

Intervention and International Law

On May 1, President Reagan declared a trade embargo against Nicaragua. In early June, the House reversed itself and joined the Senate in approving millions of dollars in aid for forces — the “Contras” — fighting to overthrow the government of Nicaragua. Two weeks later, the House approved the use of U.S. troops in Nicaragua under a number of circumstances, including the appearance of “sophisticated fighter planes” in the country. While the economic and military impact of these measures remains unclear, their legal effect is apparent. The United States has shown itself to be an unreliable treaty partner. It has shown that it will not recognize the force of international law when it conflicts with its political objectives. This is a position that America cannot lightly assume at a time when its own national security and economic well-being depend heavily on the observance of treaty obligations.

• That the present administration would disregard international law in its dealings with Nicaragua should surprise no one in light of its recent decision to walk out of the proceedings at the International Court of Justice. Even before that case was filed, the United States tried to escape from its treaty obligations to participate in proceedings before the court. When that failed, it tried to persuade the court that it had no jurisdiction to decide the case. When the court rejected that argument, the United States simply walked out. It did not even attempt to provide a legal justification for this abandonment of its international legal obligation to respect the jurisdiction of the court.

But in its recent actions, Congress has joined the administration in ignoring both the rule of international law in general and the jurisdiction of the court in particular. The whole issue of the legality of support for the Contras is presently before the court; Nicaragua has asked the court to declare that all U.S. support for the Contras violates international law. In a preliminary decision, the court ordered the United States both to cease mining Nicaraguan harbors and to respect the sovereignty of Nicaragua. Obviously, renewing support for forces dedicated to the overthrow of the legitimate government does not constitute respect for the sovereignty of Nicaragua.

Neither would a U.S. invasion of Nicaragua simply in response to the acquisition of certain weapons — including aircraft — by Nicaragua be permissible under international law. Except in response to an armed attack by Nicaragua, introduction of U.S. troops would constitute a clear violation of the charters of both the United Nations and the Organization of American States (the “OAS”). More fundamentally, however, the House has approved in principle the concept that the United States may decide for itself when and if direct military action against Nicaragua is required. This

totally disregards the elaborate post-war treaty structure, which was largely the result of U.S. efforts, that places the decision to use force within the sole competence of multilateral institutions.

Similarly, the trade embargo against Nicaragua, an action taken without consultation with Congress, violates U.S. treaty obligations. First, in 1956 Nicaragua and the United States entered a Treaty of Friendship, Commerce, and Navigation. That treaty is still the law (even though the United States has given notice that it will terminate one year from May). The treaty provides that “between the territories of the two parties there shall be freedom of commerce and navigation.” It further specifies that “neither party shall impose restrictions or prohibitions on the importation of any product of the other party, or on the exportation of any product to the territories of the other party.”

In addition, both Nicaragua and the United States are members of the OAS and have thereby incurred treaty obligations toward each other. The OAS charter does not permit unilateral acts of economic aggression: “No 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. . . .” If the United States truly believed Nicaragua to be a threat to its national security, it was obligated to bring the issue before the OAS and seek economic sanctions through the multilateral decision mechanism within

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Sandinista soldiers guarding site of Contra attacks.

that organization. But the Reagan administration has done no such thing, preferring to act without notice to, consultation with, or agreement of its allies. And, it is now clear, its allies disagree with the embargo and will not respect it.

Finally, both Nicaragua and the United States are signatories of the General Agreement on Tariffs and Trade ("GATT"), a multilateral trade agreement adopted after World War II to promote trade on the basis of reciprocity and nondiscrimination among nations. GATT does not permit discriminatory import restrictions. In fact, when the United States unilaterally cut Nicaragua's sugar import quota in May 1983, Nicaragua brought the matter before the GATT council. That council ruled that the United States had indeed violated its legal obligations under GATT.

Many people think that international law is not "real" law, that in the absence of an effective enforcement mechanism the rules of international law are not compelling and can be freely ignored. But until now, that has never been the position of the United States. Take, for example, the policies of the Kennedy administration in dealing with the genuine threat to national security posed by Cuba in 1962.

In October 1962, President Kennedy announced a naval blockade of Cuba. He simultaneously announced that the United States would immediately bring the issue of the Cuban missiles before the Security Council of the United Nations and the Organization of American States. The OAS is authorized by a multilateral treaty signed by all member states, including the United States, to decide upon "the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent." When the issue was brought before it, the OAS voted unanimously to authorize the quarantine of Cuba. Robert Kennedy later wrote, "It was the vote of the Organization of American States that gave a legal basis for the quarantine. . . . It . . . changed our position from that of an outlaw acting in violation of international law into a country acting in accordance with twenty allies legally protecting their position."

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U.S. actions toward Cuba, in short, occurred within a legal framework of collective action. This alone provided the legal justification for the actions. The framework was one to which the United States was bound to adhere by virtue of its treaty commitments. Fulfillment of this obligation, however, was not simply a formalistic burden: The claim of legal legitimacy justi-

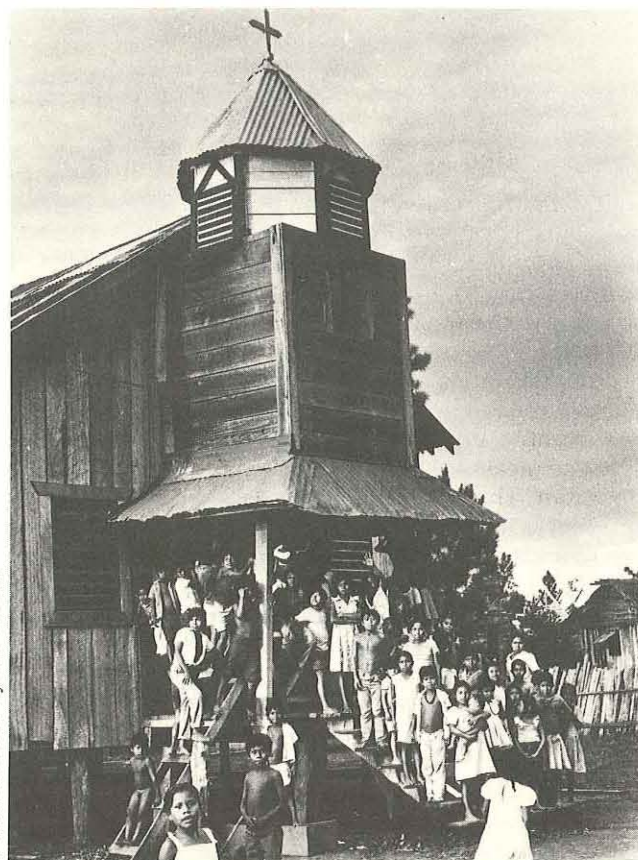


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Nicaraguan children gather on the church steps.

fied international support for the actions of the United States. Again, as Robert Kennedy stated, "Our position around the world was greatly strengthened when the Organization of American States unanimously supported the recommendation for a quarantine."

The same international legal obligations exist today that existed in the early 1960s: The United States remains a member of the Organization of American States, as is Nicaragua. As such, the United States had a legal obligation to bring its allegations against Nicaragua before the OAS. Instead of doing so, it has chosen to rely upon its own economic and military power to take unilateral actions against Nicaragua.

No law — international or domestic — has any more substance than its ability to persuade the strongest members of the society to obey. But even where not coercive, law remains a standard by which we can judge the government's behavior. International law, in particular, provides the standard by which all of us can measure our own government's behavior among the community of nations. By this standard, America has not performed well lately.

— Paul W. Kahn

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