Responding to the Crisis in El Salvador: A Public Order Perspective

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I. Introduction

In the contemporary world, civil wars produce widespread international effects. In the past, limited means of transportation and less sophisticated communications permitted at least a partial insulation of civil wars in places far from the territories of the great powers. Transnational interactions were fewer; people's foci of attention were narrower. Thus, popular demands1 and identifications2 were more circumscribed. Scientific and technological advances changed these conditions. International economic actors used new technology to integrate national economies into larger networks and to obtain information about commercial opportunities and risks. Security arrangements were developed to maintain and expand access to the resources and markets that modern industrial economies require. These factors have helped to shape the present world community, which is characterized by increasingly interrelated social processes and equally intricate political and economic interdependence.

As a result, most national decision makers need to consider the potential consequences of any major internal war, wherever located, both for world institutions and for the other, more immediate communities with which they identify. Consequently, their responses to such a conflict will be molded by expectations3 about future events and desires to affect future outcomes. In this setting, any decision or non-decision influences events far from the conflict itself.

Traditional international law regulating participation in civil wars assumed that nonintervention was a policy both viable and desirable. Nonintervention as a legal principle seeks prevention of exogenously sponsored insurrections and isolation of conflicts from external partici-
pants. These objectives are presumed to facilitate self-determination of the peoples concerned, minimize destructive violence, and promote human rights. Though nonintervention remains an influential notion in contemporary law, international politics has often ignored its command. Hegemonic states have unilaterally asserted authoritative doctrines to justify interventions in their control areas.

The civil war in El Salvador invites an examination of issues related to application of the doctrine of nonintervention, and particularly of U.S. policy choices on military and other involvement in that conflict. This Comment appraises the lawfulness and reasonableness of increased U.S. military participation in El Salvador, and contrasts military involvement with other modalities of lawful influence. The Comment submits that while foreign governments should respect the principle of military nonintervention with respect to the conflict, nonintervention should not be interpreted to bar outside actors from attempting to influence the contestants for power within El Salvador to reach a peaceful settlement.

Certain important features of the conflict will be examined comprehensively. The analysis requires investigation of the main participants

4. The policies referred to in the text are the basic community policies at stake in cases of intervention. For a discussion of these basic community values, see J. Moore, Law and the Indo-China War 163-73 (1972); Moore, Toward an Applied Theory for the Regulation of Intervention, in Law and Civil War in the Modern World 3, 18-21 (J. Moore ed. 1974).


On the United States' legal commitment to nonintervention, as well as on past intervention in the western hemisphere, see generally W.E. Kane, Civil Strife in Latin America: A Legal History of U.S. Involvement (1972).


7. Examples of other modalities of lawful influence include diplomacy, propaganda, and providing or halting economic aid.
and their demands, identifications, expectations, and degree of popular support; the resources controlled by the participants and the role and importance of outside assistance; the goals and strategies chosen by the participants; and finally, the probable long-term effects of their actions on regional socio-political processes. This Comment will examine the Salvadoran civil war in this context, and recommend policy approaches compatible with the United Nations Charter, basic documents on human rights, and regional security agreements. In light of these recommended policy approaches, the Comment will undertake a critical examination of the Reagan administration's reactions to events in El Salvador and of the recent election of delegates to a Constituent Assembly, and propose lawful initiatives to achieve the fundamental objectives of international law in the Salvadoran situation.

II. The Economic Context: A Region in Crisis

Central America is undergoing a severe economic crisis. In Costa Rica, Nicaragua, and El Salvador, per capita income is declining and reserves of foreign exchange are nearly exhausted. The economies of Honduras and Guatemala are stagnant and their balances of pay-

8. This approach differs from rule-oriented analytical frameworks. For examples of the latter, see Moore, supra note 4, at 24 (recommended standards of appraisal); Farer, Intervention in Civil Wars: A Modest Proposal, 67 COLUM. L. REV. 266, 275 (1967) (“flat prohibition of participation in tactical operations, either openly or through the medium of advisors or volunteers,” as single rule for regulation of intervention); Farer, Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife, 82 HARV. L. REV. 511 (1969). The policy-oriented approach attempts to take into account important features of the context and to recommend lawful responses, which, in practice, approximate the objectives of international law. For the jurisprudential background of this approach, see McDougall & Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. Int'l L. 1 (1959); M. McDougal & F. Feliciano, Law and Minimum World Public Order (1961); Burke, The Legal Regulation of Minor International Coercion: A Framework of Inquiry, in 1 The Vietnam War and International Law 79 (R. Falk ed. 1968).

9. For the purposes of this Comment, Central America is defined as including the following countries: Costa Rica, Nicaragua, Honduras, El Salvador, Guatemala, and Belize. The Central American region has about 23 million inhabitants. For background on the regional economic crisis, see Feinberg, Central America: No Easy Answers, 59 FOREIGN AFF. 1121 (1981); Central America: International Dimensions of the Crisis (R. Feinberg ed. 1982).

ments are worsening. All five countries face increasing deficits and inflation.

Three principal causes of the region's economic difficulties may be identified. First, past strategies of economic development failed in important respects. Balances of payments did not receive adequate attention and were allowed to deteriorate. Development institutions in the public sector were too weak to ensure balanced growth and equitable distribution of income. Second, external factors contributed to economic destabilization. Terms of trade became more unfavorable and inflation generated from abroad upset price levels. Third, political turmoil has caused capital flight, disrupted fiscal management, and, in some countries, damaged productive capital.

Since about 1960, until this crisis, Central America had experienced significant economic growth and increasing integration into the world economy. The strategy of protected industrialization and export-oriented agriculture, aided by the establishment of the Central American Common Market, benefited private industrialists by providing fiscal incentives, and fostered some diversification of agricultural exports.

13. Regional economic growth averaged 5% a year or more. N.Y. Times, Feb. 1, 1982, at A1, col. 3, A6, col. 4; Feinberg, supra note 9, at 1121.
15. U.S. private investment in Central America has been small, particularly in El Salvador; in Guatemala it totaled $260 million in 1980; in Honduras, $250 million; in Costa Rica, $210 million; in Nicaragua, $160 million; and in El Salvador, $145 million. N.Y. Times, July 9, 1980, at A10, col. 1.
16. Foreign trade accounts for over 60% of the gross domestic product of most Central American countries. Economies so structured are especially vulnerable to fluctuations in world commodity prices and interest rates. For an econometric model demonstrating this vulnerability, see Sirit, A Minimodel of External Dependence of the Central American Economies, in SHORT-TERM MACROECONOMIC POLICY IN LATIN AMERICAN ECONOMIES 289 (J. Behrman & J. Hanson eds. 1979). For a general discussion on the economic effects of the instability of export earnings from primary products in underdeveloped countries, see C. Kindleberger & P. Lindert, INTERNATIONAL ECONOMICS 206-07 (6th ed. 1978).

Coffee is by far the most important regional export; in 1979 it accounted for 41% of the region's total export earnings. In 1981, however, coffee prices were at a five-year low. Latin Am. Regional Rep./Mexico & Cent. Am., Jan. 8, 1982, at 7; Latin Am. Commodities Rep.,
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The emerging pattern of industrialization, however, brought only limited social prosperity. Duty-free entry of machinery drained foreign exchange and facilitated the creation of capital intensive industries in a region characterized by a labor surplus. These industries required continuous imports of capital goods that were not offset by industrial exports. In fact, the developing industries were incapable of successful competition in world markets.

The strategies of economic growth in the region failed to redress the highly unequal distributions of wealth and income. Mechanization of agriculture reduced needs for manpower while the population continued to grow rapidly. Peasants flocked to the cities in search of jobs, further depressing urban wages and increasing unemployment.

Access to governmental credit remained restricted to the landed and capitalist elite, while the small farmer, who produced basic grains and foodstuffs for the domestic market, was neglected. Food became more scarce and costly for a growing population that was already poorly integrated into the productive economy. Though aware of


Though Central American countries are affected by external factors they cannot control, the local elites also have been unable to generate through mutual agreement a stable regional market. In fact, regional free trade agreements are often violated by governments seeking to protect local industries. N.Y. Times, Feb. 1, 1982, at A1, col. 3, A6, col. 4. Moreover, the 1969 Honduran-Salvadoran conflict severely disrupted regional trade. See A. BOLOGNA, CONFLICTO HONDURAS—EL SALVADOR (1977). See generally Bact & Coes, Changes in the Inter-American Economic System, in THE FUTURE OF THE INTER-AMERICAN SYSTEM 35 (T. Farer ed. 1979); Lowenthal & Fishlow, supra note 14.

On import-substitution and protected industrialization generally, see B. SÖDERSTEN, INTERNATIONAL ECONOMICS 216-18, 265 (2d ed. 1980).


20. Food costs nearly quadrupled between 1960 and 1977; consumer prices doubled be-
these social problems, the governing elites failed to expand the public sector sufficiently, in part because of the private sector's resistance to increased taxation. Nevertheless, the role played by the public sector in human development and infrastructure projects served to fuel popular expectations of improved and increased social services.

Integration into the world economy made Central America vulnerable to international developments. Initially, the oil price increases of 1973-74 had a limited impact because of relatively high prices for coffee, the region's main crop. By 1980, however, with coffee prices declining, expensive oil had a clearly exacerbating effect on a worsening imbalance of payments. In addition, high interest rates aggravated the situation. And revenues have been affected by adverse terms of trade, which also generate smaller tax bases and thus reduced income from import taxes.

Economic modernization helped shape new social classes that began to demand substantive changes in the region's political-economic systems. Mechanization of agriculture required salaried rural workers, who, with their urban counterparts, proved capable of organized political activities, which were particularly effective if they received the support or tacit approval of the Catholic Church. Emerging industries and services in the cities harbored increasing numbers of urban workers, while a large portion of the potential labor force remained unemployed or underemployed in marginal communities and shanty towns. Such socioeconomic changes, coupled with improved transportation, transformed isolated rural communities into constituent elements of integrated national societies. Improved communications and increasing, albeit limited, expansion of educational opportunities created a citizenry politically more aware of its position, of the shortcomings of the national social structure, and of potential alternatives that would enhance their interests. From the growing universities and the urban middle classes came a political leadership capable of articulating demands of skilled and unskilled workers.

Ruling elites in the region, however, have been unresponsive to polit-
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Tactical demands for fundamental socioeconomic change, except, to some degree, in Costa Rica. Faced with intransigent elites who denied actual power-sharing through peaceful electoral processes, opposition forces organized popular movements for eventual political-military confrontations with the established governments. In the ensuing turmoil, private capital, both local and foreign, began to flee the region.27 Capital flight aggravated the balance of payments situation, lessened the availability of credit, and reduced overall investment. Moreover, private sector withdrawals caused tax bases to shrink, thus creating further pressures on the public sector.

Economic reconstruction will demand renewed private sector confidence in the political stability of the region. Without minimum domestic order, investors will not be attracted. But a new political equilibrium will not materialize without the participation of the organized groups that speak for the working class interests. The primary challenge facing decision-makers is to find a solution that is based on the incorporation of the new social classes and that is capable of encouraging economic development. In the absence of a realistic accommodation of these political forces, it is submitted that neither local economic reforms nor foreign aid will achieve meaningful development.

III. The Political-Military Arena in El Salvador: The Government’s Approach

Regional economic stagnation and even decline provide the critical background against which the current political-military crisis in El Salvador must be assessed. The roots of the Salvadoran civil war lie in the historical unwillingness or inability of the ruling elite28 to redress unequal distribution of land29 and income,30 to create a dynamic and self-

27. See supra note 10; Feinberg, supra note 9, at 1135.


29. El Salvador, a densely populated nation the size of Massachusetts, remains primarily an agricultural country: 50% of the economically active population works in agriculture, a
sustaining economy and integrate a rapidly growing population\textsuperscript{31} into that economy, and to create and maintain mechanisms for sharing power with newly organized political groups.\textsuperscript{32}

A. Recent History

This analysis of the current political-military crisis takes as its point of departure the coup d'\textit{etat} of October 15, 1979, which resulted in the first organized junta in El Salvador's history. The junta demonstrated an initial commitment to democratic institutions and popular accountability.\textsuperscript{33} It incorporated civilian politicians from across the political spectrum, technocrats, and members of the progressive wing of the armed forces, "the military youth." But on January 3, 1980, the moderate civilian politicians in the junta and every civilian in the cabinet resigned, citing both the junta's failure to implement promised reforms, and increased governmental repression of popular political organizations.\textsuperscript{34} These resignations marked the end of a broad-based approach sector of the economy accounting for over 25% of the gross national product. Yet about one-fourth of the country's land is not in production, and much of the rest is either unsuitable for intensive agriculture or used as pasture. Less than one-fifth of the land is suited for intensive crops, mechanization, and irrigation. L. \textsc{Simon} \& J. \textsc{Stephens}, Jr., El Salvador Land Reform 1980-1981:Impact Audit 2-3 (1981).

Over the last 20 years, three important developments took place with regard to land tenure arrangements. \textit{Id} at 5. First, the number of landless rural workers (people without access to land by either renting, sharecropping, or owning) rapidly expanded. By 1981, nearly 60% of the peasant population was landless. Second, the number of rental arrangements rapidly increased, by over 100% between 1950 and 1971; at least 28% of all agricultural units are rented. Moreover, 98% of such renting occurs on parcels smaller than five hectares, which is below the minimum size required for subsistence farming. Finally, as a result of the mechanization of agriculture and increased reliance on temporary rural workers, the number of permanent resident laborers decreased from a high of 55,000 in 1961 to 17,000 by 1971. \textit{Id} at 5-7.

At the top of the Salvadoran social structure is the landed elite, \textit{la oligarquia}, traditionally known as "the fourteen families" (their actual number is much higher; nowadays they may number a few thousand people). Despite their small number, they have effectively controlled the economy through their ownership of nearly 60% of the farmland, most industries, and the financial system. Until the October 15, 1979 coup, the oligarchs ruled the country in alliance with Salvadoran military officers. \textit{See} Leo\textsc{Grande} \& Robbins, supra note 28, at 1084-89.

30. More than two-thirds of the Salvadoran people possess less than one-third of disposable national income. In contrast, less than two percent of the population receives one-third of the disposable income. L. \textsc{Simon} \& J. \textsc{Stephens}, Jr. supra note 29, at 7. \textit{See also} Millett, \textsc{The Politics of Violence: Guatemala and El Salvador}, 80 \textsc{Current History} 70, 71 (1981).


32. \textit{See} Gordon, \textsc{Crisis politica y organizacion popular en El Salvador}, 42 \textsc{Revista Mexicana de Sociologia} 695 (1980); Leo\textsc{Grande} \& Robbins, supra note 28, at 1086-89.

33. Leo\textsc{Grande} \& Robbins, supra note 28, at 1093-97.

34. The letters of resignation of the civilian members of the Salvadoran junta, and those of ministers, undersecretaries, and other government employees, are reprinted in \textsc{U.S. Policy}
to political problems.

Each subsequent junta has excluded an additional part of the political spectrum. The second junta, formed in January, 1980, after the resignation of the moderates, included Christian Democratic Party (C.D.P.) members but no left-of-center politicians. Within two months, however, the more liberal C.D.P. representative in the junta and two other high-level civilian officials resigned, arguing that the junta was incapable of carrying out the promised reforms, of stopping violence against the popular-base organizations, or of opening a constructive political dialogue in the country. On the invitation of the military officers, a conservative C.D.P. leader—Jose Napoleon Duarte—joined the third junta, but more moderate factions of the C.D.P. were not included, as a split between the old guard of the C.D.P. and its younger activists grew more pronounced.

The process of gradual exclusions culminated in December, 1980, when Colonel Adolfo Majano, a member of a faction of younger and more moderate military officers, was ousted from the governing junta. In this fourth junta, which emerged in the wake of Majano's ouster, Duarte was named President of the junta, a position that did not include control over the armed forces and security forces. Hierarchical command and financial control over both the army and the security forces was held by Colonel Jose Guillermo Garcia, the Minister of Defense and Public Security, which made him the most powerful member of the governing junta.

B. Political Oppression

Despite its initial inclusion of moderate political elements, the Salvadoran junta demonstrated no sustained commitment to democracy. In fact, from the beginning the junta moved on a variety of fronts to sup-


35. Hearings, supra note 34, at 69 (letter of resignation of H. Dada Hirezi, C.D.P. member of junta).


38. Since the early days of the civilian-military junta, effective power lay with the military group, and in particular with the Minister of Defense and Public Security. See Hearings, supra note 34, at 70 (letter of resignation by Salvador Samayoa and Enrique Alvarez Cordova); Wash. Post, Mar. 9, 1981, at A19, col. 2; Giap’s Pupils, Economist, Jan. 3, 1981, at 29. As this issue went to press, then Gen. Garcia capitulated to Salvadoran military demands and announced his resignation in April, 1983.
press political opposition. Assuming both legislative and executive powers, the junta began to rule by decree on October 15, 1979. On the day before the junta decreed agrarian reform, the government imposed a state of siege, which has been extended every thirty days from March 5, 1980. The junta also retained prior legislation denying the right to organize labor unions in rural areas and prohibiting the formation of “fronts” or “blocs” or other popular organizations. Consequently, the most dynamic organized political movements in the country remained illegal and subject to official suppression.

The junta also decreed legislation aimed at preventing strikes and labor union activities in support of opposition political-military organizations. Decree 544 of December, 1979, prohibited union activity for wage increases. Following an opposition-organized work stoppage in June, 1980, the junta outlawed work stoppages and strikes by public employees. In the same month, the junta restricted other peaceful forms of organized dissent.

The most repressive decree came into force on the day of mourning for six murdered opposition leaders and the unearthing of the bodies.

40. Id.
41. The only peasant organization with some degree of government protection is the Union Comunal Salvadorena (U.C.S.). It probably owes its position to its association with the American Institute for Free Labor Development (A.I.F.L.D.), an agency of the A.F.L.-C.I.O. created to train campesino leaders as part of the Alliance for Progress. Except for the U.C.S. and the paramilitary organization ORDEN, Salvadoran authorities regard peasant organizations as subversive and treat them as guerrilla groups. See Hearings, supra note 34, at 105, 107 (Submission by Amnesty International to the Inter-American Commission on Human Rights of the Organization of American States).
42. See Martin-Baro, La guerra civil en El Salvador, 36 ESTUDIOS CENTROAMERICANOS 17, 18 (1981).
43. Decree 296 denies, in practice, the right of association for public employees. Id.; AMERICAS WATCH COMMITTEE & AMERICAN CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR 253-54 (1982) [hereinafter REPORT ON HUMAN RIGHTS].
45. N.Y. Times, Nov. 30, 1980, at A1, col. 4, A20, col. 1. A right-wing paramilitary group, the Maximiliano Hernandez Brigade, claimed responsibility for the murders. Evidence gathered by the San Salvador Archdiocese Legal Aid Office arguably shows complicity on the part of the Salvadoran security forces. Statement by the San Salvador Archdiocese Legal Aid Office (Socorro Juridico) on the Incidents at the San Jose High
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of four murdered American churchwomen. On December 3, 1980, the junta signed Decree 507, regulating the treatment of persons accused of treason, espionage, rebellion, sedition, and other crimes against the independence of the state. This decree effectively militarizes the administration of justice in El Salvador. It denies habeas corpus and authorizes the military to detain suspects incommunicado for up to fifteen days following arrest; then, even in the absence of evidence, a military judge may at his discretion sentence the accused to four months in corrective detention, while an investigation is to proceed. Such a provision, it has been noted, presents the opportunity for arbitrary detention, intimidation, torture, and the extraction of extrajudicial confessions from critics and opponents. In all, the decree allows the military to hold a suspect incommunicado for up to 195 days, and arguably even longer, since the decision to set a case for trial is not subject to a time requirement. The initial judicial investigation is secret, and the accused has no right to counsel during that time. A person might become a suspect through denunciation, accusation, or official order; denunciation and informing had already been encouraged by the armed forces in published advertisements.

Decree 507 sets forth an expansive scope of admissible evidence, including many extrajudicial confessions, anything on the person of the suspect or in the place he was found, ranging from arms to subversive literature, and private documents. Proof of membership in an illicit association can be established by showing that the suspect's name has been mentioned in any media in El Salvador or abroad in connection with a subversive union, association, organization, or party. The decree legalizes any detention of Salvadoran citizens based on suspicion of culpability as determined by the military authorities.

Killings of unarmed civilians by the armed forces and security forces...
continue uncurtailed. There is also evidence that these forces constitute the principal source of political violence against the civilian population, though such charges are conceded difficult to prove conclusively. In addition, the armed forces and security forces are reported to have engaged in killings at government farms established to provide security for civilians.

Observers from human rights organizations maintain that there has been official cooperation in, or at least toleration of, right-wing terrorism. The government has not moved forcefully against paramilitary groups and "death squads." Despite Decree 12 of November 6, 1979, which formally dissolved ORDEN, the largest Salvadoran paramilitary


The Legal Aid Office of the Archdiocese of San Salvador (Socorro Juridico) reported the killing of 12,501 noncombatants in 1981, and 8,062 in 1980. Of the 12,501 killings in 1981, the governmental forces, in their various units, were claimed to be responsible for 7,396. These figures are based only on cases for which there is documented personal testimony; the actual number is likely to be higher. See Washington Office on Latin America, Statement Accompanying Press Release (Feb. 1, 1982), at 1 (on file with The Yale Journal of World Public Order) [hereinafter Washington Office on Latin America].


The Salvadoran junta decreed martial law on January 12, 1981. Figures from the Archdiocese Legal Aid Office indicate that some 2,127 noncombatant civilians were summarily executed during curfew hours, when only governmental forces were allowed in the streets. See Washington Office on Latin America, supra note 56, at 1.

Various human rights organizations have asserted that the Salvadoran government forces are responsible for the vast majority of the killings in the country. N.Y. Times, Feb. 7, 1981, § 4, at 2, col. 3. In a recent report on the human rights situation, the American Civil Liberties Union and The Americas Watch Committee held the Salvadoran government responsible for the disappearance of more than 600 people, and accused the government of repressing the Catholic Church, of allowing arbitrary arrests and widespread torture to occur, of permitting the government forces to engage in politically motivated murders, and of suspending freedom of the press. See N.Y. Times, Jan. 27, 1982, at A10, col. 1; REPORT ON HUMAN RIGHTS, supra note 43.

58. In 1980, the Institute for Agrarian Transformation (I.S.R.A.) investigated 210 killings. The official in charge of conducting the inquiry testified that “[o]f these 210 I can say that maybe 80 percent were committed by the armed forces.” Hearings, supra note 34, at 190, 200 (statement of Leonel Gomez).

59. See Legal Aid Office Vows to Continue Struggle, REPORT ON EL SALVADOR/NEWSLETTER OF THE RELIGIOUS TASK FORCE ON EL SALVADOR, Nov.-Dec. 1980, at 3 (interview of Roberto Cuellar of the Legal Aid Office of San Salvador); Hearings, supra note 34, at 105, 109-11 (submission by Amnesty International); Comision Interamericana de Derechos Humanos, supra note 39, at 217.

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organization, evidence suggests that ORDEN continues to operate alongside the armed forces and security forces. Decree 12 ordered the confiscation of arms from ORDEN members, but, according to Amnesty International, “no such confiscation has taken place.” Furthermore, since ORDEN was formally dissolved, there has not been a single prosecution of ORDEN members for acts of violence. Nor has any civil or military official ever been prosecuted for having sought assistance from ORDEN.

C. Economic Reforms

Unable to defend the human rights record of the junta, supporters have stressed instead the importance of the three-phase agrarian reform. Yet the agrarian reform project has failed to bring about significant socioeconomic change. The junta promulgated the reforms without either prior studies or a clear strategy of implementation. For example, Phase III, the “land-to-the-tiller” program, would transfer to all renters ownership of the land they work. Yet, as the Oxfam-America impact audit of the agrarian reform demonstrates, Phase III “ignores the specific agricultural practices of El Salvador” and “locks for 30 years over 100,000 peasant families onto poor plots of land that do not provide subsistence and cannot sustain continuous food-crop production.” While Phase III has yet to be substantially or competently implemented, its conceptual inadequacies are patent. The reform was not properly announced or made clear to the peasants in El Salvador. A report by the A.I.F.L.D.-supported Union Comunal Salvadorena asserted that the program was in a state of near-collapse due to military terror, illegal evictions, and a hostile bureaucracy; indeed, only some 20,000 peasants have received provisional titles to land.

61. ORDEN has between 80,000 and 100,000 members, although not all perform armed security functions. See Hearings, supra note 34, at 105, 110 (submission by Amnesty International).
62. Id. at 111. For documented cases of cooperation between ORDEN and government forces, see Id. at 112-21.
63. Id. at 110.
64. Id. at 110. Decree 12 provides for such a prosecution.
66. For the decree of the expropriation and transfer of agricultural lands to tillers, see Id., at 13-17 of app. (Decree 207).
67. Id. at 71. For a discussion of the agricultural impact of the land-to-the-tiller program, see Id. at 55-56; for a general analysis of the program, see Id. at 56-63.
The failure to implement any part of Phase II had an altogether different political significance. Phase II was designed to expropriate estates in the range of 150 to 500 hectares and to establish cooperatives. This reform potentially was the most likely to achieve socioeconomic change, for it would have affected the lands producing most of the country's agricultural export crops. Initially, the junta merely postponed the implementation of Phase II, but in early July, 1981, the government dropped plans to carry it out. Cancellation was a clear victory for the landed oligarchy and indicated that the junta remained responsive to the class that has traditionally controlled the economy.

Phase I was partly implemented, but the socioeconomic impact of this reform has been limited and mostly negative. Phase I expropriated large landed estates (those in excess of 500 hectares) and transferred them to peasant-controlled cooperatives, a reform that potentially could affect 14% of the coffee plantations and 31% of the cotton farms. By invoking the "right of reserve," however, landowners have the potential to retain one-third of the available land. Moreover, in July, 1981, the government decided to remove cotton plantations from the land redistribution program.

Phase I did not benefit the landless peasants who comprise 60% of the rural population. For the approximately 62,000 families of beneficiaries under the plan, it has been a mixed blessing. Between the first junta's proclamation of a future agrarian reform program in October, 1979, and the promulgation of the reform on March 6, 1980 (and even afterwards), landowners removed machinery, cattle, and other movable property and divided their estates among relatives to avoid the impact of the reform. When an estate did become a cooperative, government forces and technicians took charge. Violence against the cooperative

70. L. Simon & J. Stephens, Jr., supra note 29, at 19. Phase II would have affected—figures vary—lands that account for 70 to 85% of the coffee production in an economy in which that commodity, a labor intensive crop, accounts for 60 to 70% of agricultural exports. It also would have affected about 50% of the sugar plantations.
73. Id. at 23.
74. Only about 12% of El Salvador's coffee plantations have been affected by the agrarian reform. N.Y. Times, Mar. 5, 1982, at A10, col. 3.
75. N.Y. Times, July 8, 1981, at A2, col. 3.
77. Id. at 27-31; Buckley, Letter from El Salvador, New Yorker, June 22, 1981, at 41, 56.
leaders and extortion against the cooperatives followed.\textsuperscript{78} Government forces extracted "protection money" from the cooperatives,\textsuperscript{79} which themselves suffered from administrative deficiencies at the hands of inexperienced government technicians. Frequently, the peasants were effectively prevented from participating in the decision-making process.\textsuperscript{80} The supposed beneficiaries' political loyalty to the junta has not significantly increased.\textsuperscript{81} The murder of the President of the Institute for Agrarian Transformation, Roberto Vieira, and the forced exile of his assistant, Leonel Gomez, further undermined the legitimacy of the agrarian reform.\textsuperscript{82}

Other reformist measures designed to support the agrarian reform, such as the nationalization of foreign trade and banking, resulted in increased governmental control over the economy without any significant improvement in economic efficiency or popular welfare. Private sector investment came to an almost complete standstill, primarily in response to the presence of members of the C.D.P. in the junta.\textsuperscript{83} Foreign commercial banks have "virtually closed their doors" to El Salvador, according to a Salvadoran business association.\textsuperscript{84} Capital flight

\textsuperscript{78} LeoGrande, \textit{supra} note 68, at 33; Washington Office on Latin America, \textit{supra} note 56, press release at 7; N.Y. Times, Feb. 22, 1981, § 6 (Magazine), at 42.

\textsuperscript{79} Buckley, \textit{supra} note 77, at 55. According to a Salvadoran government official, "80 cooperatives were paying 'protection money' to local military commanders." N.Y. Times, Feb. 22, 1981, § 6 (Magazine), at 42.

\textsuperscript{80} Buckley, \textit{supra} note 77, at 54. Predictably, many peasants are themselves ill-prepared to manage the cooperatives. \textit{Id}; Boston Globe, Apr. 30, 1981, at 1, col. 2.

\textsuperscript{81} A report prepared by the Union Comunal Salvadoran, a large democratic and anti-communist peasant organization, found that the adverse political result of the agrarian reform was caused in part by "military-backed terror and murder." Report of Union Comunal Salvadoran, \textit{quoted in White, There's a Better Way for Reagan to Help El Salvador}, Boston Globe, Feb. 11, 1982, at 21, col. 1. The agricultural workers' deteriorating economic situation also undermines any attempt to enlist their support for the junta. Despite a predicted inflation rate for 1982 of almost 50%, sugar and cotton workers will receive the same minimum wages they received in 1981 and coffee workers will continue to receive minimum wages at the 1980 level. \textit{See Cent. Am. Rep., Dec. 5, 1981, at 382.}

\textsuperscript{82} For background, \textit{see Hearings, supra} note 34, at 190, 191 (statement of Leonel Gomez); Latin Am. Regional Rep./Mexico & Cent. Am., Nov. 28, 1980, at 8.

\textsuperscript{83} Statements by Salvadoran businessmen in U.S. congressional hearings and their remarks printed in \textit{The Congressional Record} illustrate the private sector's serious opposition to the C.D.P. Much of the private sector regarded the Christian Democrats' doctrine of \textit{comunitarismo} as a type of socialism and accused President Duarte of rejecting their offers to cooperate in the government's management of the economy. Duarte was often depicted as an enemy of private enterprise economy. \textit{See Hearings, supra} note 34, at 186-87 (statement by Manuel Enrique Hinds, former Salvadoran Minister of the Economy and Executive Director of the Productive Alliance of El Salvador); 126 \textit{CONG. REC.} E3375-76 (daily ed. July 2, 1980) (statement of Luis Arce Escalente); \textit{id.}, at E3461-62 (daily ed. July 21, 1980) (same). \textit{See also Latin Am. Weekly Rep., Mar. 27, 1981, at 6; N.Y. Times, July 2, 1981, at A8, col. 3; Wash. Post, June 27, 1981, at A1, col. 3.}

\textsuperscript{84} Latin Am. Weekly Rep., Mar. 27, 1981, at 6, 7.
rose to about $1.5 billion from December, 1978 to December, 1980, with most of the flight occurring in 1980. The economy remains in serious trouble, and its future prospects are not bright. Moreover, despite massive foreign economic assistance, mostly from the United States, the junta has been incapable of bringing about economic recovery.

IV. Opposition to the Junta

Political instability, governmental repression, failed reforms, and continued economic decay and social inequality provided fertile ground for the development of opposition forces in El Salvador. The major opposition groups are the Farabundo Marti National Liberation Front (F.M.L.N.) and the Democratic Revolutionary Front (F.D.R.). The two have formed a working if not united alliance against the government. The F.M.L.N., an amalgam of various Marxist-Leninist and Castroist guerrilla groups, provides the military component of the op-
position. The F.D.R., more moderate, is a broad political coalition that includes peasant, student, labor, and professional organizations, as well as political parties such as the Social Democrats and the large dissident faction of the C.D.P. (its so-called "popular tendency," composed of young, local activists). Together, the opposition groups have the active support of about 100,000 people; up to 500,000 people have occasionally given active support. The military strength of the guerrillas is perhaps 5,000. The Christian Ecclesiastic Communities, which have some overlapping membership with the F.M.L.N.-F.D.R., claim one million members. Close to one-third of the Salvadoran people have reportedly supported the opposition.

From their earlier disparate form, the Salvadoran insurgents achieved political-military consolidation quickly. Barely a week after the January 3, 1980 collapse of the centrist junta, four front organizations created a "Coordinating Council of the Masses." Less than three weeks later, these groups organized a large political demonstration, possibly the largest in the country's history, a unity march in which reportedly 200,000 people participated. On April 18, 1980, op-

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91. Prepared Statement of Robert S. Leiken Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs, Sept. 24, 1981, at 10. Leiken also estimates, though the figures are difficult to verify, that the government at the time enjoyed at most the support of one-fifth of the people. The author thanks U.S. Representative Samuel Gejdenson of Connecticut for a copy of this unpublished manuscript. See generally Leiken, Eastern Winds in Latin America, 42 FOREIGN POL'Y 94, 103 (1981).

92. The organizations were the People's Revolutionary Bloc (B.P.R.), United Popular Action Front (F.A.P.U.), People's Leagues-28th of February (L.P.-28), and the Nationalist Democratic Union (U.D.N.). Armstrong & Shenk, supra note 88, at 11.

93. Id. at 12. The demonstrators were attacked by guards and sharpshooters placed on the roofs of the National Palace. At least 20 demonstrators were killed. REPORT ON HUMAN RIGHTS, supra note 43, at xxiv, xxxii.
position groups formalized their alliance by creating the F.D.R.\textsuperscript{94}

Initially, the F.D.R. attempted to assert its political authority through work stoppages, but despite initial successes, these actions became ineffective due to the strong government response. That response featured Decree 296, which threatened summary dismissal for those public servants absent from work, the presence of military forces in the streets, a campaign of intimidation against bus owners, and governmental control of the mass media.\textsuperscript{95} The decrease in the effectiveness of these labor actions, however, does not necessarily indicate a decline in the unity or popularity of the F.D.R. More likely it illustrates the effectiveness of government actions, particularly the continued “state of siege,”\textsuperscript{96} Decree 296, and the “state of emergency,”\textsuperscript{97} in making peaceful opposition impossible. Given that peaceful opposition is impossible, the primary measure of the strength of the insurgents has been their ability to maintain political-military offensives.\textsuperscript{98} On the first anniversary of the coup of October 15, 1979, the junta launched a major military offensive against the insurgents in the Morazan province. The government used some 5,000 troops, backed by helicopter gunships and


\textsuperscript{96} See \textit{supra} note 40 and accompanying text. Decree 155, of March 6, 1980, a second state of siege decree, suspended several constitutional guarantees: freedom of movement and residence, freedom of thought and expression, inviolability of correspondence, and the right of assembly, except for meetings or assemblies for cultural or industrial purposes. See \textit{Report on Human Rights, supra} note 43, at xxxi; Comision Interamericana de Derechos Humanos, \textit{supra} note 39, at 215 (re Decree 2, establishing the first state of siege); Le Monde, Jan. 8, 1981, at 3, col. 1. On October 30, 1981, the junta once again extended the “state of siege” for 30 days, but declared that conservative political parties were exempt from restrictions on freedom of press and expression. N.Y. Times, Nov. 1, 1981, § 1, at 7, col. 2.

\textsuperscript{97} The junta decreed a “state of emergency” on August 21, 1980 (Decree 43). This executive decree placed the Ministry of Defense and Public Security in control of some of the country’s most important public service institutions and autonomous government agencies, including water, electric, telephone, and port authorities. Employees of these institutions were viewed as having enlisted in the armed forces. See \textit{Report on Human Rights, supra} note 43, at 254; Comision Interamericana de Derechos Humanos, \textit{supra} note 39, at 215.

\textsuperscript{98} This has been particularly so since the August, 1980 work stoppage. During those three days, there were approximately 350 insurrectionary actions, and as many as 200 deaths; the junta claimed military losses of only 12 men, but unofficial sources put the total at 50. J.L.A., \textit{supra} note 95, at 718; Latin Am. Weekly Rep., Aug. 22, 1980, at 1. Earlier, the insurgents had begun to establish their presence and political influence in the rural areas of Chalatenango, Metapán, San Vicente, and a large area in the Morazan province around San Francisco Gotera, and they had fought in other areas, including San Salvador province, Usulatan, and La Union. Latin Am. Regional Rep./Mexico & Cent. Am., July 11, 1980, at 5. See also id., Nov. 28, 1980, at 7, 8; Latin Am. Weekly Rep., Aug. 22, 1980, at 1.
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light artillery.99 The offensive failed to dislodge the insurgents permanently; it did, however, result in the deaths of approximately 200 peasants and possibly many more, and created as many as another 5,000 refugees.100

Since the “formal outbreak”101 of the civil war on January 10, 1981, the insurgents have proved capable of conducting military operations on a large scale throughout the country,102 though the military situation appeared stalemated in 1982. While the insurgents do not have “liberated zones,”103 they have established areas of political-military dominance in which they run small weapons factories, hospitals, military training camps, schools for peasants and their children, and basic agricultural operations. In these areas the insurgents control roads and have built the framework for a politically organized community.

The fighting has taken a significant toll on government forces. Though the Salvadoran military has hesitated to release casualty estimates, mid-1981 statistics released by U.S. Ambassador Deane Hinton showed “1,300 government casualties since January, including more than 350 killed,”104 a significant number for a government whose army then totaled 17,000.105 The ability of the junta to respond to the insur-


In April, 1981 the F.M.L.N. claimed to control 10 to 15% of the country, and by July 30%. Latin Am. Regional Rep./Mexico & Cent. Am., July 10, 1981, at 1. Some observers have suggested that approximately one-third of El Salvador is controlled by the insurgents. See Le Monde, Feb. 5, 1982, at 4, col. 5. Many do maintain that, in fact, the government has lost control of about one-quarter of the national territory. See Manchester Guardian Weekly, Jan. 24, 1982, at 11, col. 4. Whether the insurgents have the resources and support to extend their gains and seriously threaten the government’s remaining authority remains problematic.

103. Le Monde, Jan. 9, 1981, at 7, col. 1. In fact it would be difficult to establish “liberated zones” in El Salvador. The country is approximately the size of Massachusetts and is criss-crossed with roads. There are many airstrips facilitating transportation of government troops, but there are no major tropical forests in which the guerrillas can shelter themselves. Under such conditions, it seems an impressive accomplishment that the insurgents have established political-military dominance in one-fourth to one-third of the territory.


105. In March, 1981, John D. Bushnell, Acting Assistant Secretary of State for Inter-American Affairs, testified that there were about 17,000 government troops in El Salvador. Hearings, supra note 34, at 18, 29. However, Salvadoran troop levels have expanded, doubtless due in large part to U.S. military assistance. Recent information puts the total figure at 25,000 in January, 1982; it may increase to 30,000 toward late 1982. Manchester Guardian Weekly, Jan. 24, 1982, at 11, col. 4. According to then President Duarte, the armed forces
gents' attacks has been hampered further by doubts about troop loyalty. The defection of two army captains and their companies to the F.M.L.N. at Santa Ana during the January, 1981 offensive confirmed these doubts.\textsuperscript{106}

In addition to combat capability, the F.M.L.N. has shown a capacity to cause serious economic disruption.\textsuperscript{107} The exact extent of such economic damage is as yet unknown, but reports suggest that it is substantial.\textsuperscript{108} Under such circumstances, no local program of economic recovery or project to attract foreign investment is likely to succeed.

It does not follow, however, that the F.M.L.N. can achieve a military victory, at least in the short run. The response to the guerrillas' general offensive in January, 1981, demonstrated that the army and security forces control the capital city and can prevent general strikes.\textsuperscript{109} Since that fighting, itself preceded by the junta's unsuccessful October, 1980 attack on the guerrillas in Morazan province,\textsuperscript{110} the military situation has remained stalemated. It is unlikely that the government will gain a decisive advantage.\textsuperscript{111}

Moreover, among those who support neither the F.M.L.N.-F.D.R. nor the junta, there is "an overriding hatred of the military" and a notion that any alternative to the present situation would be preferable.\textsuperscript{112} In sum, the insurgents are now, and, for the foreseeable future will be able to impose high costs on the government, but may be unable to

would need 40,000 to 50,000 troops to defeat and control the insurgents. N.Y. Times, Nov. 10, 1981, at A1, col. 3.

106. Martin-Baro, \textit{supra} note 42, at 21. For background, see \textit{El Salvador: Testimonio de un militar que pasa a las guerrillas}, Ahoral, Mar. 2, 1981, at 14 (interview with army captain and text of pact he signed in name of "military youth").


108. A recent unreleased Salvadoran government study, apparently the first effort to assess the economic impact of the war, was reported in news media in late 1982. N.Y. Times, Dec. 5, 1982, § 1, at 19, col. 1. Though a total figure could not be generated, damages were placed in the tens of millions of dollars, a sizeable figure for a country with the resources of El Salvador. Included were $41.5 million in damages over 20 months to bridges, roads, railways, public buildings, and other government property. The destruction of 34 bridges and 145 electrical transmission towers was noted, as were damages to the telephone and bus systems, the removal of large areas of farmland from production (due to attacks from both the right and the left), the loss of more than 18,000 jobs, and the closing of many businesses.


prevail. Undoubtedly, the government's earlier expectation of a quick military victory at low economic and military cost will not materialize. By late 1982, the insurgency had rooted itself deeply in Salvadoran society and was likely to remain significant.

The preceding examination suggests certain characteristics of the Salvadoran situation. The insurgency is aimed at altering governmental structures. The F.M.L.N.-F.D.R. has significant popular support. The Salvadoran conflict can be characterized as class warfare in which the insurgent coalition identifies with the economic and political demands of the unskilled and skilled workers of the rural and urban areas. The Salvadoran opposition has woven progressive Catholic thought (the "theology of liberation"), Marxism-Leninism, and notions of equity into an indigenous justification for a socialist program similar to the Sandinista program in Nicaragua. The basic elements of the F.D.R. program are non-alignment, a mixed economy, the nationalization of export industries and certain public utilities, agrarian reform designed to remove economic and political power from the coffee oligarchy, direct participation in government by the organizations comprising the F.D.R., support for small and medium-sized enterprises, respect for basic human rights, and the honoring of previous foreign debts, except those that arose from prior contracts for arms purchases.113

V. U.S. Reactions to the Crisis

Recent U.S. involvement in El Salvador must be assessed from two perspectives: (1) its general propriety, given this Comment's treatment of the intervention issue; and (2) its particular prospects for the achievement of a peaceful solution, given the current political-military situation. Analysis also must be undertaken of the fundamental assumptions about the nature of the crisis that hitherto have shaped the U.S. response.

A. Military and Economic Assistance

U.S. aid in recent years has been substantial and growing. This trend represents a departure from the 1960's and early 1970's, when aid was minimal, and El Salvador was perceived as having limited importance to U.S. strategic and economic interests.114 As concern for

113. See Update/Latin America, July-Aug. 1980, at 6. For a statement of the F.D.R. platform, see Armstrong & Shenk, supra note 88, at 31-34.
114. LeoGrande & Robbins, supra note 28, at 1089.
human rights became a focus of the Carter administration's foreign policy, the U.S. government criticized El Salvador for the activities of the right-wing death squads and their suspected links to the government.

In 1977, the Salvadoran government (along with three other Latin American countries) rejected U.S. military assistance to protest criticism of its human rights record. After the junta came to power on October 15, 1979, Congress approved $5.7 million in military aid to El Salvador for fiscal year 1981. During the insurgents' general offensive of January, 1981, the Carter administration in its final days sent $5 million in emergency aid to the Salvadoran government based on the alleged urgent need to offset impermissible military assistance by communist governments to the insurgents.

The Reagan administration has increased sharply the U.S. commitment to El Salvador. Secretary of State Haig pledged that the United States would do "whatever is necessary" to prevent the overthrow of the Salvadoran junta by the insurgents; he did not rule out the use of U.S. troops. U.S. military assistance has increased in 1981-82 by 400% over the total aid sent between 1950 and 1979. In March, 1981, the Reagan administration accelerated $25 million in additional aid to permit the Salvadoran government to acquire helicopters, military vehicles, surveillance equipment including radar, and small arms. By that time, fifty-six U.S. military advisers were assigned to El Salvador. Total U.S. military assistance to El Salvador in 1981 amounted to $35.5 million. The Reagan administration planned further increases in military aid to El Salvador for 1982. U.S. military training for Salvadoran officer candidates was stepped up. Congress initially appropriated $26 million for military aid to El Salvador for fiscal year 1982. Moreover, the Reagan administration promised from discretionary Pentagon funds an additional $55 million in emergency military aid both to replace the loss of helicopters and to improve the Salvadoran military. U.S. economic assistance to El Salvador in 1982 totaled $192 million; for 1983 the administration proposed a figure of $205 million. The administration's request for military aid, it was reported, would be for $110 million, nearly double the figure originally announced. Despite substantial domestic criticism of such assistance,
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including a congressional requirement that the executive branch certify semi-annually that progress is being made in the human rights area as a condition to continued military assistance— the administration appears determined to press its requests for increases in military and economic assistance.

B. The U.S. Perception of the Crisis

The Reagan administration's decision massively to increase U.S. assistance to El Salvador is the product of its perception of the crisis. That perception is embodied in a document issued by the State Department in early 1981 entitled Communist Interference in El Salvador and known popularly as the White Paper. Designed to outline official thinking about the crisis, and to generate support for the U.S. position in Europe and Latin America, the White Paper depicts the crisis as "a textbook case of indirect armed aggression by Communist powers through Cuba." The implication, therefore, is that it is incumbent on the United States to support the junta in order to deny further expansion of communism through illicit means. While a detailed review of the White Paper is beyond the scope of this Comment, some obser-

121. Amidst criticism, the Reagan administration certified such progress in January, 1983.


124. SPECIAL REPORT No. 80, supra note 123, at 8.
vations are appropriate, inasmuch as it is submitted that a legitimate decision to assist an incumbent government by invoking the need to offset prior illegitimate aid to insurgents requires presentation of firm evidence of such aid. As it can be shown that the administration’s view of the crisis is profoundly misguided, it follows that the administration’s reaction is misguided as well, in ways that portend increased regional conflict and serious damage to U.S. foreign policy.

The principal evidence supporting the conclusions of the White Paper consists of nineteen captured documents which are purported to show assistance furnished to the insurgents by communist governments (they are reprinted in an appendix to the White Paper). While charges that the documents are fabricated cannot be proven, the conclusions drawn from them are vulnerable to a number of attacks, even assuming their authenticity. First, they simply do not support State Department allegations. For example, while the White Paper claims that the documents provide direct support for figures on the extent of the communist commitment to the insurgents, and on the amount of arms received during the 1981 guerrilla offensive, both figures are extrapolations not based on direct evidence. A second failing is that figures conceded arguendo to be accurate lack the context necessary for proper interpretation. For example, the White Paper alleges that Viet Nam sent two million rifle and machine gun bullets to the Salvadoran guerrillas; while the figure appears substantial, given the total number of insurgents, it represents ammunition for only two days of combat. Likewise, the 200 tons of supplies alleged to have been given to the guerrillas during the 1981 offensive are, according to a Pentagon source, a “spit in the bucket that a company of soldiers—200 troops—could go through in a week.”


127. Hearings, supra note 34, at 190, 205 (statement of Leonel Gomez, former Salvadoran land reform official).

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Omitted from the White Paper is any significant discussion of the guerrillas' other sources of arms, a most important issue given the White Paper's contentions and obvious foreign policy objectives. In contradistinction to the White Paper's claims, several observers have argued that the guerrillas' chief source of arms is the black market trade, financed by kidnapping ransoms and fundraising in Western Europe.129 Other charges made in the White Paper—that military training has been given to thirty Salvadoran students in Moscow, that meetings have been held between insurgent leaders and Fidel Castro to resolve tactical differences, that advice has been received from Cuban officials—do show some external communist assistance, but given the scale and prolonged character of the conflict, such levels of participation, even if they have occurred, seem negligible. They hardly make a convincing case for external communist "coordination" and "indirect aggression." In any event, in evaluating these charges, the assistance should be measured against years of U.S. support for traditional rightist regimes in Latin America.

It is also important to note what the State Department has not claimed—i.e., that the Salvadoran conflict was itself fomented by external communist forces. While it is not directly relevant to the norm of non-intervention developed here, it should be borne in mind that the roots of the conflict go back several decades, and are found in the country's economic and political inequalities, and not in outside agitation. No one can contend that the conflict exists only because of external communist support, or that it would disappear if such support were cut off.

VI. The March, 1982 Elections

Elections took place in El Salvador in March, 1982 to choose members of the Constituent Assembly, which was to name a provisional president, write a constitution, and determine the future of the junta's programs. As Minister of Defense General Guillermo Garcia promised, the elections were held "under flying bullets,"130 with one candidate shot dead, and another wounded.131 Despite a campaign by the F.M.L.N. to discourage potential voters from casting ballots, voter

129. Gomez & Cameron, supra note 88, at 74; Allman, supra note 126, at 31. See also Feinberg, supra note 9, at 1134 (noting captures and purchases from Salvadoran military in addition to black market purchases); NEWSWEEK, Mar. 1, 1982, at 16, 22.
turnout was relatively high. This turnout indicated support within the Salvadoran population for the democratic process and for non-violent options to the continuing civil strife. Thus, the elections conveyed an important signal, and it was clearly wrong for the F.M.L.N. to use violent means to discourage citizens from taking part.

Despite the high turnout, some conclusions drawn may be unwarranted. For example, before the elections were held, the State Department and the junta predicted that the elections would establish the legitimacy of the regime, and after they were held, Secretary of State Haig asserted that the results constituted a "political repudiation" of the guerrilla movement. Neither of these statements seems justified, however.

At least four factors explain why the electoral results cannot be said to have clarified the attitudes of important segments of the population toward the regime and the F.M.L.N.-F.D.R. First, the center-left political forces did not field candidates for the elections. Second, approximately forty percent of the estimated number of eligible voters did not...
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cast ballots;\textsuperscript{138} low voter turnout occurred mainly in the provinces controlled by the F.M.L.N.\textsuperscript{139} Third, spoiled, blank, and “null” ballots amounted to nearly twelve percent of the vote,\textsuperscript{140} possibly reflecting a protest.\textsuperscript{141} Finally, voting is mandatory in El Salvador;\textsuperscript{142} voters had their identification cards stamped as evidence of participation in the election.\textsuperscript{143} In a country where military authorities regularly check citizens’ documents in search of dissidents, a concern for personal safety will promote voting. Nonetheless, despite a few irregularities\textsuperscript{144} and difficulties in controlling multiple voting,\textsuperscript{145} observers agreed that, by Salvadoran standards, the March 28 elections were conducted with a high degree of procedural regularity.

Nevertheless, the elections are unlikely to contribute to, and in fact might damage, the prospects for peace in El Salvador. The election results\textsuperscript{146} weakened the center-right Christian Democratic Party,\textsuperscript{147} in-

\textsuperscript{138} See Anderson interview, supra note 132. The exact number of eligible voters is not known. There was no registration process and the last census was held in 1970. Citizens were permitted to vote in any polling station, simply by presenting their voting certificate. See Cent. Am. Rep., Apr. 2, 1982, at 97, 98. A little less than 1.2 million ballots were cast out of an eligible electorate estimated by Anderson to be a little over 2 million people. Anderson Interview, supra note 132. See also An Election with No Victors, MACLEAN’S, Apr. 12, 1982, at 31; In These Times, Apr. 14-20, 1982, at 5, col. 1; N.Y. Times, June 4, 1982, at A5, col. 1; N.Y. Times, June 14, 1982, at A3, col. 1. Note that in the 1977 Salvadoran presidential election the official national total was a little over 1.2 million ballots cast. S. W. E. B. E. R., supra note 28, at 197 n.21.

\textsuperscript{139} The provinces of Morazan, Chalatenango, and Cabanas had low voter turnouts. N.Y. Times, Mar. 30, 1982, at A9, col. 1.

\textsuperscript{140} Anderson Interview, supra note 132; Cent. Am. Rep., Apr. 2, 1982, at 97, 98.

\textsuperscript{141} The number of null votes was especially high in the capital, where the electorate is politically more sophisticated. Casting spoiled or blank ballots is a common means of expressing dissatisfaction with the available candidates. See Boston Globe, Mar. 30, 1982, at 1, col. 4.

\textsuperscript{142} Though non-voting is a misdemeanor, and a citizen might not be allowed to leave the country as a penalty, it is doubtful that such sanctions are important in practice. Anderson Interview, supra note 132.

\textsuperscript{143} ECONOMIST, Apr. 3, 1982, at 67; Boston Globe, Mar. 30, 1982, at 1, col. 4.

\textsuperscript{144} See, e.g., N.Y. Times, Mar. 30, 1982, at A1, col. 6, A11, col. 1 (in shantytown of San Antonio Abad, soldiers dragged residents from homes and beat them, frightening others into voting); New Haven Journal-Courier, Mar. 29, 1982, at 1, col. 4 (ballot shortages); An Election with No Victors, MACLEAN’S, Apr. 12, 1982, at 31 (lost ballots).

\textsuperscript{145} The ultraviolet lights used to prevent multiple voting by showing indelible ink marks on voters’ fingers did not work. New Haven Journal-Courier, Mar. 29, 1982, at 1, col. 4, 4, col. 1; N.Y. Times, Mar. 29, 1982, at A1, col. 5.

\textsuperscript{146} The Christian Democrats (C.D.P.) emerged from the elections winning 24 seats, the Nationalist Republican Alliance (ARENA) 19 seats, the National Conciliation Party (P.C.N.) 14 seats, Democratic Action 2 seats, and the Salvadoran People’s Party 1 seat in the Constituent Assembly. ECONOMIST, Apr. 3, 1982, at 67; N.Y. Times, Apr. 4, 1982, § 1, at 10, col. 1.

\textsuperscript{147} See N.Y. Times, Apr. 2, 1982, at A1, col. 4, A8, col. 3 (interview with Napoleon Duarte); id., Apr. 3, 1982, at 1, col. 4 (far right vetoes further participation of Duarte in the government); id., Apr. 10, 1982, at A4, col. 3. (Congressmen warn Salvadoran far right on
creased the role of the far-right parties such as ARENA and P.C.N. in the governing process, and have left unchanged the power of the main sources of violence and civil strife in the country—the Salvadoran armed forces and security forces. As in the past, the effective power holders are the military. Ironically, the election results facilitated the return to open and active public life of officers and politicians who were “retired” after the 1979 coup. In fact, these individuals now control the Constituent Assembly. A cashiered officer allegedly linked to death squads, Major Roberto D'Aubuisson, is the President of the Assembly and leader of the far-right alliance that possesses broad powers to organize the government and set the country's legislative agenda. The stalled reforms of the junta might be reversed (e.g., the nationalization of banks) or slowly undermined (e.g., land reform). Furthermore, the far-right politicians who control the most important center of civilian politics will offer little, if any, pressure on or supervision over military conduct in the civil war. Under such circumstances, increased repression by the government forces against noncombatant civilians is likely to occur, and polarization is likely to accelerate.

The United States is not obliged to provide economic or military support to any government, and it should not make any commitment to

148. ARENA (Nationalist Republic Alliance) is a new rightist party led by Maj. Roberto D'Aubuisson, who is widely claimed to have been associated with far-right death squads.

149. P.C.N. (National Conciliation Party) represents the interests of the traditional alliance of oligarchs and military officers. The P.C.N. ruled El Salvador for 17 years, until the 1979 coup overthrew its last leader, Gen. Humberto Romero.


151. The Constituent Assembly has power to name the president, vice-president, supreme court, and other major officials, and also to review, and perhaps reject the president's cabinet and subcabinet appointments. Furthermore, the Assembly has the power to modify the reform programs enacted by the junta. N.Y. Times, Apr. 28, 1982, at A19, col. 1.

152. However, under pressure from the United States and the military, the Assembly named Alvargo Magana, an independent, to the provisional presidency. See Wash. Post, Apr. 23, 1982, at A1; see also N.Y. Times, Jan. 30, 1983, § 1, at 11, col. 1. Magana has had difficulties steering between right and center—to say nothing of the left.

153. The first reported post-election massacre of noncombatant civilians by the Salvadoran government forces resulted in 48 deaths. See N.Y. Times, Apr. 22, 1982, at A12, col. 3. In the last two weeks of May, 12 Christian Democrat officials and activists were murdered, allegedly by the military authorities. See N.Y. Times, June 1, 1982, at A3, col. 1.
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the victors of an electoral process that is, at best, incomplete. The voter turnout for the March 28 election, however explained, surely indicated that the people of El Salvador are weary of war. Unfortunately, control of the Constituent Assembly by the far right probably will aggravate the crisis and prolong the civil war. Moreover, the interim government\textsuperscript{154} imposed by the armed forces under pressure from the Reagan administration\textsuperscript{155} presents only a facade of national unity to appease international and U.S. congressional audiences. Because the parties participating in the elections did not represent center-left political opinion, it was unrealistic to assume that a truly representative (however measured) Constituent Assembly could have resulted. It was equally unrealistic to assume that any resulting Assembly and interim government could achieve a political regime whose legitimacy would force the insurgents to lay down their arms. As long as that substantial portion of the population represented by the insurgents cannot be or is not integrated into a democratic El Salvador, no government will achieve a confident order for coping with the pressing social and economic problems confronting the country and region.

VII. Policy Objectives and Recommendations

The principal goals that should orient external decision-makers in responding to the Salvadoran conflict in a lawful and reasonable fashion are expressed in contemporary international law. These goals are the maintenance of international peace and security, the minimization of destructive violence, the facilitation of processes of self-determination for the peoples in the country concerned, and the protection of fundamental rights.\textsuperscript{156} Beyond these goals, legitimate widespread interests in the Americas and Europe also should influence responses to the Salvadoran crisis: containment of the arms race in Central America, strategic non-alignment expressed as non-dependence on any one source of military assistance, prevention of major land wars, maintenance of open sea lanes and other channels of communications, access to scarce resources, non-discrimination in trade and investment,

\textsuperscript{154} The provisional President, Alvaro Magana, is a banker with graduate economics training at the University of Chicago. He comes from one of El Salvador's "14 families" (the traditional oligarchy) and has strong ties to the armed forces. See Wash. Post, Apr. 26, 1982, at A16, col. 1; N.Y. Times, Apr. 30, 1982, at A7, col. 1. As part of the political package of the interim government, three vice-presidents, one from each major party, were selected. In order of succession to the presidency, the Christian Democrat representative is last. See Boston Globe, Apr. 30, 1982, at 57, col. 1.


\textsuperscript{156} For background, see supra note 4 and accompanying text.
and respect for minimum humanitarian norms.\textsuperscript{157}  

The preceding analysis suggests, however, that the approach of the Reagan administration to the crisis in El Salvador is unlikely to further the achievement of these goals and interests. The administration's policy has two elements, a commitment to assist the Salvadoran government in its counterinsurgency efforts, and support for the election of the Constituent Assembly in March, 1982 as a means of conferring legitimacy on the regime. The policy appears based on the assumption that the government is both willing and able to take steps to end human rights abuses, to carry out socioeconomic reforms, and to investigate and initiate prosecutions for the murders of U.S. citizens.\textsuperscript{158} But the government is isolated from the population, and is politically accountable only to the Salvadoran military, the oligarchy, and the U.S. government. The government lacks political legitimacy and skill, and is incapable of directing a program of reform necessary to economic recovery. Military victory seems unattainable, and elections held under the government's sponsorship are unlikely to produce a peaceful and comprehensive settlement. Thus, the basic assumptions on which the administration has built its policy seem ill-founded, and the policy itself has little chance to advance objectives sanctioned under international law.

The likely failure of the Reagan administration's policy compels a search for other options that would be more likely to restore peace to El Salvador and bring an equitable order to the region. A much more fruitful approach to the crisis would be for the major international actors interested in the restoration of peace and stability to adhere to a strict policy of non-intervention in the military conflict, and to pressure the contestants for power to use techniques sanctioned under international law to achieve a settlement. The policy of non-participation would not ensure immediate cessation of internal strife, but it would further basic goals of the international community, such as isolation of the military aspects of the conflict, minimization of destructive violence, and facilitation of the processes of self-determination. Among the legal mechanisms that appear most likely to help bring an end to hostilities are international mediation, and formal recognition of the opposition.

By sponsoring mediation, international actors can facilitate the polit-

\textsuperscript{157} See generally \textit{U.S. Interest in Latin America}, supra note 14.

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A political-diplomatic process necessary to bring peace to El Salvador. Foreign governments must press both sides to negotiate a settlement, or, at least, to negotiate a general framework for achieving a political solution to the conflict. Although the Organization of American States is an appropriate forum for these negotiations, informal peace initiatives outside that body can promote agreement.

A proper framework for international mediation requires the contestants for power in El Salvador to accept certain conditions. Both the government and the opposition must be willing to begin negotiations without preconditions. Negotiations must include all active participants in the internal conflict, including both the F.D.R. and the F.M.L.N. Direct talks must be held on the principal issues in dispute. The negotiating parties need to state publicly the general terms of the proposed settlement, though the specific terms might be suggested only if such a course would aid in the achievement of a peaceful settlement. Finally, the parties must show good faith in reaching a legally binding settlement, however achieved, that would reflect consensus on future impermissible conduct.

The terms of the settlement should, of course, adhere to the international law of the United Nations Charter and other relevant international documents. At a minimum, the settlement should mandate no use of force against the territorial integrity or political independence of any state, guaranties of basic human rights, self-determination of peoples, and cooperation with third states for social and economic progress.

F.D.R. as an insurgent group. First, recognition of the F.M.L.N.-F.D.R. as insurgents would oblige third parties to consider the war in El Salvador in their political-diplomatic responses to the situation. It would focus attention more sharply on the civil war and might reduce the severity of the conflict by guaranteeing greater adherence to the laws of war. This recognition would constitute a de jure "internationalization" of the Salvadoran internal war. Second, recognition by foreign governments of a state of insurgency might pressure the Salvadoran government and the F.M.L.N.-F.D.R. to agree to mediation as a means of settling the conflict. Third, were the situation widely recognized as an insurgency, countries aiding either side in the conflict would be required to admit explicitly that they are assisting a party to the conflict, and thus would be pressured to justify their actions. Such international accountability could elicit more information on the relative merits of the parties' positions, and might also have a restraining effect on further foreign participation. Finally, recognition of the F.M.L.N.-F.D.R. as insurgents would identify an organized group, in addition to the government, which could be held responsible for acts affecting the recognizing state.160

Given the scope, duration, and intensity of the conflict in El Salvador, there is no doubt that there is an insurgency in the country.161 Thus the recognizing state could not be accused of "premature recognition," an established instance of illegal interference in the internal af-

160. This recommendation for the recognition of the F.M.L.N.-F.D.R. as an insurgent group is based on a general policy rationale which Professors W. Michael Reisman and Eisuke Suzuki have postulated for "every violent political revolt against an established government." Reisman & Suzuki, supra note 6, at 426. Formal recognition of insurgency has been rare.

161. The situation in El Salvador fulfills the indicia of an insurgency. Insurgency has been defined as the state of political revolt or insurrection that falls short of civil war, S. Patel, Recognition in the Law of Nations 92 (1959), or a twilight zone between rebellion and belligerency, Farer, Foreign Intervention in Civil Armed Conflict, 142 Recueil des Cours 291, 318 (1974). Some jurists regard any distinction between the recognition of insurgency and belligerency as fallacious. See 1 D. O'Connell, International Law 164-65 (1965). But see H. Lauterpacht, Recognition in International Law 270-71 (1947).

By mid-March, 1982, the F.M.L.N.-F.D.R. had not yet fulfilled the traditional prerequisites for recognition as a belligerent. Certain factual conditions are said to be required to permit a foreign state's recognition of belligerents: a) there must exist within the state an armed conflict of a general (as distinguished from a purely local) character; b) the insurgents must occupy and administer a substantial portion of national territory; c) the insurgents must conduct hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; and d) there must exist circumstances that make it necessary for outside states to define their attitude by means of recognition of the belligerency. Id. at 176. The F.M.L.N.-F.D.R. has nonetheless made considerable progress toward isolating the eastern part of the country and consolidating its effective political-military dominance in the area. If the F.M.L.N.-F.D.R. establishes administrative control over cities, recognition as a belligerent may be appropriate.
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fairs of another state. Moreover, recognition of the F.M.L.N.-F.D.R. as insurgents would not entitle it to any form of aid. It would only signify that the recognizing state considers the insurgents to be legal contestants for state power, and not simply lawbreakers.

The joint Mexican-French declaration on El Salvador, which recognized the F.M.L.N.-F.D.R. as a "representative political force," serves many of the same purposes as would formal recognition of the insurgents, but it has the disadvantages of any innovation in discourse that has traditionally relied on legal terminology. The more established term "insurgents" would also indicate that the F.M.L.N.-F.D.R. is a legal contestant for power in El Salvador and that the ongoing civil strife is an object of international concern because of its threat to regional stability. Moreover, while the apparent objective of the joint statement—to counter U.S. support for the junta’s pursuit of a military rather than a political solution—is consistent with the goal of world public order, its terms are impolitic. The call for the restructuring of the Salvadoran armed forces as a prerequisite to free elections could not be expected to find support among the military dictatorships of Latin America.

Whatever objections there may be to any specific formula for mediation, there is no practical and helpful alternative to international consultations among foreign allies of the power contenders in El Salvador. The United States, Western Europe, and other countries or regions with ties to Central America have an interest in working toward a peaceful solution to the war in El Salvador. They must bring to bear diplomatic pressure to develop a structure and procedure for national


Nine Latin American countries, led by Venezuela, protested the Mexican-French joint statement as an act of intervention in the internal affairs of El Salvador. (The others were Argentina, Uruguay, Chile, Guatemala, Honduras, Dominican Republic, Paraguay, and Colombia. Later Equador, Peru, and Costa Rica also endorsed the protest note.) Latin Am. Weekly Rep., Sept. 11, 1981, at 1; Guardian, Sept. 2, 1981, at 7.

The Brazilian government has acted cautiously and independently in regard to the Salvadoran crisis: it has supported neither the U.S. nor the Mexican-French position. It has, however, opposed any military intervention in El Salvador. See Wash. Post, July 16, 1981, A29, col. 1, at A30, col. 1; Jornal do Brasil, Sept. 3, 1981, at 12. Brazil remains, therefore, in good diplomatic position to contribute to international mediation and could, for instance, offer its good offices as mediator with some chance of acceptance.
166. Id.
reconstruction in El Salvador that would incorporate the demands of the F.M.L.N.-F.D.R. and the interests it represents. International mediation is no easy task, but in view of the military stalemate in El Salvador and the increased level of destruction, it is a preferable and lawful alternative to the current stalemate. Once a solution is achieved, foreign governments could lawfully and effectively provide the assistance necessary for the long-term economic and political reconstruction of the country.

In conclusion, it must be noted that the effects of the civil war in El Salvador are not limited to the misery inflicted on the people of that country alone. The conflict belongs to a larger crisis threatening the security and stability of the entire Central American region. Tensions are already running high between Honduras and El Salvador, as refugees from the conflict are settling in Honduras. Claiming that these refugees are providing aid to the insurgency, the Salvadoran military has undertaken raids inside Honduras against them. Meanwhile, clashes are taking place along the Honduran-Nicaraguan border, and the Sandinista government of Nicaragua is strengthening its armed forces, and its ties with the Soviet bloc, in anticipation of covert action and externally supported acts against it. The Reagan administration's regrettable emphasis on a counterinsurgency solution in El Salvador and its support of Honduras only fuels the fears of the Sandinistas, and further retards the potential for regional economic growth. The arms race is growing in Central America, and with it the probability of wider conflict. A negotiated political settlement in El Salvador could mark the first step in defusing this regional security crisis. Unless Western actors, including European countries, take steps to mandate a political solution in El Salvador, the Central American region is unlikely to realize the minimum public order necessary for mutual security and renewed economic development.

170. See Schulz, supra note 125, at 699.