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COMMENTS

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I. INTRODUCTION

Between 1974-1979, various reports surfaced alleging human rights violations in Nicaragua. An increasingly pervasive tension arose between the Somoza government and opposition groups, culminating in civil war and the fall of the Somoza regime in July 1979. Neither the United Nations (UN) nor the Organization of American States (OAS) took any action until late in 1978, when the OAS sent a three-nation mission to help negotiate a settlement between Somoza and the opposition forces.1 Despite the reluctance of these international organizations to take any specific action with regard to the alleged human rights violations, the United States unilaterally asserted and implemented a policy of economic coercion designed to “remedy” the human rights “situation.” In the spring of 1977, the United States began the withdrawal of foreign assistance to Nicaragua, a policy which was to continue in effect until the alleged “situation” was cured.2

The withdrawal of United States foreign assistance to Nicaragua, on human rights grounds, raises three major issues with regard to the legitimacy of economic coercion under international law: (1) whether such coercion constitutes intervention; (2) whether such coercion constitutes a prohibited use of force; and (3) whether and under what circumstances human rights considerations are a suffi-

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1. On September 23, 1978, the OAS passed a resolution urging member nations to refrain from any action which might aggravate the Nicaragua situation. At the same time, the OAS sponsored a three-nation mission to help negotiate a peaceful settlement between Somoza and the opposition. See DEP'T ST. BULL. 56 (Aug. 1979) (statement of Ambassador McGee).


icient legal justification for intervention. In light of the current status of human rights policies in international relations, and particularly the human rights achievements prerequisite to certification for U.S. foreign assistance, these issues may be of critical importance to present and future administrations. After presenting necessary background information, this comment examines the issues in view of customary international law and applicable international treaties and conventions, and attempts to draw certain conclusions about the legality of the United States' action in this specific instance.

II. THE FACTUAL CONTEXT

A. The Situation in Nicaragua and the Historical Context of the United States-Nicaragua Relationship

During the first third of this century, the United States was deeply involved in the major political, economic and military events taking place in Nicaragua.\(^3\) This relationship was evidenced by economic aid and substantial military intervention, including creation of the Nicaraguan National Guard.\(^4\) The Somoza family came to power during this period with U.S. support,\(^5\) and continued to dominate Nicaraguan politics until the fall of President Anastasio Somoza in July of 1979.

In 1971, Somoza entered into an agreement with the Nicaraguan Conservative Party concerning the drafting of a new constitution, which was to upgrade Conservative representation in the national legislature from thirty-three percent to a minimum of forty percent.\(^6\) Somoza relinquished power as President and was succeeded by a three-man National Junta.\(^7\) A constitutional convention drafted the new constitution, effective April 3, 1974,\(^8\) which

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3. Tierney, *Revolutions and the Marines: The United States and Nicaragua in the Early Years*, in *AN ALLY UNDER SIEGE* 9 (B. Bell ed. 1977) [hereinafter cited as *Early Years*].


7. *Id.*

provided for a presidential election that year.9 Somoza defeated the Conservative leader with over ninety percent of the vote10 and was reinaugurated December 1, 1974.11

On December 27, 1974, the Sandinista National Liberation Front (FSLN) terrorists attacked a reception for United States Ambassador Turner B. Shelton, murdering four persons and holding forty-one guests hostage for sixty hours.12 Two days later, Somoza declared a State of Siege, suspending all constitutional rights.13 Martial law prevailed until September 19, 1977.14

The United States remained supportive of Nicaragua and the Somoza administration until 1977. This support involved economic aid totalling almost $78,000,00015 and military assistance, including direct training of the National Guard.16

Between December 1974 and September 1977, reports emerged of human rights violations in Nicaragua.17 These reports led to a worldwide press campaign, two separate hearings in the United States House of Representatives, and subsequent investigation by the OAS Human Rights Commission.18 The reports were conflict-

9. Legalities, supra note 6, at 48.
10. Id. at 43.
11. Id. at 44.
12. Id. at 57.
13. OAS REPORT, supra note 8, at 29.
14. Id. at 29. For a detailed discussion of the martial law, see id. at 28-29.

Note, however, that Article 197 of the Nicaraguan Constitution provides: "[n]o case shall the decree of suspension of restriction [of constitutional rights] affect the following guarantees:

   a) The inviolability of human life;
   b) The prohibitions of trials by judges other than those designated by law;
   c) The prohibition against acts of cruelty of torture and infamous punish-
      ment;
   d) The prohibition against retroactive or confiscatory laws;
   e) The prohibitions against imposing taxes . . . ."

Id. at 27.
16. Rethinking, supra note 4, at 6. Military aid included the training of Nicaraguan officers and enlisted men at United States service schools. Id. at 6. For a discussion of the differing perspectives on the nature of military aid to Nicaragua, see Sigmund & Speck, Virtues Reward: The United States and Somoza 1973-1978, reprinted in Major Trends and Issues in the United States Relations with the Nations of Latin America: Hearings Before the Subcomm. on Western Hemisphere Affairs of the Senate Comm. on Foreign Affairs, 95th Cong., 2nd Sess. 204 (1978) [hereinafter cited as Virtues Reward].
17. These "reports" appeared primarily in the media. The source of all such reports appears to have been a handful of Capuchin priests. See infra note 20.
ing, and several "sources" were clearly impeachable.

In April 1977, ostensibly on human rights grounds, the Carter Administration announced that it was withholding $20,000,000 in economic aid and refusing to sign new security assistance pacts with Nicaragua. Throughout the spring and summer of 1977, Congress debated cutting all Nicaraguan military aid from the 1978 fiscal year appropriations, and the State Department began pressing Somoza with regard to the "human rights" condition.

Somoza lifted the State of Siege on September 19, 1977. The State Department decided to sign the military security agreement


20. Congressman Murphy maintained that the 1976 Hearings were rigged—that hostile witnesses were arranged by the Washington Office on Latin America (WOLA) and that the witnesses were coached on the form and substance of their testimony by William Brown. Moral Confusion, supra note 19, at 70.

The only witness from Nicaragua to appear before the subcommittee was Jesuit Father Fernando Cardenal, whose politics were clearly suspect and whose testimony contained 12 specific errors of fact according to the State Department. Id. at 70-72. When the United States Embassy in Managua sought to substantiate Cardenal’s claims of human rights violations, Dr. Pedro Chamoro (opposition leader and publisher of La Prensa) told Embassy officials that he could neither confirm nor endorse many of Cardenal’s allegations. Id. Even Cardenal admitted that he had no personal knowledge of the violations he cited. Id. at 73.

The single source of all allegations of Nicaraguan human rights violations, leading to the press reports, United States hearings, OAS and Amnesty International reports, was a handful of Capuchin missionaries. Id. The Capuchins admittedly thought that a Communist regime would be preferable in Nicaragua and advocated the withdrawal of United States aid for this reason. Id. at 73-77. Furthermore, the allegations of “violent” human rights violations resulted almost exclusively from clashes between Nicaraguan national guard and FSLN terrorists. Id. at 73.

Throughout the period of martial law, there remained freedom of religion, passage, press, political opposition, etc. Id.


23. See Rethinking, supra note 4, Part II at 2-8 & 7-9.

for 1977, but deferred payment of $12,000,000 in economic aid for the rural poor indefinitely "pending evidence of long-range improvement in the human rights policies of Nicaraguan President Anastasio Somoza."26

A State Department report referred to marked improvements in Nicaragua's human rights record in February of 1978. In early May, the State Department decided to release the $12,000,000 economic aid package.28 In June, Somoza agreed to accept a visit by the OAS Human Rights Commission.29 After these signs of improvement, the United States signed the loans for the $12,000,000 in economic aid—but the loans were never in fact dispersed.30

On August 23, 1978, FSLN terrorists attacked the National Palace.31 Constitutional rights were temporarily suspended on September 13, and on October 12, Somoza decided that certain rights would remain suspended for six months.32 In late September 1978, the OAS, in accordance with a U.S. proposal, sent a three-nation mission to Nicaragua to mediate between Somoza and the opposi-

25. Id.
26. Id. at 65-66.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. OAS REPORT, supra note 8, at 25.
33. Id. at 25-26. The constitutional rights suspended were those stipulated in Articles 39, 40, 41, 42, 46, 49, 58, 59, 73, and 75:

Article 39: Guarantees individual liberty; Article 40: states that arrests can only be carried out upon the written order of a competent official; Article 41: guarantees that a person arrested be released or delivered to the competent judge within 24 hours after detention; Article 42: deals with the right to habeas corpus; Article 46: states that any detention for investigation must be revoked or converted into imprisonment within ten days of being placed at the disposal of the competent judicial authorities, and minors must be sent to special rehabilitation institutions; Article 49: states that no court shall handle cases outside its jurisdiction (fuero attractivo); that no case shall be removed from the appropriate judge nor brought before a special court, except under a previous law; Article 58: guarantees the inviolability of the home and of any other private place; Article 59: recognizes personal freedom to travel throughout the country and to choose a place of residence within it; Article 73: guarantees the right to meet in the open and to demonstrate publicly; Article 75: establishes the right of every person to address written petitions or claims to public authorities and the obligation of those authorities to act on them and make known the result. Id.

Article 2 of the Martial Law states that the President of the Republic himself or through civilian or military authorities can execute all dispositions of law, during periods of suspension or restrictions of constitutional rights.
The OAS also passed a resolution urging member governments to refrain from taking any action which might aggravate the “situation” in Nicaragua. 35

The U.S. and the OAS triumvirate consistently called for the resignation of Somoza and replacement of his regime by a broadly-based transition government. 36 This was to be followed by a negotiated cease-fire, new democratic elections, and subsequent economic aid. 37 Although Somoza made some concessions, including rescission of the October decree and reinstatement of constitutional law in December 1978, 38 the U.S. terminated all military assistance programs and withdrew all military aid early in 1979. 39 Simultaneously, the Carter Administration terminated aid funding on all projects in an early stage of development, stating that the 1977 economic loans would not be dispersed and that no further economic aid would be forthcoming. 40

The Somoza regime fell to the Sandinista insurrectionists on July 17, 1979, upon Somoza’s resignation. 41

B. The Carter Human Rights Policy—Grounds for the Withdrawal of Aid

Three grounds appear to be the basis for the withholding of aid from Nicaragua by the Carter Administration: 42 that AID funds had been “misappropriated” and converted to the Somoza family’s personal use; 43 that Nicaragua was not sufficiently democratic; and that Nicaragua had engaged in consistent violations of human rights.

There is significant overlap between the second and third

34. DEP’T ST. BULL., supra note 1, at 55.
35. Id. at 55, 59.
36. DEP’T ST. BULL. (Nov. 1979).
37. Id. at 57.
40. Id. The United States cited the unwillingness of the Somoza government to accept the proposals of the OAS triumvirate, the resulting prospects for renewed violence and polarization, and the human rights situation as primary considerations in the determination to withdraw all aid. Id.
41. DEP’T ST. BULL., supra note 1, at 60.
42. This is to be concluded from various congressional debates, reports, statements of State Department, etc.
43. The allegations of conversion [see, e.g., Rethinking, supra note 4, Part I, at 5 (statements of Richard L. Millett)] were refuted by both the United States Embassy in Managua and AID in a 1976 statement. Economic Aid, supra note 15, at 141.
"grounds," in part because of the ambiguity and broadness of the Carter human rights policies. UN Ambassador Jeanne Kirkpatrick described this overlap in a 1980 article:

Carter's human rights were not defined in terms of personal and legal rights—freedom from torture, arbitrary imprisonment and arrest [crimes against human dignity] as in the usage of Amnesty International and the United States Foreign Assistance Acts of 1961 and 1975—but in accordance with a much broader concept which included the political "rights" available only in democracies, and the economic "rights" promised by socialism (shelter, food, health, education). It may be that no country in the world meets these standards; certainly no Third World country does. The very broadness of the definition invited an arbitrary and capricious policy of implementation.44

The statements of the Carter Administration and Congress referred frequently to democratic rights and principles, the absence of democratic rule in Nicaragua, and the achievement of a democratic solution in Nicaragua and other Latin American countries.45 It is apparent that the absence of a "democratic" government, as defined by the United States, was critical to the United States' withdrawal of aid. The foreign aid instrument was used by the Carter Administration in an attempt to force change in the structure of Nicaraguan politics,46 and it also seems clear that the changes sought would have resulted in a climate more favorable to the United States' interests.47

Several important issues arise with regard to the United States' use of the economic instrument. These include whether the "withholding of the carrot" constituted unilateral intervention into the domestic affairs of Nicaragua; whether the use of economic coercion constituted a proscribed use of force; and whether the United States'  


47. Id. See also Dep't St. Bull. 14 (Nov. 1979).
failure to delineate between human rights goals and democratic principles precludes any claim to a right of humanitarian intervention.

III. DID THE UNITED STATES'S WITHDRAWAL OF FOREIGN AID CONSTITUTE INTERVENTION?

Article 38 of the Statute of the International Court of Justice (ICJ) lists the generally-recognized sources of international law the ICJ is required to apply:  

(a) International conventions, whether general or particular, establishing rules expressly recognized by the consenting states;  
(b) International custom, as evidenced of a general practice accepted as law;  
(c) The general principles of law recognized by civilized nations;  
(d) [Subject to the provisions of Article 59] judicial decisions and teachings of the most-qualified publicists of the various nations, as subsidiary means for determination of the rules of law.

International custom, mentioned in subsection (b) of Article 38, refers to a "usage felt by those who follow it to be an obligatory one." Evidence that a customary law exists is found primarily through an analysis of the practice of states over time. If states generally adhere to a single course of interaction, out of a sense of legal duty, the emerging mode of conduct attains the status of a principle of customary international law.

Customary law may be overridden by certain treaty or conven-

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50. I. BROWNLI, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (2d ed. 1973) [hereinafter cited as BROWNLI].  
51. Id. There is a presumption in favor of sovereign power. The burden of proof is on the state alleging that the act of another state has violated international law. The International Court of Justice addressed the notion of putative rule customary international law in the Asylum Case (Colum. v. Peru), (1950) 150 I.C.J. 266, 276:

The Party which relies on a custom [sic] must prove that this custom is established in such a manner that it has become binding on the other Party. The Columbia Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.
tion provisions.\textsuperscript{52} Two treaties are pertinent in analyzing the legality of the United States’ actions in Nicaragua: the Charter of the United Nations and the Charter of the Organization of the American States.

\textbf{A. Customary International Law}

Brownlie tells us that “[T]he objectives of [foreign] aid must be lawful” and it should not be “given [or taken away] under conditions which lead to infringement of principles of the sovereign equality of states.”\textsuperscript{53} The principle of sovereignty is an irrefutable example of customary international law. The principal corollaries of the sovereignty and equality of states are:

\begin{itemize}
  \item[(1)] a jurisdiction prima facie exclusive, over a territory and the permanent population living there;
  \item[(2)] a duty of non-intervention in the area of exclusive jurisdiction of other states; and
  \item[(3)] the dependence of obligations arising from customary law and treaties on the consent of the obligor.\textsuperscript{54}
\end{itemize}

The duty of non-intervention complements and guarantees the principle of sovereignty. When applicable, this duty prohibits interference by one state with the affairs of another, which impairs the independence of the latter state.\textsuperscript{55} Not all degrees of interference constitute a prohibited intervention; persuasion by states to accommodate conflicting interest is the essence of art of international relations. However, when persuasion amounts to forced interference into the affairs of a sovereign state, without consent, for the purposes of constraining the sovereign will of that state, permissible persuasion becomes impermissible intervention.\textsuperscript{56} Lauterpacht defines traditional intervention a bit more forcefully as “dictatorial interference in the sense of action amounting to a denial of the independence of a State . . . implying a preemptory demand of positive conduct or abstention—a demand which, if not complied with, involves a threat or recourse to compulsion in some form.”\textsuperscript{57}

\textsuperscript{52} See Brierly, \textit{supra} note 49, at 402.
\textsuperscript{53} Brownlie, \textit{supra} note 50, at 253-54.
\textsuperscript{54} Id. at 280.
\textsuperscript{55} Brierly, \textit{supra} note 49, at 402.
\textsuperscript{56} See A. Thomas & A. Thomas, Non-Intervention 71-72 (1956) [hereinafter cited as A. Thomas & A. Thomas].
\textsuperscript{57} Lauterpacht, \textit{Intervention and Human Rights}, \textit{Recueil des Cours} LII at 19 (1947-1).
The first issue thus becomes whether the degree of "persuasion" or action used by the United States in Nicaragua amounted to a forced intervention into the internal affairs of that state. It should be noted that in many cases, there appears to be an overlap between the concept of prohibited force and the concept of intervention. There are several general principles and customs of international law which may be applied to cases of economic concern.

1. Method and Degree of Coercive Measures as a Determinator

Some commentators argue that the degree and/or manner in which economic pressure is applied should be considered in determining whether a state's actions constitute a "forced interference" with the affairs of another state.58 While there is little "law" specifically referring to economic coercion, the argument or principle is somewhat analogous to the Law of the Sea.59 The emerging law governing fisheries requires that if a coastal state seeks to withdraw fishing rights from another country, it must do so over a reasonable period of time.60

In the instant case, the United States' withdrawal of aid was clearly abrupt and without prior notice, with devastating results. A conclusion might therefore be drawn that the United States' actions did constitute a "forced interference" in Nicaraguan affairs.

2. United Nations Declarations and Resolutions

United Nations declarations and resolutions represent at a minimum a consensus of world expectation, and therefore may reflect customary law and universally-accepted principles.61 Two United Nations resolutions are pertinent: the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty,62 and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of

59. Id.
60. Id.
61. See BROWNLIE, supra note 50, at 14.
the United Nations.63

The Declaration on the Inadmissibility of Intervention provides in Paragraph 1:

_No state has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned._64

Paragraph 2 states that "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantage of any kind."65

Together, these paragraphs indicate a general consensus by states of a proscription against any intervention, either direct or indirect into the affairs of a state such as Nicaragua, or any interference with that state's political or economic elements.66 Any exercise of economic coercion, whatever the form, directed towards obtaining the subordination of the state's sovereign rights, including its choice of political structure, appears to be proscribed also.

The Declaration on Principles of International Law contains similar provisions:

_No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind._67

_Every State has an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another State._68

The UN declarations do not define economic coercion or force

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64. Declaration on Inadmissibility, _supra_ note 62, at 12 (Emphasis added).
65. _Id._
66. The author recognizes that in any discussion of foreign aid as intervention, there exists a counter-argument, i.e., that under the principle of sovereignty each state has the right to manage its economy as it deems best, including the right to both grant and revoke aid in such a manner as would maximize the national interest.
67. Declaration on Principles, _supra_ note 63, at 123.
68. _Id._
in relative terms. The declarations proscribe *any* form of interference and *any* form of economic coercion, regardless of degree, where used to subordinate the exercise of sovereign rights (such as the choice of government). This is particularly true where the interfering state will derive some benefit from its actions.

The United States admittedly directed the use of economic pressure toward achievement of some change in Nicaragua's political structure.69 This would be to the benefit of United States' interests in the region. The United States' actions might well be in violation of non-intervention and non-force principles of international law.

B. International Conventions and Treaties

1. The United Nations Charter

The United Nations Charter is the foremost example of international treaty law.70 To the extent that the Charter proscribes conduct previously governed by customary law, the latter is preempted.71

The UN Charter proscribes use of force as a unilateral action by any state or group of states when it constitutes a threat to the peace, breach of the peace, or act of aggression identified in Article 39.72 Therefore, it must be determined whether economic coercion constitutes force under Article 2(4), and if so, whether it constitutes permissible action under the attendant circumstances.

a. Article 2(4)

Article 2(4) of the Charter provides that "[A]ll 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."73 If force is used inconsistently with the Charter's

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70. OPFENHEIM, INTERNATIONAL LAW (H. Lauterpacht 8th ed. 1955) [hereinafter cited as OPPENHEIM].
73. U.N. CHARTER art. 2, para. 4.
stated purposes against territorial integrity or political independence, it is *prima facie* prohibited as intervention into the domestic affairs of the state.

Extensive discussions have produced little agreement regarding the kind of force proscribed by Article 2(4). One view is that "force" is limited to armed force and does not include political and economic pressure. Support for this position dates from the 1945 San Francisco Conference where a motion by Brazil to amend the article to read "from the threat or use of force" and from the threat or use of "economic measures" was rejected in favor of the present language. However, United States delegates, among others, pointed out that the phrase "in any other manner inconsistent with the Purposes of the United Nations" was designed to insure against any loopholes. Thus, the possibility that economic coercion is illegitimate is at least arguable.

Given the general principle that no section of the Charter should be read "in a vacuum," proponents of a more restricted reading of Article 2(4) claim that the nexus between Article 2(4) and Articles 39 and 51 must be examined. The Security Council's monopoly over the use of force established by articles 39 and 42 helps to explain prohibition of force in Article 2(4), and it is argued that the terms "threat to the peace, breach of peace, or act of aggression" in Article 39 constitute a disposition of that force. Since the majority interprets Article 39 as excluding the use of economic and political pressure, it is argued that force must be interpreted only as an armed attack.

A final and major argument against a broad reading of force under Article 2(4) is that the broader interpretation would lead to practical difficulties in distinguishing between permissible and impermissible economic or political pressures.

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74. *See* Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. VI 331, 334-335 (1945). The Brazilian Amendment was rejected by a 26-2 vote. *Id.* at 335.


78. *Id.* at 22.

79. *Id.*

Perhaps the strongest argument in favor of a broad interpretation of Article 2(4) is to be found in the language of the provisions itself. While aware of the diverse methods by which one modern nation can coerce another, the framers neither embellished nor modified the word "force" with any adjectives which might have the effect of limiting its scope. In other areas of the Charter, where the framers meant to limit the use of force to armed force, they specifically did so. Furthermore, the Charter has a constitutional character, and it is an axiom of constitutional drafting that the instrument be imbued with enough flexibility and expansiveness to ensure against obsolescence. This was the rationale for leaving Article 2(4) open-ended.

Whether or not Article 2(4) was intended to include coercion as force at the time of its drafting, it is clear that the United Nations and its Charter are not intended to exist in a vacuum. The evolution of international relations may therefore compel inclusion of economic coercion within the meaning of Article 2(4). Insofar as the UN purports to embody world opinion, it cannot easily ignore concern with respect to measures "necessary" to insure peace. Exogenous sources offering evidence of a world consensus regarding the illegitimacy of economic coercion must be considered. Examples of such evidence include the UN Declaration on the Inadmissibility of Intervention, the UN Declaration on Principles of International Law, the Soviet Draft Definition of Agression, the Charter of

82. See, e.g., U.N. CHARTER preamble, art. 43, art. 46 & art. 51.
83. Use of Nonviolent Coercion, supra note 81, at 999.
84. Id.
85. Id.
86. Id.; Brosche, supra note 75, at 18.
87. Declaration on Inadmissibility, supra note 62.
88. Declaration on Principles, supra note 63.
That State shall be declared to have committed an act of economic aggression which first commits one of the following acts:
(a) Takes against another State measures of economic pressure violating its sovereignty and economic independence and threatening the bases of its economic life . . . .

It is thus arguable that measures of economic coercion such as those taken by the United States vis-à-vis Nicaragua fall within the province of Article 2(4) force.

b. Article 2(7)

The Article 2(7) proscription of UN intervention into the domestic affairs of states is another standard by which to evaluate the United States' actions. The predominant view is that unilateral acts of states should be judged at a minimum by the standards required of the UN.

There has been considerable discussion as to what constitutes intervention. One view defines Article 2(7) intervention in the same terms as intervention was defined under customary law:

[A] technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to denial of the independence of a state. It implies a preemptory demand for positive conduct or abstention—a demand which, if not complied with, involves a threat of or recourse to compulsion in some form.

An alternative view is that intervention should not be interpreted in a narrow technical sense, but rather in the sense under-

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No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.


1. Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent; . . .

2. U.N. CHARTER art. 2, para. 7 provides "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State . . . ."


93. Id.

stood by the layman to mean interference in any form.96

While the UN organs have never signified a definite preference, it is apparent that the nature of the United States' actions would fall within either definition of Article 2(7) intervention. The United States conditioned the release of aid funds and the reinstatement of aid programs upon positive conduct and/or abstention by the Nicaraguan government—a demand which involved a threat and recourse to compulsion in the form of a withdrawal of aid greatly needed by that country.

c. Article 2(3)

Article 2(3) provides that "all members shall settle their international disputes by peaceful means, in such a manner that international peace and security, and justice are not endangered." Article 2(3) is the logical corollary of Article 2(7). Article 2(3) by its terms refers only to "disputes," not to "situations." The Permanent Court of International Justice has defined "dispute" as "a disagreement on a point of law or fact, a conflict of legal views between two persons. This takes the form of claims which are met with refusals, counterclaims, denials, countercharges, accusations, etc."97 A situation is a condition which, although undesirable, has not yet become a dispute—an unhealthy condition that could eventually degenerate into a confrontation amounting to a dispute.98

The Charter expresses no standards for state action with respect to a "situation." However, it seems clear that peaceful settlement as proscribed in Article 2(3) would be the minimum standard consistent with Charter goals. Although Article 2(3) fails to delineate "peaceful methods of settlement," Article 33(1) provides that "parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice." Conspicuously absent from this list is the use of economic or political pressure.

In the case of the United States' withdrawal of aid from Nica-

96. GOODRICH, supra note 76, at 67.
98. Friedman, U.S. Trade Sanctions Against Uganda: Legality Under International Law, 11 LAW & POL'Y IN INT'L BUS. 1149, 1176 (1979). "Situations" are referred to in articles 1(1), 11(3), 12, 14, 34, 35(1) and 36(1) of the UN CHARTER.
ragua, it is unclear whether a "dispute" existed, or merely a "situation." Arguably, the issue as a point of law was whether Nicaragua had violated human rights. If so, the "dispute standard" would apply. In either event, the United States' failure to employ peaceful means of settlement violated the standards proscribed in Article 2(3).

2. The OAS Charter

Both the United States and Nicaragua are contracting parties to the Charter of the Organization of American States (OAS Charter).99

a. Articles 15 and 16

Article 15 provides:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force, but also any other form of interference or attempted threat against the personality of the state or its political, economic and cultural elements.100

The prohibition of intervention by the OAS Charter is broad. It includes any action which places another state in the position of choosing submission or the harsh consequences of refusal.101 Broad freedom from intervention is thus accepted as a principle of inter-American law. Any compulsion exerted from state to state constitutes a violation.102

Lest there be any doubt that economic or political coercion lies within the gambit of the Article 15 proscription, Article 16 provides that "[n]o state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from its advantage of any kind."

The message is clear: under the OAS Charter, no economic coercion may be applied against a member state to compel subordi-
nation of its sovereign rights. The United States' actions were in violation of the OAS Charter.

b. Articles 5(g) and 21

Article 5(g) affirms as a principle of American international law that "controversies of an international character arising between two or more American States shall be settled by peaceful procedures." Article 21 defines these peaceful procedures as "direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration and those upon which the parties to the dispute may especially agree upon at the time."

While the OAS Charter, like the UN Charter, makes no specific reference to the standard for action with regard to a situation, the minimum standard consistent with the Charter would be settlement by peaceful procedures. Determination of whether a dispute or a situation existed is therefore unnecessary. In either event, economic coercion would be outside the scope of proscribed action under these Charter provisions.

c. OAS Resolutions

While the binding nature of resolutions or declarations has been open to controversy, there is a strong body of authoritative opinion which holds Conference resolutions and declarations to be juridical and to have obligatory force upon signatory nations. It is appropriate, therefore, to consider the OAS Council's resolutions of September 1972 and June 1979 which called on member states to abstain from any action which might aggravate the situation.

103. OAS CHARTER, supra note 100, at art. 15.

The modifying phrase "and obtain from it advantages of any kind" limits the scope of the provision. However, under the present facts, it seems probable that any resulting change would be to the United States' security interests in the region.

104. A. THOMAS & A. THOMAS, supra note 56, at 67-68. The Thomas' refer to Fenwick's conclusion that inter-American Conference resolutions and declarations as sources of international law are legally binding.

The Thomas' also cited United States Secretary of State Hughes who stated that certain resolutions which are of a character not requiring sanction in the form of a treaty are deemed to be binding upon the powers according to the tenor adopted by the specific conference. Id. at 68.

105. The United States was the proponent of the Resolution referred to by Ambassador McGee in his statement which is reprinted in DEP'T ST. BULL., supra note 1, at 55. The text of the resolution may also be found at OEA/Ser F/II 17; Doc. 40/79, rev. 2.

106. Id.

107. Id. at 58.
While the tenor of the resolution seems not to make it legally binding, the resolution would seem, at a minimum, to reinforce policies of Articles 15 and 16. The United States’ economic coercion subsequent to these resolutions is therefore strongly suspect. If the resolutions are binding, the United States’ actions would be violations thereof.

3. General Agreement on Tariffs and Trade

One might argue that the General Agreement on Tariffs and Trade (GATT)\textsuperscript{108} is applicable by analogy to the U.S.-Nicaraguan situation. GATT generally prohibits economic coercion. A major goal of GATT is the prevention of economic and trade warfare, by a substantial reduction of tariffs and other trade barriers, and the elimination of discrimination in international commerce.\textsuperscript{109} Since the United States and Nicaragua are both parties to GATT, its policy of reasonable economic conduct is inconsistent with discriminatory economic treatment of Nicaragua.

\textbf{C. Conclusions}

The United States’ withdrawal of aid from Nicaragua in an attempt to force Somoza to resign,\textsuperscript{110} forces a “democratic” solution to the Nicaraguan “problem,”\textsuperscript{111} and creates an overall change in the Nicaraguan human rights environment\textsuperscript{112} seems clearly violative of international law. Analysis of both customary and treaty law indicates that United States’ actions constituted proscribed intervention and use of force, contradicting the mandate of the modern law of nations.

The question thus arises whether the attenuating human rights circumstances might serve to legitimize the otherwise “illegal” acts.

\textbf{IV. WAS THERE A LEGITIMIZING FACTOR?—THE DOCTRINE OF HUMANITARIAN INTERVENTION}

Under customary international law, an act of intervention had


\textsuperscript{110} The statements of Mr. Christopher and Mr. Vaky in DEP’T ST. BULL., supra note 1 at 58-60, typify the United States’s position throughout the latter part of the period at issue.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}
to be justified as a legitimate case of reprisal,113 protection of nationals abroad,114 or alternatively as authorized by special treaty with the state concerned.115 None of these justifications existed when the United States proclaimed its new policy, and withdrew aid from Nicaragua. The United States asserted that human rights violations were the primary basis for the withdrawal of aid. An examination of international law governing humanitarian intervention is therefore appropriate.

A. The Doctrine of Humanitarian Intervention Defined

A general rule of customary international law provides that "by virtue of its personal and territorial supremacy, a State can treat its own nationals according to its discretion."116 This is part of the broader principle of non-intervention.

While historically there has been no unanimity on the point, there appears to be a possible exception to the general rule: the doctrine of humanitarian intervention. Lauterpacht tells us that:

[T]here is a substantial body of opinion and practice in support of the view that there are limits to that discretion [of states in the treatment of their nationals] and that when a State renders itself guilty of cruelties against and persecution of its nationals, in a way as to deny their fundamental rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.117

However, even Lauterpacht conceded that the doctrine of humanitarian intervention had "never become a fully acknowledged part of positive international law."118 Indeed, historically, several scholars felt that the doctrine was not within the "code of international law" and further believed that it should not be so included, in light of the fact that the doctrine would be "manifestly open to abuses, tending to violation and destruction of the vital principles of

113. BRIERLY, supra note 49, at 402.

Reprisal refers to the institutions of seizing property or persons by way of retaliation for a wrong previously done to the State taking reprisals. Id. at 399.

114. Id. at 402.

115. Id. The Treaty of Havana of 1903, for example, gave the United States the right to intervene in Cuba for the preservation of its independence, the maintenance of a government adequate for the protection of life, property and liability, etc. It was abrogated in 1934.


117. OPPENHEIM, supra note 70, at 137.

118. BRIERLY, supra note 49, at 403.
that system of jurisprudence."

One tendency which emerges is to accept a limited right of humanitarian intervention, restricting its lawful application to either very specific circumstances, or to situations involving certain categories of states.

Despite the fact that there have been serious objections historically to the incorporation of the doctrine of humanitarian intervention as an established principle of international law, there remains a growing sentiment in the present era that such a principle does exist. The continuous reference throughout the twentieth century to the theory of humanitarian intervention in doctrine and in state practice supports this thesis. However, if humanitarian intervention does exist as a principle of international law, it exists as an extraordinary remedy to be used only under the gravest circumstances.

B. Application of the Doctrine

An analysis of pronouncements by both pre-UN Charter and post-UN Charter scholars tends to establish certain criteria governing humanitarian intervention:

1. restriction to extreme cases of atrocity and breakdown of order (such as to shock the conscience of mankind);
2. proportionality of coercive measures used;
3. disinterestedness of the intervening state(s) in the sense of a non-seeking of particular interests or individual advantages;
4. general predilection for collective action under the auspices of a competent international organ;
5. active participation or passive complicity in the violations by the sovereign;
6. compliance with international law regarding the use of force.


120. Id.

121. Reisman & McDougal, Humanitarian Intervention to Protect the Ibos, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 168 (R. Lillich ed. 1973) [hereinafter cited as Protect the Ibos].

122. See Fonteyne, supra note 119, at 235; HUMANITARIAN INTERVENTION, supra note 93, at 49-50 (statement of Professor John Moore); Lillich, Forcible Self-Help by States to Protect Human Rights, 53 IOWA L. REV. 325 (1967).
These criteria in the post-Charter era are reinforced by international resolutions and conventions.\textsuperscript{123}

1. Restriction to Extreme Cases—Overriding Necessity

This criterion looks to the values threatened by the conditions to be remedied. The general consensus is that the values threatened must be fundamental, such as the right to life or freedom from torture,\textsuperscript{124} and the deprivation of such rights must be widespread.

What is meant by the term, “deprivation of major, fundamental human rights” in the post-Charter era? Clearly, widespread loss of human life would fall within this category. But beyond the right to life and freedom from torture, the legal line is less clear. An examination of more recent instruments—the Universal Declaration of Human Rights,\textsuperscript{125} the (OAS) American Declaration of the Rights and Duties of Man,\textsuperscript{126} and the flow of human rights conventions\textsuperscript{127}—is therefore critical.

The Universal Declaration and the Covenant on Civil and Political Rights treats as fundamental rights,\textsuperscript{128} freedom of movement,\textsuperscript{129} freedom of religion and belief,\textsuperscript{130} freedom of expression,\textsuperscript{131}

123. Id.
124. Fonteyne, \textit{supra} note 119, at 259; \textit{Humanitarian Intervention}, \textit{supra} note 93, at 49 (statement of Professor John Moore).
128. The Charter itself nowhere defines the term “fundamental human rights.” The Universal Declaration of Human Rights and the Covenants were thus the preliminary steps toward an elaborate formulation of standards which would have some legally binding force. It must be remembered, however, that the Universal Declaration was adopted by resolution, not treaty, and was not intended to be binding upon members.

The subsequent international covenants have been ratified only by a very few states and thus are not binding upon the majority of states.
130. Universal Declaration, \textit{supra} note 125, at Article 18; Covenant, \textit{supra} note 127, at Article 18.
freedom of association, the right to vote freely, the right to participate in public affairs, and the right to a standard of living adequate for health and well being. However, of the twenty-nine articles of the Declaration (and the corresponding articles in the Covenants), the general consensus has been that the most exigent in regard to humanitarian intervention are those providing that "every one has the right to life, liberty, and the security of person," and that "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

To compare, the Carter policy emphasized violations of "political rights" as the primary justification for the withdrawal of aid. Although reference was made to the widespread loss of human life resulting from the civil war, the absence of sufficient "change" and of a government sufficiently "democratic" to satisfy United States standards was a primary target of the United States' attack.

There is no international instrument defining political rights of representation or popular participation in terms equating them to the United States system. Even if "democratic" rights were fundamental for purposes of humanitarian intervention, the pertinent instruments might be satisfied. As Senator Curtis pointed out in 1977, when the United States first withdrew aid:

Visibly, the degree of public participation in the Nicaraguan political process may not match the North American standards—but there are few countries that do, and Nicaragua is by no means a dictatorship in the world of Brezhnev's Russia or Castro's Cuba. In Nicaragua an opposition not only exists, but is

132. Universal Declaration, supra note 125, at Article 20; Covenant supra note 127, at Article 22.
133. Universal Declaration, supra note 125, at Article 21(3); Covenant, supra note 127, at Article 25(b).
134. Universal Declaration, supra note 125, at Article 21(2); Covenant, supra note 127, at Article 25(a).
137. Universal Declaration, supra note 125, at Article 3; Covenant, supra note 127, at Article 9.
138. Universal Declaration, supra note 125, at Article 5; Covenant, supra note 127, at Article 7.
139. See 1976 Hearings, supra note 18, at 3, 79-80; Rethinking, supra note 4, at 5-6, 29 (statement of Fernando Cruz Villa); 123 CONG. REC. S7446 (statement of Sen. Kennedy); See generally Kirkpatrick, supra note 44 (discussing the Carter Administration approach to Latin America, emphasizing human rights and politico-economic rights).
guaranteed 40% of the seats in the national legislature. While there is some press censorship, it is almost negligible in relation to Third World nations. Civil liberties are generally respected . . . .141

In sum, it would appear that the Carter Administration's basis for its claim of human rights violations was insufficient to warrant humanitarian intervention. Probably the only evidence in its favor would be the widespread loss of life. It is questionable to what degree the Nicaraguan government could be held uniquely responsible for such loss, in light of the effects of civil war. Civil war alone is probably not sufficient justification for humanitarian intervention.

2. Limited Use of Coercive Measures

This standard requires that coercive measures be proportionate to the situation sought to be remedied. The principles of relativity and proportionality are to be used as guidelines to balance the harm which intervention causes, with the size of the group affected by the violations, and with the character of the threatened human rights.142 The potential for persistence of the problem and the chance of independent internal solution should be considered.143 This includes the premise that there should be "[n]o unnecessary affectation of the authority structures" of the target state.144

The termination of military aid alone would probably satisfy this criterion. Since the National Guard was the primary perpetrator of the alleged human rights violations, withdrawal of military training and funding would seem to be a proper and proportional method to achieve the remedial purpose.

The withholding of economic aid to the rural poor, however, prior to the withdrawal of military aid, or even in addition thereto, was a questionable and disproportionate means to effect the stated remedial goals. The devastating result was to deprive those whom the United States sought to protect.

In combination, it is therefore arguable that the coercive meas-

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141. This generalization has been substantiated. See, e.g., 123 CONG. REC. 20,189-20,190 (daily ed. June 21, 1977) (statement of Rep. Murphy). While martial law provided that certain measures could be carried out in violation of freedoms and civil liberties, there is little evidence that such measures were in fact taken. The possible exceptions are in regard to the issuance of arrest warrants and in communication of prisoners.

142. Fonteyne, supra note 119, at 259.

143. Id. at 259-60.

144. Id. at 262.
ures used by the United States in the name of humanity failed to satisfy the criterion of proportionality.

3. Relative Disinterestedness of the Intervenor

This principle is a relative notion, which has become almost obsolete in the modern era. The remaining premise is that the overriding motive of the intervening state should be the protection of human rights, and any national interest should be markedly subordinate.\(^{145}\)

While a change in the “democratic” human rights status of Nicaragua might have been in the United States’ security interests, it seems clear that the overriding motive was the protection of human rights.

4. Possibility of Action by a Competent International Organization

There is a predilection for collective action where humanitarian intervention is warranted.\(^{146}\) This criterion looks to the actions of competent international organizations related to the humanitarian crisis, and to the exhaustion of all peaceful means of settlement.

Collective action was not forthcoming from the UN,\(^{147}\) probably because of the politicised nature of the problem. The OAS, perhaps the most appropriate organ to take action in this instance,\(^{148}\) did not do so until September 23, 1978, at which time it passed the resolution urging members to abstain from any action which might aggravate the Nicaraguan situation.\(^{149}\) The OAS also sent a three-nation mediating mission to Nicaragua at that time.\(^{150}\)

The United States’ withholding of aid prior to the 1978 action by the OAS would appear to be premature and in conflict with the preference for collective action. The failure of international organizations to take action with requisite speed, however, might be a sufficient justification for unilateral action.\(^{151}\)

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145. *Id.* at 261.
146. *Id.* at 266-67.
147. The only U.N. action was the passing of a resolution which only took cognizance of the situation. See supra note 1 at 41.
148. See OAS CHARTER, supra note 100, art. 20.
149. See supra note 1.
150. *Id.* at 56.
5. Compliance with International Law Regarding the Use of Force

a. The UN Charter

Arguably, the prohibition of Article 2(4) is not against the use of coercion or force per se, but rather the use of force for specified unlawful purposes;\textsuperscript{152} "All Members shall \textit{refrain} in their international relations from the \textit{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".\textsuperscript{153} Since humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved, and since it is consistent with the humanitarian purposes of the UN, it should not be precluded by Article 2(4).\textsuperscript{154} A large majority of UN delegates, however, have expressed the opinion that intervention to protect human rights is not permissible under the Charter, and that Article 2(4) contains an absolute and unconditional prohibition against force that makes any goal or intention of the state initiating force irrelevant.\textsuperscript{155}

Assuming that economic coercion constitutes force, the United States' actions would probably prove to be in contradiction to this criterion. Even if economic coercion does not constitute force under the Charter, the result would probably be the same.

b. The OAS

Economic coercion clearly constitutes force and intervention under the OAS Charter. Traditionally, whenever a choice has had to be made between the principle of non-intervention and the affirmation of human rights, the American States and the OAS have placed more emphasis on the principle of non-intervention.\textsuperscript{156} The general consensus continues to be that unilateral humanitarian intervention, such as the United States acts of economic coercion, is not an exception.\textsuperscript{157}

\textsuperscript{152} Protect the Ibos, supra note 121, at 177.
\textsuperscript{153} U.N. Charter art. 2, para. 4 (emphasis added).
\textsuperscript{154} Protect the Ibos, supra note 121, at 177.
\textsuperscript{155} Humanitarian Intervention, supra note 93, at 214, 216.
\textsuperscript{156} Le Blanc, supra note 126, at 11.
\textsuperscript{157} Id.
C. Conclusion

An analysis of the aforementioned criteria leads to a conclusion that the doctrine of humanitarian intervention, if it exists at all as a justification or exception to the general principle of non-intervention, could not be applied to the United States actions in Nicaragua. The failure of the United States to discriminate between “democratic” principles and grave “fundamental” human rights, as defined by the majority of nations, in and of itself probably precludes the United States from claiming applicability of the doctrine. When combined with the disproportionate use of coercive measures, the prematurity of the unilateral actions taken, and the violation of OAS standards for the use of force, there appears to be an almost overwhelming certainty that the doctrine could not be applied, and that the United States’ withdrawal of aid from Nicaragua was therefore an illegitimate use of economic coercion.

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