States lost on both contentions[191]. By a vote of 15 to 1 (again, with the negative vote of the US judge) the Court

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[187]Ibid, at 22.

[188]Ibid.

[189]Ibid.

[190]In fact, a third argument involving the inherent right of self-defence was also presented. This argument will be discussed in more detail in the last chapter.

[191]*Nicar. v. U.S.*, Jurisdiction and Admissibility, Judgment of Nov. 26, 1984, p. 1 at 11-15.

decided on November 26, 1984 that it did have jurisdiction to entertain the case brought to it by Nicaragua[192].

On June 1, 1984, while on his flight home from President Jose Napoleon Duarte's inauguration in El Salvador, Secretary Shultz made a sudden visit to Managua. There, he met with the top leaders of the Sandinista junta, including Ortega, at the airport[193]. Apparently, Reagan had asked the Secretary of State to make the stop in order to explore the possibility of improving relations between the two countries[194]. During the meeting, Shultz made the following demands: an end to Nicaraguan support for rebel guerrilla groups in Central America; a reduction of military strength to numbers that would restore a military balance between Nicaragua and its neighbours; and fulfilment of the original Sandinista commitment "to support democratic pluralism"[195].

Upon reaching Washington, however, Shultz reiterated the Reagan Administration's intention to request an additional $21 million from Congress to continue aid for the contras (which Congress denied the next month)[196]. At the same time, incidentally, talks continued with Nicaragua on an ambassadorial

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[192]Ibid, at 54.

[193]Friedlander, supra note 180, at 278.

[194]Ibid, at 279.

[195]James H. Michel, "U.S. Relations With Honduras and Nicaragua" (June 1984) 84 Dep't St. Bull. 81 at 84.

[196]Friedlander, supra note 180, at 279.

level. It did not take long for the US to start raising the spectre of a Nicaraguan Marxist dictatorship again, and claim once more to have evidence of clandestine Nicaraguan military assistance to guerrilla movements in Central America.

In October, a manual published by the CIA in the name of the contras began to circulate in the US. It was a 90-page Spanish-language booklet, entitled *Psychological Operations in Guerrilla Warfare*. The manual contained a section, "Selective Use of Violence", that suggested, among other things, hiring professional criminals to carry out "selective jobs" and advised arranging for the death of a contra supporter to create a "martyr" for the cause[197]. Congress was apparently outraged that the CIA had behaved in this manner. Funding to the contras from any agency involved in "intelligence activities" was cut-off[198]. From then on, the President had to openly ask for money to arm a people to fight a government with which, incidentally, the US still maintained diplomatic relations. The situation raised abundant moral and legal questions.

In the same month, the United States presented several arguments in The Hague that the World Court did not have jurisdiction to decide on Nicaragua's claims. All of these submissions were rejected by the Court on November 26 when the Court decided that it did, in fact, have jurisdiction and that

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[197]Burns, supra note 148, at 58.

[198]Ibid, at 59. North, a White House Liaison to the N.S.C., took charge of coordinating the contras, giving advice and helping them to raise more than $20 million in private funds.

the provisional measures issued in May should remain in effect[199]. The US State Department promptly responded by withdrawing from the proceedings[200]. The US would not participate in the case because when it accepted the Court's compulsory jurisdiction in 1946 it never "conceived of such a role for the Court in such controversies". The State Department also stated that much of the evidence that would establish Nicaragua's fault is of a highly sensitive intelligence character. The US could not risk its national security by presenting such material "before a Court that includes judges from Warsaw Pact nations"[201]. The US did, however, continue its covert war against Nicaragua.

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[199]*Nicar. v. U.S.*, supra note 191.

[200]"U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the I.C.J." (March 85) 85 Dep't St. Bull. 64.

[201]Ibid.

VI. ANALYSIS

The decisions of the Reagan Administration to intervene in the domestic affairs of Nicaragua and Grenada have had numerous legal implications. In many ways, US action in both cases was seen by the international community as contradicting well-established norms and principles of international law. Every state possesses the inherent legal right to choose any form of governmental political institution it desires. Moreover, this right should be available to all states, regardless of size or strength, without prejudice and absent any interference from other states. Yet, in Grenada and Nicaragua, the United States acted to restrain regimes that it found ideologically distasteful.

In both cases, the United States claimed that it had taken action in self-defence. Grenada, however, was hardly a threat to US security; and the same can be argued for Nicaragua. What the US argued, in fact, was that it had acted in "anticipatory" self-defence. The government speculated that Grenada and Nicaragua <u>might</u> someday pose a threat to US security. As was previously mentioned, it is very difficult to support such

anticipatory self-defence legally[202].

In the following sections, the major legal arguments presented by the Reagan Administration in defence of the decisions to intervene in Grenada and Nicaragua will be discussed one by one. With respect to Grenada, three major justifications were presented. First, President Reagan stated that his main concern was the safety of the US nationals who were living in Grenada. Second, the US had taken collective action with the member states of the Organization of Eastern Caribbean States to prevent further chaos. Third, the argument was presented that the Governor General of Grenada had invited the US to take action.

Similarly, the decision to intervene in Nicaragua was based on the United States' claimed right of self-defence. This justification branched out into two different directions: First, the US perceived its national security interests to be threatened; thus, it acted in self-defence. Second, the US joined forces with countries neighbouring Nicaragua and acted in collective self-defence. Finally, the US decision to withdraw from the jurisdiction of the International Court of Justice (and its consequent behaviour in the Court) has had legal implications which are worthy of mention.

The purpose of this section will be to set out, in detail, the arguments used by the US; and then, to apply the norms and rules of international law to comment on the validity of each

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[202]See "Self-Defence" in Chapter III.

argument. Needless to say, if the US justifications contradict norms of international law, then the conclusion that should be reached is that norms of international law and legal standards had little or no impact on determining US policy regarding Central America.

A. GRENADA:

1. Safety of US Nationals in Grenada

On the morning of October 25, when President Reagan announced that American forces had landed in Grenada, he gave two basic reasons for his decision[203]. The first reason was that the security and the lives of US nationals in Grenada were in danger. The Administration maintained, throughout the invasion, that humanitarian intervention was the main justification for US involvement. There was a great deal of discussion about this issue at the initial stages; and if it had been used properly, this defence could have potentially justified the invasion to some extent. Reagan, however, was haunted by the fear of another Teheran-type hostage situation, in which the US was powerless in the hands of a group of fanatics. His Administration was not going to get caught -- as had Carter's -- in a no-win situation that would jeopardize American lives and result in a greater loss of prestige.

Intervention for humanitarian purposes can be justified if the most fundamental human rights of a country's nationals are being violated in another. The right to life, obviously, falls within this category; but some commentators argue that if a state's nationals are being tortured, or are taken hostage, then

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[203]See Reagan, supra note 129.

that state is also justified in intervening[204]. The case of the US students in Grenada, however, was somewhat different because they were not being tortured, nor were they taken hostage.

If a state is required to wait until the fundamental rights of its citizens are actually violated, then it may not be able to assist them at all. The inability of the US to rescue the hostages in Iran supports a view of humanitarian intervention which would allow a state to intervene in the face of "imminent" and "immediate" danger to potential hostages. The requirement of the immediacy of a threat to human rights should be satisfied once a state makes a good faith determination that its nationals are in danger.

The facts in Grenada seem to suggest that there was no real threat to the Americans living on the island. The real danger to the students existed during the initial phases of the coup, and since Coard and Austin did not threaten the students in any way then, there was no reason to believe that the students were in danger.

Coard and Austin must have been concerned about the safety of the Americans because they desperately sought to avoid giving the US a pretext to invade. In fact, at one point over the week-end, the RMC became aware that the US was preparing to launch a full-scale military attack on Grenada. On Monday, October 24, the RMC sent a telex to the US Embassy in Barbados

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[204]For example, see Laura Wheeler, "The Grenada Invasion: Expanding the Scope of Humanitarian Intervention" (Summer 1985) 8 B. C. Int'l & Comp. L. Rev. 413 at 423.

urging the US and its Caribbean allies not to invade Grenada. The telex stated, in pertinent part:

> We should view any invasion of our country, whether based on the decision of those [Caribbean Community] governments or by that of any other government, as a rude violation of Grenada's sovereignty and of international law ....
>
> Grenada has not and is not threatening the use of force against any country, and we do not have any such aspirations .... [W]e are prepared to hold discussions with those countries in order to ensure good relations and mutual understanding ....
>
> We reiterate that the lives, well-being and property of every American and other foreign citizen residing in Grenada are fully protected and guaranteed by our government. However, any American or foreign citizen in our country who desires to leave Grenada for whatever reason can do so ....[205]

Despite this plea for non-intervention and requesting negotiations, the US led the military invasion of Grenada the following day.

The Reagan Adminstration argued that political authority had disintegrated in Grenada, that further violence would occur, and that the violent killings posed a real threat to the Americans on the island. President Reagan thought that, despite the reassurances, it would be very easy for the RMC to change its mind and seize hostages. He could not possibly rely on the

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[205]"Special Report: International Law and the United States Action on Grenada" (Spring 1984) 18 Int'l Law. 331 at 338-9 (reprinted the text of the telex). According to a New York Times report, however, foreigners were refused permission to use the airport in order to leave the island (See New York Times, Oct. 26, 1983, at A1, col. 6). Other reports, on the other hand, indicated that foreigners were able to leave the island if they so desired (New York Times, Oct. 28, 1983, at A20, cols 1-2 [witnesses report that at least 4 charter planes were allowed to leave]; New York Times, Oct. 29, 1983, at A7, col. 3 [Robert Meyers, former director of Reagan's Social Security Commission, left Grenada under normal airport procedures]).

guarantees of a group of people who had just murdered their own prime minister along with numerous others, including women and children. Furthermore, the imposition of the shoot-on-sight curfew and the closing of the airports in Grenada suggested that events were not following a normal course. In fact, the sequence of events bore a bleak resemblance to what had happened in Iran.

If the US government truly believed that its nationals were not in danger and rescuing them was just an excuse, then the invasion cannot be justified and the argument need not be carried any further. If, on the other hand, the government made a good faith determination that American lives were in danger, then because of the large number of American nationals in Grenada, the threat to human rights violations was substantial. It may be harder to justify an invasion designed to save only a few lives; in such a case a smaller operation might be a plausible alternative. But, when trying to save over 1,000 lives, nothing short of an invasion may prove successful.

Two points significantly detract from the strength of this argument. First, a shrewd adviser might have contended that an invasion could precipitate the very thing that Reagan wanted to avoid. Since Grenada could not have withstood a military assault by the US, the only way that the military could survive personally was to take hostages. Demands for the invasion forces to withdraw, or at least for the RMC's safe conduct out

of the country, would be difficult and costly to refuse[206].

Second, and more important, if the US were genuinely and solely concerned about the safety of the Americans, only a limited-purpose rescue mission could have been justified. The US forces, however, stayed in Grenada for nearly two months, until they were certain that a democratic government was established. In addition, State Department did not view evacuation as the only way to protect the US nationals. Deputy Secretary Dam indicated that the plan was to protect Americans by changing domestic political order so that US nationals could safely reside in Grenada[207]. Rules of international law do not allow a state to use the rationale of protecting its nationals to change political structures in other countries to better suit the needs of its citizens residing in those countries. Hence, it should be clear that the US decision to send troops to Grenada was not a direct result of concerns about the safety of the Americans.

2. Joining the Collective Security Forces of the OECS

The second reason given in Reagan's announcement on October

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[206]One of the greatest ironies of the management of the students' safety was that the majority were finally evacuated under conditions that were far more dangerous than those prevailing before the invasion. Ambursley, supra note 109, at 86.

[207]"The Situation in Grenada", Hearing Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 6 (1983); in John Quigley, "The United States Invasion of Grenada: Stranger Than Fiction" (Winter 1986/87) 18 U. Miami Inter-Am. L. Rev. 231 at 278.

25 was that the US had joined the Organization of Eastern Caribbean States collective security forces "to forestall further chaos"[208]. This was related to his third reason of helping to restore democratic institutions in Grenada. Created in 1981, the OECS Treaty contains within its charter a quasi-collective security provision[209]. Article 8 established the Defence and Security Committee which consists of the ministers of defence of the member states. This Committee is responsible to the heads of the government of the member states[210]. The Committee advises the Authority "on matters relating to external defence and on arrangements for collective security against external aggression"[211].

It is not clear that the OECS Treaty contemplates the use of armed force against a member state, especially an invasion having the objective of resolving an internal struggle for control of the structures of authority. If that were the case then, undeniably, the OECS acted *ultra vires* its treaty since

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[208]Reagan, supra note 129, at 67.

[209]Article 8 provides in relevant part:
The Defence and Security Committee shall have responsibility for coordinating the efforts of Member States for collective defence and the preservation of peace and security against external aggression and for the development of close ties among the Member States of the Organisation in matters of external defence and security ... in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations.

[210]The heads of government comprise the "Authority" . See Article 6 of the OECS Treaty.

[211]Article 8(3) of the OECS Treaty; emphasis added.

the aspects of the situation in Grenada (which the OECS statement cited as giving rise to concern) were entirely internal to that country. It should logically follow that the US cannot legitimize its intervention by relying on an unlawful OECS request.

Some commentators have argued that a literal reading of Article 8 is misleading[212]. Article 3 of the OECS Treaty sets out the purposes and functions of the Organization and makes it clear that they broadly include "External Relations", "Mutual Defence and Security", and "[s]uch other activities calculated to further the purposes of the Organization as the Member States may from to time decide". This broad interpretation of Article 3 may permit the use of collective self-defence against internal threats. This argument is rather weak, nevertheless, because it is hard to imagine that a group of small Caribbean states signed an agreement in order to fight each other.

Even if one succeeds in establishing that the OECS Treaty does allow for responses to internal aggression among member states, several other complications arise. For instance, it is not clear at all that the Treaty contemplates an invitation to a military dominant non-member to lead an invasion. Although the term "collective self-defence" is used on numerous occasions, nowhere is the option to invite outside assistance against a member state stipulated. The United States is not a party to this Treaty and, therefore, lies outside the ambit of

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[212]See for example, Norton Moore, supra note 94, at 163-66.

its concerns[213].

At this point, those who seek to defend the US invasion refer to the relative military strength of Grenada. The Caribbean states, if left on their own, would not have stood a chance against the Cuban-trained and equipped Grenadan army and military personnel. The United States was asked to help a group of small states whose security was seemingly in danger. Such a request could not have been denied.

The next objection concerns the procedure used for decision-making under the OECS provisions. Paragraph 5 of the Treaty stipulates that decisions and directives pertaining to defence and security must be consented to unanimously by the member states[214]. Since, technically, Grenada was still an active member of the OECS, its vote was required in the decision. The member-states, however, did not even invite Grenada to participate in the meeting.

The OECS members stated that there was no apparent government in Grenada and, as a result, that country could not participate in the meeting. This statement was meant to remove any objections to the rule of unanimity. There was, however, one other problem: According to various sources and press accounts, only four of the six other member states voted for the

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[213]It should be noted that Barbados and Jamaica, which also participated in the invasion, are not parties to the Treaty, either.

[214]Christopher C. Joyner, "The United States Action in Grenada" (Jan. 1984) 78 Am. J. Int'l L. 131 at 137.

plan to be carried out. Some have reported that Montserrat and St. Kitts / Nevis abstained, other reported that they voted against the intervention[215]. In either case, the vote was not unanimous, and the plan should not have been carried out.

There have been indications that the US prompted the OECS decision, and that it actually drafted the written request in which the OECS asked for US military intervention in Grenada. The New York Times, for instance, reported on October 30 that the request was "drafted in Washington and conveyed to the Caribbean leaders by special American emissaries"[216]. On October 23, Ambassador McNeil flew to Barbados to confer with the Prime Minister of the Dominican Republic and Chairperson of the OECS, Eugenia Charles, and get her signature on a written request[217]. The US drafting of the request does not, on its own, negate the OECS desire for intervention. It does, however, show a strong US role in the process by which the OECS made its request. More importantly, it casts doubts on the true motives of the United States.

Finally, and most importantly, although states do possess the inherent right of individual or collective self-defence, such a right is limited to those situations in which the vital interests of a state are threatened. The situation in Grenada

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[215]"Special Report", supra note 205, at 343; Joyner, supra note 214, at 137; New York Times, Oct. 26, 1983, at A8, col. 3; New York Times, Oct. 26, 1983, at A16, col. 6.

[216]New York Times, Oct 30, 1983, at A20, col.1.

[217]Quigley, supra note 207, at 316.

was one of internal concern, and neither the Caribbean states, nor the US had any valid cause to panic. It is inconceivable that a small island in the Caribbean could pose such a threat to the US that the latter would actually resort to war.

In this respect, the Caribbean community's concerns may have been more understandable. But, even in that case, the Grenadan officials issued a statement ensuring everyone that they were not seeking military confrontation[218]. In short, there was no real or imminent threat to any of the countries that invaded Grenada. Simply because there is disorder or even a military coup in a country, the neighbouring states should not give themselves the right to intervene for the purpose of re-establishing minimum public security, let alone imposing a particular form of government.

3. The Invitation by Grenada's Governor-General

Since the decision-makers in Reagan's Administration must have all been aware of the faults and short-comings of these two justifications for the decision to invade Grenada, it is very unlikely that these were the actual reasons that the decision was based upon. A third legal justification of the action in Grenada was also presented by the US government. On November 2, 1983, in a testimony before the House Foreign Affairs Committee, Deputy Secretary of State Kenneth Dam revealed that the Governor-General of Grenada, Sir Paul Scoon, had confidentially

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[218]"Special Report", supra note 205, at 339.

transmitted "an appeal for action by the OECS and other regional states to restore order on the island"[219].

If the Governor-General were the legal representative of the state, and if he did request military assistance, then his invitation could justify the US decision to intervene. There are, nevertheless, several points which should be discussed. First, the 1974 Constitution of Grenada placed "the Executive Authority of Grenada in the Governor General as representative of Her Majesty's Government[220]. Various powers were given to the Governor General; for example, he could proclaim an emergency. The first impression that one gets from the 1974 Constitution is that Scoon probably did have the legal authority to take action.

In 1979, when Bishop came to power, he effectively suspended the Constitution and replaced it with the People's Revolutionary Government in a manner that limited the Governor General's powers. The Governor General's position was confined to performing "such functions as the People's Revolutionary Government may from time to time advise"[221]. However, even with his residual powers, the Governor General may have been able to

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[219]Kenneth Dam Statement in Nash Leich, supra note 111, at 203.

[220]Article 57 of the *Constitution of Grenada*; Detlev F. Vagts, "International Law Under Time Pressure: Grading the Grenada Take Home Examination" (Jan. 1984) 78 Am. J. Int'l L. 169 at 171.

[221]"Declaration of Grenada Revolution", dated March 28, 1979, People's Law No. 3, in "Special Report", supra note 205, at 348.

authorize the intervention. Furthermore, in the chaotic state of affairs which followed Bishop's murder, Scoon was the only authority left under the Constitution and, therefore, the only person who had the power to act.

One other factor which lends credence to the claim that Scoon did have the right to take action was that the OECS, the US, Barbados, Jamaica, and later even the UN accepted Scoon's authority to act in Grenada's behalf[222]. This acceptance represents, to some extent, political recognition of Scoon's authority. The recognition, however, may not have been as effective as one would have hoped. First, the OECS, the US, Barbados and Jamaica were already planning the invasion. Their recognition, therefore, served their own needs more than Grenada's. By recognizing the Governor General's authority, they strengthened their own decision. Second, the recognition of the UN, on the other hand, could have made a critical difference if it had been extended at the appropriate time. But, it was given after the Governor General's *de facto* control of the island had been assured by the foreign military forces.

Third, the Governor General was appointed by Great Britain. Mrs. Thatcher, however, advised against the invasion and stated that the British did not wish to take part in it. The fact that the Governor General did not request the support of Great Britain, and that the latter did not wish to invade Grenada somewhat detracts from the validity of Scoon's request. However,

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[222]Ibid.

Secretary Shultz, in a news conference on October 25, pointed out that Grenada is an independent state that no longer needs to consult with Great Britain before making a decision. Furthermore, although the British have had "great experience" in the Caribbean, so have the Americans. The Caribbean is in the US' neighbourhood, so the US has "a very legitimate affinity for those people"[223]. The permission or the consent of Great Britain, therefore, was not required in this situation.

Finally, recognition extended by outside forces says nothing or very little about the true state of events in a country. There is reason to argue that General Austin's RMC was entitled to recognition as the *de facto*, if not the *de jure*, government of Grenada. The RMC was in sufficient control of the island to impose a curfew. Also, the US, Great Britain and Canada contacted the RMC (as the main authority on the island) in an effort to secure the safety of their nationals; and it was the RMC that sent a telex to the US embassy assuring the US government that their citizens would be safe.

This debate over who had lawful authority usually arises in cases of domestic strife. Although in Grenada the Governor General was not the leader of one of the contending factions in a civil war, the situation was ambiguous enough that other countries should have remained neutral. When the outcome of a rebellion is not entirely clear, the government (or a

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[223]"Secretary Shultz's News Conference", supra note 133, at 71.

representative thereof) cannot hold itself out to speak for the state[224]. The Governor General and the RMC both had equivalent, colourable claims to authority.

When President Reagan announced that US forces had landed in Grenada, he did not mention anything about the Governor General's request. Partly because of this initial silence, the news of the invitation was greeted with scepticism. In fact, the State Department has still not been able to prove unequivocally that a request was made prior to the invasion[225]. On October 27, when the Department issued its first statement regarding a request from Scoon, an explanation was offered that the alleged request was not publicized earlier because it feared for the safety of Scoon, who was taken from his residence to the US warship Guam of the morning of October 26.

This explanation is rather hard to accept because there have been reports that Scoon did not make the decision to request assistance on his own. Once he was safely on board the US ship Guam, he made a written request, prompted by the US[226]. Statements later made by Scoon himself have been equally circumspect. His interviews do not fully resolve doubts about how voluntary his invitation was; nor is he clear on whether he asked for a full-strength military operation, or merely security

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[224]In this case, the outcome was relatively clear: Without the US invasion, the RMC would have stayed in power.

[225]Quigley, supra note 207, at 330.

[226]Ambursley, supra note 109, at 81.

forces to perform police functions.

Most importantly and critical to the validity of this justification, in at least two interviews, Scoon stated that he asked for outside help on Sunday night, October 23[227]. In other words, the request came two nights after the OECS decision and several hours after Reagan's provisional decision to proceed with military action. The decision to invade was made prior to the request and, that being the case, the Governor General's request (even if there was a valid request) is irrelevant.

Another argument which has been implicitly presented in support of the Governor General's actions is that the legitimate government of Grenada acted in its own self-defence, and the OECS and the US acted in their right of collective self-defence. The basis of this argument is the assumption that the coup that brought the RMC to power was instigated and supported by Cuba. If there is a civil conflict and the rebels are receiving foreign aid, then the government may ask for assistance. Since the RMC was receiving Cuban aid, it was perfectly legal for the Governor General to request outside assistance.

There has been a considerable amount of information on Cuba's involvement in Grenada. Cuba, after all, was providing financial and technical aid to Grenada; the airport at Point Salines was being built mainly by Cubans; and the resistance to US forces was led by Cuban military personnel. Despite this, however, Secretary Shultz admitted that the US had no direct

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[227]"Special Report", supra note 205, at 346.

information on whether or not the Cubans were involved in the coup, although the "feeling" was that they were. He also emphasized that the US decision was not based on this "feeling"[228]. That being the case, the argument cannot be made later that the rebels were receiving foreign assistance, and that the Governor General was acting in Grenada's defence. Also, the Cubans were present in Grenada prior to the revolution. The Cuban involvement that the US was referring to was all initiated by Prime Minister Bishop himself. It was not as if the Cubans were covertly supporting guerrillas seeking to overthrow the government.

The Grenadan incursion, therefore, is significant for what did not occur. There was no prior official invitation by the Governor General on behalf of the Grenadan Government to any party for external intervention. There was no recourse taken by either the OECS members or the US to bring the matter before the OAS or the UN for peaceful settlement. One of the criteria for the initiation of humanitarian intervention mandated that a state attempt to achieve a solution through an international organization before resorting to forcible self-help. Simply because the US authorities believed that diplomatic efforts would prove futile it was no reason to fail to contact the UN. For the US, swift and decisive use of military force took precedent over following the course of diplomatic channels.

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[228]"Secretary Shultz's News Conference", supra note 133, at 71.

B. NICARAGUA:

The circumstances of the US intervention in Nicaragua were different from Grenada in several ways. First, and most obvious, the United States did not overtly invade Nicaragua. There was not a direct US military presence in Nicaragua at any point. Rather, the war was fought from Washington. A second difference is that, in this case, the US presented only one main legal justification for its actions: self-defence. The argument that was put forth by the US was that its action against Nicaragua were legally justified under Article 51 of the United Nations Charter as actions of collective and/or individual self-defence. Nicaragua had allegedly been supplying guerrilla groups attempting to overthrow the governments of El Salvador and Honduras since 1979. The US maintained that the purpose of its actions was to interdict traffic in arms and supplies proceeding from Nicaragua to rebels in the neighbouring countries.

The US claimed that Nicaragua was exporting violence to the region and was trying to bring down the newly established democratic governments of its neighbouring countries. El Salvador and Honduras had the inherent right to self-defence; the US, as an ally and a friend, had the right to act in collective self-defence. The government of Nicaragua was,

furthermore, a source of threat to the security of the US, which suggested that US actions could also be justified by principles of individual self-defence. As Reagan stated in a news conference on February 21, 1985, the Americans believed that they "have an obligation to be of help where [they] can to freedom fighters and lovers of freedom and democracy, from Afghanistan to Nicaragua ..."[229]. The only act that the US was guilty of, therefore, was trying to help El Salvador -- an ally and a friend -- in defending itself against "the communists".

If self-defence is defined with respect to Daniel Webster's formulation in the *Caroline* case, then a government alleging self-defence must show a "necessity of self-defence [that is] instant, overwhelming, and leaving no choice of means, and no moment for deliberation"[230]. The *Caroline* formula cannot be applied to the Nicaraguan case because there was never any threat by Nicaragua to the US (or any other country, for that matter) which required an instant reflexive action. The activities undertaken by the CIA, for instance, were all planned over a long period of time. The US government, in addition, had more than four years to deliberate about the choice of means for its Nicaraguan policy. There were numerous occasions where the parties had the chance to commence negotiations, but the US was never really interested in this approach.

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[229]"News Conference of February 21" (April 1985) 85 Dep't St. Bull. 10 at 11.

[230]See Schachter, supra note 31, at 1635.

It was clear from the beginning that the purpose of US actions against Nicaragua had been to overthrow the Sandinista government, or at the very least, to force it to completely change its structure. Public admissions were made in this regard by US officials including the President himself. In a news conference on February 21, 1985, President Reagan explicitly stated that until the Sandinista government "says uncle", the goal of US policy would be that of removing the "present structure" of that Government[231]. This, of course, was what Nicaragua had alleged to be the US goal from the very beginning.

In all fairness, it should be pointed out that in 1983 statements were made by Reagan which claimed that the goal of the US was not to overthrow the Sandinista government. On April 27, 1983, before a joint session of Congress, President Reagan said the following:

> ... let us be clear as to the American attitude toward the Government of Nicaragua. *We do not seek its overthrow*. Our interest is to ensure that it does not infect its neighbours through the export of subversion and violence. Our purpose, *in conformity with American and international law*, is to prevent the flow of arms to El Salvador, Honduras, Guatemala, and Costa Rica[232].

These statements, however, were worth very little because in 1983 the CIA's covert war against Nicaragua was well under way.

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[231]President's News Conference, New York Times, Feb. 22, 1985, at A10, cols. 1,3.

[232]Reprinted in Friedlander, supra note 180, at 273-4; emphasis added.

As it was mentioned, the US claimed that Nicaragua was supplying arms to neighbouring countries and was, in effect, "exporting revolution". Under such circumstances, the US and the other affected countries had the inherent right of self-defence. The main factual problem with this argument is that the allegations were not entirely true[233]. In the *Nicar* v. *US* case in 1986, the ICJ found that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981[234]. After the early months of 1981, however, evidence of military aid from Nicaragua was very weak[235]. The Court added that, if evidence really existed, the US could be expected to have taken advantage of it in order to forestall or disrupt the traffic[236]. The Court concluded that:

> It is difficult to accept that it [the US] should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of collective self-defence"[237].

It is hard to imagine that Nicaragua was able to transport arms and equipment without alerting the CIA of such activity.

There are several other inconsistencies in the US policy

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[233]Carlos Tunnermann Bernheim, "United States Armed Intervention in Nicaragua and Article 2(4) of the United Nations Charter" (Fall 1985) 11 Yale J. Int'l L. 104 at 131.

[234]*Nicar. v. U.S.*, Merits, Judgment of June 27 1986, I.C.J. Reports 1986, p. 1 at 82.

[235]Ibid, at 84.

[236]Ibid.

[237]Ibid.

which are worthy of mention. First, in the very first NSC documents accompanying the plan initially approved by Reagan in November 1981, the following statement of purpose was included: "[To b]uild popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza ..."[238]. This purpose is in no way related to interdicting the flow of arms.

Most of the actions and plans of the CIA were also irrelevant to the flow of arms from Nicaragua. For example, the CIA provided military and financial support to Eden Pastora, whose forces were based in Costa Rica -- far from any potential weapons routes -- and whose stated objective was the overthrow of the Nicaraguan government[239]. Moreover, the "Psychological Operation in Guerrilla Warfare" manual which was published by the CIA had purposes other that the interdiction of weapons traffic.

Even if the US allegations of Nicaraguan arms shipments were true, the US response was on a completely different scale and the requirement of proportionality was severely violated[240]. Nicholas Rostow, Special Assistant to the Legal Adviser, United States Department of State, has tried to argue the contrary[241].

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[238]Washington Post, May 8, 1983, at A11, col. 3.

[239]Tunnermann Bernheim, supra note 233, at 132.

[240]See supra note 33.

[241]Nicholas Rostow, "Nicaragua and the Law of Self-Defense Revisited" (Spring 1986) 11 Yale J. Int'l L. 437.

According to him, a defensive use of force ought to reflect only what is necessary to end the violation of international law that gave rise to the right of self-defence. Thus, US support for the government of El Salvador is a proportional use of force, designed to discourage the Sandinistas from supporting guerrilla movements. Rostow's argument is understood to the point that it is acceptable to give assistance to one side in a civil strife if the opposite side is receiving foreign aid.

On the other hand, Mr. Rostow takes his argument one step further by claiming that mining Nicaragua's harbour in 1984 constituted a proportional response to Nicaragua's arms shipments by aiming to deprive it of the sources of these supplies[242]. What he fails to accept is that the mining did much more damage than merely depriving Nicaragua of supplies. A blockade is an act of war that cannot be justified by the US' claimed right of self-defence[243]. The US creation of the mercenary army which regularly launched attacks against Nicaragua's economic and civilian targets deep within the country was not a proportionate response, either.

Even if US intervention in Nicaragua can be justified based on the facts, US action in the World Court raises a number of legal implications. First, as was previously mentioned, the announcement on April 8, 1984 that the US was immediately withdrawing from the jurisdiction of the ICJ was ineffective.

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[242]Ibid, at 454.

[243]von Glahn, supra note 10, at 653-57.

By so doing, the Reagan Administration showed its disregard for the rules of the Court, and tried to escape the obligation that it had to the other states which had accepted the Optional Clause of the Court. In its judgment of November 26, 1984, the Court held that the US notification of withdrawal "cannot override the obligation of the United States to submit to compulsory jurisdiction of the Court vis-a-vis Nicaragua"[244]

Second, and more importantly, the ICJ entered an interim judgment against the US on May 10, 1984 which had the effect of an international injunction. The CIA, nonetheless, continued to support the contras under the authorization of the US government and President Reagan. On this alone, the US government was in violation of the Court's decree. The US government persisted in a policy and course of action in wilful violation of international law as determined by the World Court.

After the Court made this initial decision, the US attacked the Court on another level and began arguing against the jurisdiction of the Court. The government placed considerable emphasis on the wording of Article 51 of the United Nations Charter and claimed an "inherent" right of self-defence. The US stated that, by hearing the case on its merits, the Court would be taking action "under the Charter". In turn, by pronouncing on the lawfulness of the self-defence claims, the very right protected by Article 51 would be impaired.

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[244]*Nicar. v. U.S.*, Jurisdiction and Admissibility, supra note 191, at 54.

It was further argued that a decision by the Court would violate Article 51 since that provision provides a role in such matters only to the Security Council. The US claimed that the Security Council's competence was total and exclusive so that any judicial examination of a self-defence claim would be an impairment of the self-defence right[245].

The Court decided on November 26, 1984, that it did have jurisdiction to entertain the case brought to it by Nicaragua[246]. The US Department of State immediately released a statement which said:

> The Court's decision of November 26, 1984 ... is contrary to law and fact. With great reluctance, the US has decided not to participate in further proceedings in this case.[247]

To that day, the Department of State had issued a statement withdrawing from the ICJ's compulsory jurisdiction, and another statement claiming that the Court did not have jurisdiction to hear the case on its merits. Since neither of these strategies prevented the Court from making a decision regarding the case, the US refused to participate in the proceedings.

According to Franck, the US statement suggested that the

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[245]Isaak Dore, "The United States, Self-Defense and the U.N. Charter: A Comment on Principle and Expediency in Legal Reasoning" (Fall 1987) 24 Stan. J. Int'l L. 1 at 16.

[246]*Nicar v. US*, Jurisdiction and Admissibility, supra note 191, at 54.

[247]"US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice", statement by the U.S. Dep't of State, undated, at 1 (mimeo). Quoted in Thomas M. Franck, "Icy Day at the I.C.J." (April 1985) 79 Am. J. Int'l L. 379.

decision to withdraw from the proceedings was based on two conclusions. First, the US government believed that the Court's decisions to date were so blatantly biased as to foreclose the possibility of a fair hearing[248]. The government statement asserted that the decision of November 26 was "erroneous as a matter of law" and was based "on a misreading and distortion of the evidence and precedent"[249]. The US was dissatisfied with the supposedly politicized, anti-Western bias of the Court, as revealed by the preliminary decisions in the Nicaraguan case.

The second conclusion was that the US had to undertake a basic rethinking of its relations with the Court and other multilateral institutions. The Reagan Administration was convinced that the US could act more swiftly and decisively in matters of national interest if its interests were not subordinated to a system that it could not control[250]. The decision not to participate in the proceedings reflected, more than anything else, the determination of the Reagan Administration. This was, after all, the same Court that despite its so-called anti-Western tendencies overwhelmingly endorsed the US complaint against Iran during the hostage crisis of 1980. There was no logical reason for the US to claim that the Court could not make a fair decision.

The US decision to withdraw from the proceedings, arguably,

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[248]Ibid.

[249]Ibid.

[250]Ibid.

was a mistaken strategy. For, by doing so, the US *ab initio* undercut its own legal arguments. In a way, the US admitted being guilty, even before the Court made its decision in 1986. The ICJ then held that the US was, in fact, engaged in an armed attack against Nicaragua through the arming and training of the anti-Sandinista rebels[251]. The judgment of the Court publicly declared the US guilty of acting in violation of norms and standards of international law. The covert was against Nicaragua was an example of the US wilfully disregarding the rights of another state and intervening in the internal affairs of that state.

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[251]*Nicar v. US*, Merits, supra note 234, at 96-98.

VII. CONCLUSION

The Reagan Administration, as can be seen from the two cases discussed above, was not truly concerned with the norms and principles of international law. In both situations, the US was determined to preserve US security by stopping the spread of communism in the Western Hemisphere. This fear of "the domino effect" was a major factor in US decision-making. Every action of Grenada and Nicaragua -- even before the actual United States' intervention -- was seen from this point of view. Well before 1983, for example, a dispute arose over the character of a new international airport being built at Point Salines in Grenada. In a speech in March 1983, Reagan made a reference to this airport:

> Grenada is building a new naval base, a new air base, storage bases and barracks for troops, and training grounds and, of course, one can believe that they are all there to export nutmeg[252].

The same attitude was clearly present in US relations with Nicaragua. In an address before a joint session of Congress on April 27, 1983, Reagan said that the Sandinista government, "even worse than its predecessor, ... is helping Cuba and the

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[252]Ambursley, supra note 109, at 49.

Soviets to destabilize our hemisphere"[253]. The US was not going to just witness the destabilization of an entire region.

A successful operation in Grenada, furthermore, would have restored self-respect for the United States as far as the public was concerned. Since the traumatic withdrawal from Vietnam, on almost every occasion where US forces had been deployed in combat, things had gone unbelievably wrong. The Mayaguez incident in 1975, and the rescue attempt to rescue the hostages in Tehran in 1980 are only two examples from a list of failures.

The real rationale behind the decision to invade Grenada, therefore, was to maintain US security by establishing a regime which met with the Reagan Administration's approval. The new government of Grenada was not supposed to get too close to either Havana or Moscow. In a televised speech on Grenada, on October 27, 1983, Reagan said:

> Grenada we were told was a friendly island paradise for tourism. Well, it wasn't. It was a Soviet-Cuban colony being readied as a major military bastion to export terror and undermine democracy. We got there just in time[254].

There is no doubt, moreover, that American support of the contras was directed toward creating an incentive for the Nicaraguan junta to modify its behaviour and to begin a dialogue of accommodation with the US. By fall 1983, the junta was giving indications of a willingness to moderate its differences

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[253]Ronald Reagan, "Central America: Defending Our Vital Interests" (June 1983) 83 Dep't St. Bull. 1 at 3.

[254]Lewis and Mathews, supra note 97, at 28.

with the Reagan Administration. But, by that time, the US was so caught up in its war against Nicaragua that it saw each mild concession as an opportunity to exact more stringent measures.

Thus, it is clear that the decision-makers, in both the Grenadan and Nicaraguan cases, were following the same basic strategy. They had a chance to, at least, try to overthrow an adversarial regime. Both situations occurred at almost the same time, so there was no time for a major change in US foreign policy. As a matter of fact, the legal arguments that emerged after the interventions were very similar in nature. Heavy emphasis was placed on the individual and collective rights of self-defence. In both cases, the US tried to alleviate some of the pressure by arguing that it had taken action in order to help other countries, and that it did not have any selfish motives. The purpose of the invasion of Grenada, supposedly, was to establish the security of its small neighbouring states.

It should be mentioned, once again, that in neither case the argument was made that US policies were counter-interventionist. In other words, both Grenada and Nicaragua were receiving military and financial aid from Communist countries. It has been suggested in the previous sections that, had a counter-intervention argument been made, it probably would not have been able to withstand close examination. However, it is noteworthy that the Reagan Administration did not even try to present such a case.

What is clear from these two cases is that there has been a steady erosion of the legal norms governing the use of force in the relations of the United States with other countries. That the US has the military and political power to circumvent into international legal obligations without fear of international sanction is somewhat beside the point. The main concern is that, following US behaviour as a model, other national leaders will perhaps feel less constrained by these norms than they once did. It should be mentioned, nonetheless, that the US was widely criticized regarding its policies toward Nicaragua. This may show that some states found the actions of the US unacceptable and contrary to the norms of international law. There is, as a result, very little respect for the US as a promoter of international law.

In terms of the purposes and the goals of the United Nations, it is impossible to reconcile the commitment to sovereignty, political independence, and territorial integrity with allowing foreign forces to choose a country's government structure. When, for instance, US forces are sent into Grenada to resolve an internal struggle for power, the chances are minute that the US will forsake its own national policy interests in favour of unconditional self-determination. To answer a question posed by Franck, perhaps the US is partly responsible for "killing" Article 2(4)[255].

The US attitude regarding the ICJ (in the Nicaraguan case,

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[255]Franck, supra note 22.

in particular) has had serious ramifications. First, withdrawing from the Court's compulsory jurisdiction on such short notice showed that the United States is not seriously committed to resolving disputes in such a forum if its interests are better served otherwise. The Court is a tribunal that the US will gladly refer to it is certain beforehand that it will emerge a winner -- as was the case involving the US and Iran.

The indication that the ICJ did not have jurisdiction to decide the case on its merits was another case of disrespect for the Court. Had this argument been, in fact, accepted, the Court's functions would have been reduced to hearing the most trivial cases. The role of the Court in peaceful resolution of disputes would have declined even more.

The main difference between the two cases of Grenada and Nicaragua was the actual duration of the intervention. For Grenada, the decision to deploy forces was taken in ten days, and by November 2, the armed conflict had come to an end. United States' intervention in Nicaragua, on the other hand, lasted for years. The Reagan Administration had many opportunities to begin negotiations with the Sandinistas, or to consider reversing its policies. Perhaps if, instead of Nicaragua, a second case had been chosen in which the US perceived itself to be under time constraints to act, the comparison with Grenada would have been more valid.

Finally, if a generalization can be made from these two cases, the conclusion to be drawn is that states tend to act in

their own national interest. Hence, international law works to the extent that states permit it to do so. When perceived national interests are deemed paramount, the law may suffer accordingly. International law may serve less as a restraint on national policy than as an *ex post facto* rationale to explain it. For the United States, in the two instances discussed, anticipated political and strategic gains through intervention overrode diplomatic considerations involving international legal constraints.

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