

NOTES AND COMMENTS
CORRESPONDENCE BETWEEN SIR ROBERT JENNINGS
AND KEITH HIGHET

Editor's Note: Judge Jennings and Mr. Highet have agreed to share this private letter from the former to the latter sent in response to notification of his honorary membership in the Society. We thought it would be of some interest to the general membership and to historians.

Dear Keith,

I am writing to thank you most warmly for your kind letter of April 19th about my honorary membership of the A.S.I.L.

May I also say again how very much I appreciate this honour? You may be interested to know how it was that I have been a member for so long. When, after returning from six years in the Army during W.W.II, I returned to Cambridge, I quickly came under the influence of Hersch Lauterpacht, who became one of the closest friends I have ever had. One of his earliest pieces of advice was: "You cannot pretend to be a serious scholar of international law, unless you subscribe to the *American Journal*; so take my advice and do that straight away."

I did!

With renewed thanks, and best personal regards,

Yours sincerely,

ROBBIE

A NOTE TO OUR READERS

Because of space constraints in the *Journal*, a response by John Norton Moore to Rowles, "*Secret Wars, Self-Defense and the Charter—A Reply to Professor Moore* (80 AJIL 568 (1986)), is being published in the March/April 1987 issue of the *Virginia Journal of International Law* (vol. 27, No. 2).

CORRESPONDENCE

The *American Journal of International Law* welcomes short communications from its readers. It reserves the right to determine which letters should be published and to edit any letters printed. Letters should conform to the same format requirements as other manuscripts.

TO THE EDITOR IN CHIEF:

September 3, 1986

Professor Glennon's brief Editorial Comment, *Mr. Sofaer's War Powers "Partnership"* (80 AJIL 584 (1986)), appears hurried, heated, tendentious, and a bit naive.

Glennon charges that Legal Adviser Sofaer "ignores the authority of Congress to define its own intent" (*id.* at 585). The fallacy of that charge is elementary: the 99th Congress has no power to define the intent of the 100th Congress, and no power to decree that an enactment of the 100th Congress (which the 99th might never have adopted) be construed not to alter the intent of the 99th. It would, indeed, be an abdication of duty for anyone charged with interpreting, applying, or executing the laws to fail to discern, as best he could, the intention of the latest legislation and then carry that out. (*See, e.g.*, *Johnson v. United States*, 163 Fed. 30, 32 (1st Cir. 1908).)

Can the 99th Congress (or could the 84th or 93d) authoritatively lay down that future acts of a future Congress shall not control over the will of *this* Congress, except on conditions imposed by this Congress? If, as seems to be the case, Professor Glennon would say yes, then it is he and not Judge Sofaer who mistakes the ambit of legislative authority.

MALCOLM T. DUNGAN

Professor Glennon replies:

If Congress lacked power to prescribe its own rule of interpretation to specified statutes and thereby to preclude the application of a court-made canon of construction such as the last-in-time doctrine, or if the courts had power to apply such a canon notwithstanding an express statutory prohibition, the writer would be correct in believing a canon of construction to be the juridical equivalent of a constitutional doctrine. It doesn't, they don't, he's not.

TO THE EDITOR IN CHIEF:

July 29, 1986

In *The Secret War in Central America and the Future of World Order* (80 AJIL 43 (1986)), Professor John Norton Moore seeks to provide the academic and legal basis for the Reagan administration's policies in Central America. In doing so, he unequivocally accepts the United States Government's description of events and rejects the views of those who suggest there is a reality other than that presented by the Reagan administration. Admittedly, there is a tremendous amount of misinformation concerning the situation in Central America, including that relating to the level of human rights abuses in the various countries. However, those interested in investigating the subject credibly must be prepared to review critically human rights reports prepared by various entities, including the United States Government, and to consider whether the methodologies employed therein were credible.

In this regard, Professor Moore questions the fact-finding methodology employed by a mission sponsored by the International Human Rights Law Group and the Washington Office on Latin America to investigate abuses by contra forces in Nicaragua (*id.* at 123 n.333). The basis for his complaint is the use by the mission members of a car and driver provided by the Sandinistas and their procedures for selecting persons to be interviewed. The team, however, explains the reasons for its use of the former in its report (Fox and Glennon report, p. 9). Professor Moore neglects to mention that the car was unmarked and that the driver did not accompany the team members once they reached a particular city where interviews were to be conducted.

Further and more important, Professor Moore seeks to undermine the contributions human rights fact-finding missions have made throughout the world by suggesting that interviews conducted by experienced attorneys would not uncover the truth regarding questions of human rights abuses. Investigations, such as the one conducted by Messrs. Fox and Glennon, have sought to document human rights violations by reliance on first-person testimonies, which are subjected to critical cross-examination. Moreover, those concerned with human rights abuses believe that any abuse should be reported; thus, questions of "statistical significance" are not the only point.

Despite his criticism of the methodology employed by some human rights fact-finding missions, Professor Moore does not hesitate to rely on the first-hand observations he made as an election observer in El Salvador as part of an official United States delegation. For those unfamiliar with the phenomenon, let me describe the "methodology" employed by Professor Moore and his colleagues.

In concluding that the Salvadoran elections were amongst the fairest in that country's history, Professor Moore spent less than 48 hours in the country. He was transported to polling sites by U.S. military helicopters and spoke with voters through interpreters, certainly not ways designed to encourage trust in the eyes of those being interviewed.

Further, despite the fact that human rights abuses continue in El Salvador at unacceptable levels, Professor Moore is satisfied that President Duarte is committed to "democratic pluralism, human rights and social justice." How does Professor Moore know this? Because of the vigorous questioning conducted by the United States observer delegation of Duarte and his responses to their questions. What did Professor Moore expect Duarte to say?

The type of fact-finding mission conducted by Professor Moore and his colleagues can only give such missions a bad name. Serious human rights groups, on the other hand, constantly review their methodology to ensure that their findings and conclusions are credible. Alas, one wishes the same could be said of the Department of State and the other groups which Professor Moore so uncritically relies on.

LARRY GARBER
*Acting Director
International Human Rights Law Group*

Professor Moore replies:

One of the encouraging features of the contemporary international legal system is the proliferation of independent human rights organizations dedicated to making human rights a living reality. Such organizations should be encouraged in carrying out their mission of hard-hitting and objective reporting on human rights violations. That mission, however, can only be harmed by circling the wagons against criticism rather than seeking to improve standards of investigation and reporting. In this respect, the letter from Larry Garber, reacting to restrained criticism of the Donald Fox-Michael Glennon investigation of contra abuses, is disappointing. The methodology of that investigation is flawed and a facile comparison with the United States election observation mission, if indeed relevant, should only heighten an understanding of the investigation's defects. I am disappointed,

but amused, at the suggestion that I seek "to undermine the contributions human rights fact-finding missions have made throughout the world" by applying the very criteria Mr. Garber endorses in his first paragraph ("those interested in investigating the subject credibly must be prepared to review critically human rights reports . . . and to consider whether the methodologies employed therein were credible"). When the acting director of a well-known human rights organization can contradict himself within three paragraphs, I would think that scrutiny would indeed be welcome.

Before I proceed to a brief analysis of the shortcomings of the Fox-Glennon effort and a comparison with the U.S. election observation mission, it may be helpful to set out some of the relevant context for human rights reporting in Central America and to set the record straight as to what I have said, as opposed to Larry Garber's characterizations.

Human rights abuses seem to have occurred on all sides in the Central American conflict. Although, on the basis of the evidence cited in my *Journal* article on Central America, I believe that the Sandinista abuses are particularly systemic and wide ranging, that would not excuse human rights violations by any party. Contrary to the assertion by Garber that my conclusions critical of the Sandinistas are based solely on the U.S. Government's description of events, my *Journal* article cites and relies on all of the major human rights reports on Central America, including those by Americas Watch, Amnesty International, the Inter-American Commission on Human Rights, the nongovernmental Nicaraguan Permanent Commission on Human Rights and numerous press and scholarly reports.¹ In my judgment, the available evidence suggests a pattern of severe and continuing human rights abuse by the Sandinistas, including attacks against opponents, denial of press freedom, suppression of dissent, suppression of organized labor, harassment of religious activities, atrocities against native Indian populations, anti-Semitism, politicization of the judiciary and a general suspension of civil liberties.² No data are offered in the Garber letter that any of these abuses, documented in my article, have in fact not occurred. With respect to alleged contra abuses, Garber fails to note that my article specifically says, "There also have been persistent reports of contra attacks in violation of Article 3, and it seems likely that some have taken place. All such violations should be condemned."³

Human rights reporting in Central America, particularly on alleged contra abuses, has been made particularly difficult by an apparent Sandinista policy to provide misinformation on human rights issues as a deliberate form of political warfare and to seek to use foreign-based groups to spread misinformation. These tactics have been described by numerous observers, including Mateo Guerrero, the former executive director of Nicaragua's National Commission for the Preservation and Protection of Human Rights.⁴

¹ See Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43, 117-25, particularly reports cited at 117 n.293 (1986).

² *Id.* at 117-25. See also the more detailed human rights discussion in my forthcoming book, J. MOORE, *THE SECRET WAR IN CENTRAL AMERICA* (1987).

³ Moore, *supra* note 1, at 123 (footnote omitted).

⁴ Gedda, *Nicaraguan Defects: Human Rights Official Given Asylum in U.S.*, Wash. Post, Aug. 21, 1985, at A13, cols. 1-3. For a summary of information supplied by Guerrero, see DEP'T OF STATE, *INSIDE THE SANDINISTA REGIME: REVELATIONS BY THE EXECUTIVE DIRECTOR OF THE GOVERNMENT'S HUMAN RIGHTS COMMISSION* (1985).

According to Guerrero, the Secretary-General of the Foreign Ministry and the official responsible for monitoring the Nicaraguan National Commission for the Promotion and Protection of Human Rights (CNPPDH), Alejandro Bendana,

stated that acting on the authority of President Daniel Ortega and Foreign Minister Miguel D'Escoto, he would personally direct the CNPPDH for the purpose of promoting a [*sic*] international offensive by the Nicaraguan government denouncing abuses allegedly committed by anti-Sandinista forces. He noted that the CNPPDH would help establish a network of foreign human rights organizations to publicize these abuses throughout the world.⁵

Of particular relevance, Alvaro Baldizón, former chief investigator of the Special Investigation Commission of the Nicaraguan Ministry of the Interior, has reported:

As part of its international political strategy, the Sandinista government seeks to use foreign visitors and religious groups as instruments of support for its public posture that the FSLN and the Nicaraguan Government respect religion and human rights. Baldizón said that the GON [Government of Nicaragua] carefully orchestrates such visits whenever possible in order to obtain the greatest propaganda value

Borge [the GON Minister of the Interior] sends teams of people to be on the routes used and in the localities to be visited. These are called "casual encounter" teams and when a delegation arrives at a location, MINT [Ministry of the Interior] personnel, pretending to be local residents, "just happen" to be available to talk with the delegation's members. They describe alleged contra atrocities and the benefits of the Sandinista revolution for Nicaragua's peasants and workers.⁶

Baldizón has also described covert special operations teams sent by the Nicaraguan Government to front areas to impersonate contras. In a statement of February 27, 1986, Baldizón said:

Towards the end of 1981, the first of three platoons of Nicaraguan commandos in the Special Operations Forces returned from training in East Germany. Their first mission was to search out and annihilate bands of counter-revolutionaries operating in the countryside surrounding Matagalpa and Jinotega. The platoon was placed under the command of Captain Marcos Arevalo (alias Marcon), and the soldiers were disguised as counter-revolutionary guerrillas. They were given old clothes and miscellaneous M-16 and Galil weapons.

They went into the bush, and began operations as if they were part of the resistance. They killed about a dozen campesinos who were known Sandinista collaborators. They burned their houses and even set fire to a government cooperative. . . . At the end of the operation, Captain Arevalo was promoted to sub-comandante, and all of his soldiers were rewarded with commissions as second lieutenants.

⁵ DEP'T OF STATE, *supra* note 4, at 3.

⁶ DEP'T OF STATE, INSIDE THE SANDINISTA REGIME: A SPECIAL INVESTIGATOR'S PERSPECTIVE 11 (1986).

By the end of 1982, two more platoons returned from commando training in East Germany and were sent to the field in March of 1983. Meanwhile, the Special Operations Forces had been buying jungle boots and uniforms identical to those used by the organized resistance movements. These two platoons were dressed up as contras and given weapons like M-60 machine guns and FAL, G-3, M-16 and Chinese Ak-47 automatic rifles. They sent one of the units, under the command of Captain Paniagua, to work in Matagalpa, Jinotega and Nueva Segovia departments. The other, led by Captain Octavio Huete, went to Boaco and Chontales departments. . . . These platoons continued to operate until the end of 1984.

Near a place called El Corozo in Boaco, Captain Huete's group posed as FDN combatants and moved in to threaten and agitate local peasants. They continued until an actual ARDE task force, led by Comandante Cyclone, approached. . . .

During December 1984 and January 1985, I was asked to investigate another failure of one of the Special Operations platoons on a mission near San Juan de Rio Coco. I questioned three captains and some 30 soldiers who discussed the atrocities they had broadly committed in the course of their association with their units.

Apart from these activities, a new unit was inaugurated in October 1984, whose mission was distinctly more oriented toward international propaganda. Selected officers from Special Operations were placed in a squad under the command of Captain Morales. An ex-member of the FDN, Alfredo Lazo Valdivia was assigned as a guide. They began operations near the Honduran border in Chinandega, Madriz, Nueva Segovia, and Jinotega. They also made selective incursions into Honduras. They still operate in that area, and their mission is to pose as FDN combatants, ambush civilian vehicles, as well as threaten and beat up local peasants, especially those known to have collaborated with the government. They are one of Interior Minister Borge's greatest treasures.⁷

Similarly, Douglas Payne has documented how the FMLN "incorporates broadfront deception in its strategic line, with a special emphasis on human rights." Of particular interest, he notes:

One document describes the existence of an internal human rights front whose task is to promote among outside observers specific human rights issues that would enhance the FMLN's military capability. For instance, it was stressed that the issue of civilian deaths during Salvadoran Air Force bombing was paramount for promotion because the bombing was the most effective tactic against the FMLN military operation and had to be defused.⁸

⁷ Dep't of State, Sandinistas Disguised as Contras (Statement by Alvaro Baldizón, Feb. 27, 1986).

These widely reported statements by former Sandinista officials have not been independently cross-checked by the author, who does not purport to have made a field investigation of human rights abuses in Nicaragua.

⁸ D. Payne, Human Rights in Nicaragua 6-7 (paper presented to a conference jointly sponsored by the American Bar Association and the Saint Louis University School of Law, Feb. 1, 1986). Payne also tells how a Nicaraguan Jesuit priest, Fernando Cardenal, concealed from an American congressional committee in 1977 that he "was a full member of the Sandinista Front." *Id.* at 3.

The Central American human rights reporting landscape also includes a partially successful effort by the Sandinistas secretly to influence a major Senate hearing on contra human rights issues.⁹ More generally, Professor Paul Hollander has described the difficulties of what he terms "political pilgrims" in accurately reporting events in totalitarian countries,¹⁰ and in several recent articles he has detailed this problem for those traveling in Sandinista Nicaragua.¹¹ This general context in which human rights investigations must necessarily proceed in Nicaragua does not suggest that human rights reporting that may coincidentally be supportive of the objectives of such regimes should not be undertaken, but only that when undertaken, it should be pursued with particular care to ensure that it not be compromised.

* * * *

With this general background, let me turn to my specific criticisms of the methodology of the Fox-Glennon report. It might first be noted, however, that because of my respect for the motivations of those undertaking this report, my *Journal* criticism was deliberately muted; it consisted of a footnote saying: "Although the authors are clearly sincere, their use of a Sandinista governmental car and driver, and the procedures employed, e.g., in selecting and interviewing persons and reporting the results, significantly flawed the report."¹² Larry Garber's exception to this mild criticism compels me to offer a fuller exposition of the flaws in the investigation and report. In doing so, let me reiterate my support for objective, hard-hitting human rights investigation and my respect for those who carry out such investigations under difficult conditions.

First, while Fox and Glennon are both able lawyers, the delegation was overly narrow. An important human rights investigation, undertaken against a background of Nicaraguan governmental misinformation, should have been conducted by a broad cross-section of investigators, including distinguished individuals with a variety of perspectives and backgrounds. The report, however, does not indicate that any effort was made to include additional perspectives or a larger number of experts. In contrast, the United States observer mission to the elections in El Salvador had a broad cross-section of national leaders, including a number of congressmen and senators; and leading congressional opponents of U.S. policy, such as Senators Dodd and Tsongas, were invited to participate. It was led by Ambassador Max Kampelman, the experienced U.S. head of delegation to the Conference on Security and Cooperation in Europe and currently the U.S. head of delegation to the Geneva arms control talks with the Soviet Union. While I am completely convinced that Donald Fox is motivated solely by human rights concerns—there is at least an *appearance* of conflict of interest when his wife is a relative of a Nicaraguan official. This appearance of conflict is heightened when not disclosed in the report. Anyone with such an apparent conflict, no matter how able, is not the appropriate choice for a two-person investigating team in such a sensitive area. The lack of breadth in the team's report

⁹ See Muravchik, *Manipulating the Miskitos*, NEW REPUBLIC, Aug. 6, 1984, at 21–25.

¹⁰ P. HOLLANDER, *POLITICAL PILGRIMS* (1981).

¹¹ See, e.g., Hollander, *The Newest Political Pilgrims*, COMMENTARY, August 1985, at 37, 37, 38, 40 and 41.

¹² Moore, *supra* note 1, at 123 n.333.

is exacerbated by the fact that one of the sponsoring organizations of the investigation was the Washington Office on Latin America, well known for its opposition to U.S. policy in Central America.

Second, the investigation vigorously asserted its complete independence, yet seems to have been intertwined with the Government of Nicaragua—and particularly with counsel for Nicaragua in the World Court case against the United States—in a number of subtle, but potentially distortive, ways:

- According to Paul Reichler, an attorney representing Nicaragua before the World Court and a registered agent of the Government of Nicaragua, “the suggestion for an independent and objective study of contra abuses against civilians came initially from my law firm.”¹³

- The mandate for the investigation by Fox and Glennon included as a core direction that it evaluate the previous “Brody report,” prepared at the initiation of Reichler’s office but compromised by substantial involvement of the Nicaraguan Government. Indeed, the Fox-Glennon report was released at a press conference with the Brody report, which Fox and Glennon asserted was substantiated by their investigation. Larry Garber’s introduction to the Fox-Glennon report is particularly revealing in characterizing the assistance provided by the Nicaraguan Government to the preparation of the Brody report as “minor.”¹⁴ This “minor” assistance is described by the former executive director of the Nicaragua Human Rights Commission as including a headquarters in Managua, lodging, financing and assistance in arranging interviews believed to “have most impact on the lawyers and the public.”¹⁵ The interrelation with the Brody report in effect meant that the Fox-Glennon investigation was significantly channeled toward evaluating a report produced with substantial Sandinista involvement.

- There seems to have been considerable interaction between the investigation and the office of Paul Reichler representing Nicaragua before the World Court. This has been said to include conversations between Reichler’s office and the sponsoring organizations, and Reichler’s meeting the members of the delegation at the airport in Managua, expediting them through customs, driving them to their hotel and subsequently, as part of the same trip, arranging a meeting for one of the delegation principals with government officials involved with Reichler in the case against the United States before the World Court.¹⁶ The delegation member apparently attending that meeting later testified for Nicaragua before the World Court. The delegation members also used a car and driver provided by the Sandinistas, although they—and Larry Garber—have made much of the points that the car was unmarked and that the driver did not attend interviews. There have

¹³ See *Facts Don't Support Attack on Professor*, Cincinnati Enquirer, Dec. 22, 1985, at F3, col. 1.

¹⁴ See D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA, at iv and 2 (1985) (Garber, and Fox & Glennon, respectively).

¹⁵ See Moore, *supra* note 1, at 124 n.338.

¹⁶ The other principal may not even have been aware of this meeting.

also been reports that media coverage on the release of the Fox-Glennon report was arranged by a public relations firm, Fenton Communications, which previously served as a registered agent for the Government of Nicaragua (and for Grenada under Maurice Bishop). None of these interactions with the Government of Nicaragua and those intertwined with it were revealed in the Fox-Glennon report except the use of a Sandinista car and driver.¹⁷

Third, the procedures for the selection of persons interviewed about contra abuses do not fill one with confidence in view of the reported tactic of the Sandinistas to field "casual encounter" teams for foreign visitors and the existence of Sandinista-controlled *Sandinista Defense Committees* (SDCs) at the local level throughout Nicaragua. Apparently, 10 of the "over 36" witnesses were selected from Brody report affidavits already tainted by heavy involvement of the Nicaraguan Government. And unknown numbers of others, according to the Fox-Glennon report, "came to see us because they heard we were there." Although the authors say they did not reveal their itinerary, they do not indicate how it was selected and seem insensitive to the fact that their government driver could certainly know their whereabouts.

Fourth, the procedures used to conduct the "investigation" were rudimentary at best. The investigators apparently spent no more than 4 days interviewing in the field, and while they say they sought to cross-check where possible, their report does not reveal what percentage of interviews relied on were cross-checked, what percentage of incidents discussed were corroborated through cross-checks, or what techniques were used to verify that those perpetrating incidents were in fact contras. A recent report by investigators at Berkeley who examined North Vietnamese human rights violations provides an instructive contrast in the specificity with which cross-check methodology is developed and discussed.¹⁸ In place of careful investigation techniques, the authors of the report, and Larry Garber in his letter, rely heavily on an almost mystical assertion of a lawyer's alleged ability to find the facts through cross-examination. But, as any experienced lawyer knows, cross-examination is largely a technique used by an adverse party for impeaching a witness's testimony when contrary facts are known through previous investigation. How witnesses were to be reliably tested by nonadverse interviewers who had not conducted a full investigation of the alleged incidents remains a mystery. Moreover, almost none of the questions asked interviewees in this assertedly tough cross-examination are reproduced in the Fox-Glennon report. Similarly, the investigators apparently felt that they had adequately verified the controversial Brody report by interviewing 10 of some 146 persons interviewed by Brody. Again, the investigators seem

¹⁷ It has been urged that this series of contacts with the Nicaraguan Government was simply part of a broad series of inquiries made for the investigation. There is substantial question, however, whether the indicated degree of contact with the Nicaraguan Government is appropriate for an investigation that must, of necessity, operate in the shadow of Sandinista political interest.

Of equal concern, there is a serious question whether the appropriate contact of the Nicaraguan Government for the investigation was a principal attorney coordinating Nicaragua's pending case before the World Court. This concern is heightened by the admitted involvement of that attorney in promoting the investigation and the subsequent appearance of one of the delegation principals on behalf of Nicaragua before the Court.

¹⁸ Desbarats & Jackson, *Vietnam 1975-1982: The Cruel Peace*, WASH. Q., Fall 1985, at 169.

unaware that the issue is less one of the existence of persons making statements than the accuracy of those statements and the existence of corroborative evidence of the underlying incidents, including the identity of the perpetrators. The crux of an investigation of human rights abuse in an area of high political controversy surely must be a careful cross-checking of incidents through multiple sources, rather than interviewing and counting of affidavits.

Fifth, the reporting of the data is poor. As previously mentioned, it does not reveal all the questions asked by the interrogators or anything about the number of affidavits or incidents verified through cross-checks or how any such cross-checks were conducted. Eleven out of 25 of the attached affidavits conclude with a statement roughly to the effect that the interviewee is a good Catholic and not a Communist. Since this is a rather startling coincidence, not only in content but also in location—and one coinciding with an obvious Sandinista public affairs theme—it suggests either an effort to manipulate the authors or a pattern of questioning by them that resembles leading questions more than rigorous cross-examination. Since at least one of the authors of the report in a conversation with me expressed doubts about the questioning of the other (a difference itself suggesting little advance thought or institutional input in critical methodology to the investigation), and since the report itself refers to the team's getting as a response to a question that the witness was Catholic, I will assume that the latter was true. Neither conclusion lends much confidence to the investigative process. Similarly, the report does not fully present to the reader any contrary views heard by the delegation. While the report in passing reveals that some interviewees were inclined to dismiss reports of contra atrocities, no affidavits from any such persons are included except for El Muerto, a contra leader interviewed in Tipitapa at the Modelo Prison who denied contra participation in abuses and whose statement is apparently disregarded by the authors. Although the affidavit of the Nicaraguan Deputy Minister of the Interior, Luis Carrión (accused by Baldizón of authorizing "special operations" to kill dissidents¹⁹), is included, no affidavit is supplied from Cardinal Obando y Bravo, a leading critic of the Sandinistas with whom the delegation met. Even more significantly, the report only includes 25 affidavits out of "more than 36" interviews. Why some were omitted, and why no full transcripts of the interviews seem to have been made available, is not apparent. The report also does not reveal why no affidavits were included from the field investigations in Esteli and which of the included affidavits were from interviewees of the Brody investigation. A puzzling technical matter is that not all the dates on the affidavits coincide with the reported itinerary.

This critique of their report does not—and does not purport to—establish the truth or falsity of the substance reported by Fox and Glennon. Nor does it impugn—or seek to impugn—the good faith of the investigators or the organizations they represent in seeking to further human rights. Nor does it deny the possibility that the report may have increased pressure on one combatant in a difficult conflict to tighten human rights standards. It *does* suggest naiveté in an admittedly difficult investigation and procedures that are sloppy at best. It is important to remember that in the end, good faith is not sufficient. Truth, as ascertained through careful investigation, is of particular importance in a politically sensitive ongoing war. Certainly in the

¹⁹ See Information Supplied by Alvaro Baldizón Aviles 1, 7, and 9 (unpublished paper on file at the Center for Law and National Security, University of Virginia School of Law, 1985).

Central American context, pressure on all sides to tighten human rights standards is useful.

Additional comparisons with the official U.S. observer mission to the Salvadoran presidential election further demonstrate the shortcomings of the Fox-Glennon report. Since an election observation mission is primarily to monitor the voting, it is not inappropriate for it to remain in the country only for that event and rely on secondary sources for characterization of preelection events. In contrast, there is no apparent reason for a serious investigation of contra human rights abuses that relies exclusively on events not observed by the delegation to confine itself to 4 days of field investigation. Moreover, the U.S. special mission to observe the presidential election in El Salvador did not rely on the Salvadoran Government; rather, it exclusively used transportation and facilities supplied by the United States Government, and arrangements were made through the United States Embassy. It should also be pointed out that the U.S. mission included an internationally known expert on the election process and did not purport to be anything other than an official United States government delegation. Contrary to the suggestion that my *Journal* article relies on questioning of Duarte to reveal his human rights record, the reference to the interview with Duarte appears in a footnote and is clearly cited only for the unexceptional proposition that *the United States delegation* was "impressed with the depth of Duarte's commitment" on human rights. Incidentally, Garber's account of the U.S. observation mission is factually inaccurate in numerous respects, but those inaccuracies, like his use of this very different mission as a comparison, are largely irrelevant. Even if the mission was not perfectly conceived, that would no more justify structural defects in an important human rights investigation than the argument that Sandinista human rights abuses justify contra abuses. That is, this argument of Garber, as all such arguments, is a paradigm of the logical fallacy known as a *non sequitur*.²⁰

The Fox-Glennon report cites as a reason the authors did not prepare a report on Sandinista abuses that their "sponsors also have monitored human rights developments in Nicaragua since the 1979 revolution."²¹ As far as I can ascertain, this "monitoring" by Larry Garber's International Human Rights Law Group has resulted in only two reports. One is cautiously critical of the Sandinistas for press censorship,²² while the other proclaims that the Sandinista elections were genuine.²³ That is the same election in which mobs organized by the Government stoned Arturo Cruz, the principal non-Sandinista candidate.²⁴ It should be recalled that the *New York Times* editorialized about the same elections that "only the naive believe" they were democratic and legitimating.²⁵

Most importantly for the future, if independent human rights organizations are effectively to implement their mandate for promoting human rights,

²⁰ See, e.g., S. BARKER, *THE ELEMENTS OF LOGIC* (1965).

²¹ D. FOX & M. GLENNON, *supra* note 14, at 8 n.14.

²² See INTERNATIONAL HUMAN RIGHTS LAW GROUP, *GOVERNMENT RESTRICTIONS ON THE PRESS IN NICARAGUA: THE STATE OF EMERGENCY AND INTERNATIONAL LAW* (1983).

²³ See INTERNATIONAL HUMAN RIGHTS LAW GROUP & WASHINGTON OFFICE ON LATIN AMERICA, *A POLITICAL OPENING IN NICARAGUA: REPORT ON THE NICARAGUAN ELECTIONS OF NOVEMBER 4, 1984* (1984). (Like the Fox-Glennon report, this election report was cosponsored with the Washington Office on Latin America.)

²⁴ See J. MOORE, *supra* note 2, at 18 (in manuscript).

²⁵ See *id.* at 75.

they must toughen their standards of independence, evenhandedness, investigation and reporting. The Fox-Glennon report is a flawed report, but in that respect it may not be much different from many current efforts in the difficult Central American setting, including, in this author's judgment, some of the Americas Watch reports.²⁶ It is hoped that rather than seeking to stifle criticism, human rights organizations working on Central America will begin to police one another and to raise the level of independent human rights reporting generally. It is precisely because the stakes for human rights and world order are so high that we must accept no less.

Editor's note: A response by Professor Glennon will appear in the April 1987 issue.

TO THE EDITOR IN CHIEF:

December 4, 1986

Professor Thomas Franck's Editorial Comment (In re *Herbert Reis*) in the October 1986 issue of the *Journal* attacks the decision by the U.S. Government to nominate an individual, unnamed by Professor Franck, whom he deems a "hapless successor" to Herbert Reis, the outgoing U.S. national on the United Nations Administrative Tribunal. The nomination is characterized by Professor Franck as "ward-level partisan politics" and the product of "narrowly defined partisan interest"; the decision not to reappoint Mr. Reis is described as a "baleful incident," reminiscent of the McCarthyism which prevented Professor Philip Jessup's appointment in 1955 to the International Law Commission.

This is rather strong and unusual language for a *Journal* Editorial Comment. To be sure, as Editor in Chief and a member of the *Journal's* Editorial Board, Professor Franck is free to write and publish editorial comments as he pleases. But unless the same standards of scholarship and scrupulous fairness demanded of other contributions to the *Journal* are adhered to, the *Journal* and all concerned are disserved. Surprisingly, Professor Franck's Editorial Comment departs from the high standards of his other writings. He apparently either did not look carefully into, or ignored the qualifications of Mr. Reis's successor, Jerome Ackerman of the Washington, D.C. Bar.

Permit me to set the record straight. In early 1986, I was asked by the U.S. Mission to the United Nations, where I continued to serve as Adviser to Ambassador Vernon Walters, to assist in the search for a highly qualified candidate as a possible alternative to Mr. Reis. I knew Mr. Ackerman as a brilliant attorney and advocate with a national reputation as a litigator in labor law-related matters, and with considerable arbitration experience. A graduate of the Cornell University School of Industrial and Labor Relations, he received his law degree, magna cum laude, at the Harvard Law School and specialized in employment relations law for 35 years at the Washington law firm of Covington & Burling, from which he was scheduled to retire from active practice in late 1986. In addition to his experience, his reputation for competence, good judgment, integrity and fairness persuaded me, after reviewing the qualifications of several other distinguished individuals, that he would be an ideal candidate for the UN Administrative Tribunal.

Professor Franck suggests that little prior experience in public international law is a disqualifying factor for membership on the Tribunal. But this

²⁶ For a critique of the Americas Watch reports, see Moore, *supra* note 1, at 51 n.28.

is off the mark. The UN Administrative Tribunal is concerned primarily, if not exclusively, with employment relations issues of various types. By its statute the Tribunal is empowered only to "hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or the terms of appointment of such staff members." Whatever questions of public international law that may arise in this context are unlikely to be beyond Mr. Ackerman's abilities.

The very high regard for the UN Administrative Tribunal held by the United States led it to designate an individual meeting the highest standards of professional competence and personal integrity. Professor Franck's prophecy that by this appointment "the administration's base of support in the international legal profession, already eroded by various law-defying policies, will needlessly suffer further attrition" is simply conjecture based on mistaken assumptions. In saying this, I do not differ with the point twice made by Professor Franck in the *Journal* that Mr. Reis has served ably on the Administrative Tribunal. He brought to the Tribunal his useful perspectives as a career State Department lawyer and surely merited the honor of being designated by his peers as one of the two Vice-Presidents of the Tribunal. Mr. Ackerman will doubtless bring fresh perspectives from a different, but no less valuable, background. There is every reason to believe that his tenure on the UN Administrative Tribunal will reflect equally, and perhaps even more, to the credit of the UN Administrative Tribunal and the United States.

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