The Reagan Doctrine, the 2003 Invasion of Iraq, and the Role of a Sole Superpower

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Introduction

This Essay compares two doctrines of United States foreign policy. The first is the Reagan Doctrine, which achieved prominence in national discourse during the two presidential administrations of Ronald Reagan.[1] The second is the National Security Strategy (NSS), issued by President George W. Bush in the fall of 2002, developed in response to the September 11, 2001, terrorist attacks on the United States.[2] The NSS could be described as a "Bush Doctrine" on the use of preemptive self-defense in U.S. foreign policy.[3] The particular focus of the comparison in this Essay is the relationship of the Reagan Doctrine and the Bush Doctrine to the international law on the use of force. This comparison will yield some tentative conclusions about the consequences of the United States serving, in some senses, as the world's sole superpower.

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1. *See infra* Part III.

2. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Mar. 26, 2004) [hereinafter NSS].

3. Many commentators have discerned a "Bush Doctrine" in foreign policy, and of course there have been various views as to what such a doctrine entails. It is clear, however, that a substantial proportion of these commentators view the doctrine of preemptive self-defense, one of the more prominent elements of the National Security Strategy, as the primary characteristic of the "Bush Doctrine." *See, e.g.*, Bryan Bender, *North Korea, Iran Seen as More Receptive to U.S.*, BOSTON GLOBE, Jan. 4, 2004, at A1 (referencing a "Bush doctrine of preemptive defense, threatening 'rogue states' with military force"); Rod Dreher, *Texan of the Year President George W. Bush*, DALLAS MORNING NEWS, Jan. 4, 2004, at 1H (defining the "Bush Doctrine," with perhaps deliberate exaggeration, as "the principle that the United States reserves the right to strike any nation that threatens it, imminently or not, without permission and without apology"); Charles Krauthammer, *The Doggedness of War*, WASH. POST, Dec. 26, 2003, at A35 (referencing "a clearly enunciated policy—now known as the Bush Doctrine—of targeting, by preemptive war if necessary, hostile regimes engaged in terror and/or refusing to come clean" on weapons of mass destruction).

Each doctrine was very much a product of its time. The Reagan Doctrine developed tentatively in a period in which the United States always had to consider the Soviet Union's reaction.[4] The Bush Doctrine, in contrast, developed more boldly in a period in which the United States had no counterbalancing superpower to temper its intent.[5]

This Essay will show that the issuance of the NSS, including its open declarations regarding preemptive self-defense, was a much more explicit and formally acknowledged act than the implementation of the Reagan Doctrine, which was stated in much less formal terms.[6] The issuance of the NSS therefore bespeaks a greater attention to publicly-stated principles than that evinced in earlier times, and this can be salutary for international law.[7] On the other hand, this Essay will also show that the substance of preemptive self-defense under the NSS is more radical than the Reagan Doctrine.[8] Thus, the NSS is certainly no less questionable, and is probably more questionable under current international law.[9] Consequently, the NSS, in the context of its preemptive self-defense statements, produces effects for international law that are at once potentially salutary in form and problematic in substance.[10] This tension between formal effects that can enhance the workings of international law, and substantive effects that can be problematic for it, may be characteristic of things to come if the United States maintains its role as a sole superpower.

I. Why Examine Doctrines?

Specifically enunciated doctrines in foreign affairs can have a constructive effect on the development of international law. Some

4. *See generally* ALLAN GERSON, THE KIRKPATRICK MISSION: DIPLOMACY WITHOUT APOLOGY: AMERICA AT THE UNITED NATIONS 1981-1985, 197-215 (1991) (describing the "low point in U.S.-Soviet relations" that occurred during Reagan's presidency).

5. *See infra* note 17 and accompanying text.

6. *See infra* Part VI and accompanying text (describing the differences in the "respective manners of propagation" of the Reagan Doctrine and the NSS).

7. *See infra* notes 11-12 and accompanying text (describing the ways in which the issuance of "specifically enunciated doctrines in foreign affairs can have a constructive effect on the development of international law").

8. *See infra* notes 104-108 and accompanying text (describing the ways in which a "narrow conception of the Reagan Doctrine" is "much more radical" than the relevant provisions of the NSS).

9. *See infra* notes 91-103 and accompanying text (noting that the International Court of Justice "essentially determined that the Reagan Doctrine . . . violated international law" under the facts of the litigation before it between Nicaragua and the United States).

10. *See infra* notes 119-124 and accompanying text.

tend to view international affairs as solely matters of brute strength and political machination;[11] these observers may tend to doubt the character and effectiveness of international law.[12] To the extent that the foreign policy of powerful states is composed merely of ad hoc determinations maximizing selfish advantage from one factual situation to the next, this state of affairs plays into the hands of international law skeptics. After all, relegating policy decisions to a set of ad hoc determinations based on nothing more than physical and political advantage contradicts the rule of law.

On the other hand, when the officers of an individual state specify in advance a set of explicit principles upon which they will conduct foreign policy, the foreign relations of that state appear to be governed by principle as well as, and perhaps more than, ad hoc determinations of pure advantage. These principles can have a dual positive effect on the role of law in international affairs. First, the rationalizing or guiding effect of enunciating a specific policy can help to define policy options and increase predictability. As an experiential matter, this can create a more orderly environment that is conducive to law. Second and more esoterically, distilling foreign policy doctrines into specific statements can aid in the development of customary international law.[13] These doctrines can help both to develop an *opino juris*[14]

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11. Louis Henkin, for many years a professor of international law at the Columbia Law School and a former President of the American Society of International Law, has referred to this kind of viewpoint. *See* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 10 (2d ed. 1979) (stating "it is a common view . . . that the norms of international law are so widely disregarded as to be largely irrelevant to the behavior of nations. Some have even elevated this impression to a doctrine, questioning whether one may meaningfully speak of international norms, of their observance or violation"). Some political science texts give tacit, or perhaps unintentional, support to this view. *See, e.g.*, ROBERT L. WENDZEL, INTERNATIONAL RELATIONS: A POLICYMAKER FOCUS 20 (1st ed. 1977) (stating "in any case where one of the parties perceives a significant threat to its fundamental objectives it will quickly dispense with legal considerations that might inhibit their achievement") (emphasis omitted).

12. *See* HENKIN, *supra* note 11, at 10.

13. One of the principal sources of international law, apart from treaties and conventions, is customary international law. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 2 (5th ed. 1998). For a practice among states to be considered customary international law, the practice must be general, consistent, and be supported by a conviction that the behavior is legally obligatory. *Id.* at 4-11. This conviction of legal obligation is referred to as *opino juris*. *Id.* at 7. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102(1), (2) (1987) (stating in section 102(2) that "[c]ustomary international law results from general and consistent practice of states followed by them from a sense of legal obligation").

14. *See supra* note 13.

and to guide and model actions of the declaring country and its allies toward building general and consistent practice.

Of course, enunciated doctrines of foreign policy can amount to mere political posturing, and may not always be followed. However, even when not followed, they can be valuable. A state that enunciates a specific doctrine and then ignores it, or observes it in a patently invalid way, has nevertheless created the very yardstick by which others can note the discrepancy between its stated policy and its behavior. The practice thus advances, albeit in some cases at the margins, a mechanism whereby the failure of states to conduct themselves in principled ways can be made more evident to all. When these discrepancies are public, the international community has greater ability to hold the state accountable.

II. President Bush's "National Security Strategy"—Preemptive Self-Defense

On September 17, 2002, President George W. Bush issued the *National Security Strategy of the United States of America*.[15] Its date of issuance, of course, was shortly after the first anniversary of the September 11, 2001, terrorist attacks. The Bush Administration intended the NSS to announce that United States foreign policy, after the events of September 11th, would be conducted according to the dictates of the NSS. The Administration drafted the NSS with two elements foremost in mind: the implications of the events of September 11th,[16] and the status of the United States as the world's sole superpower.[17]

The NSS lists a set of national security goals, which the White House describes as being based on "a distinctly American internationalism that reflects the union of our values and our national interests."[18] The overriding sentiment of the document is that the United States must pursue international relations according to the American values of democracy, freedom, and free markets,[19] as well as according to less policy-specific foreign

15. *See* NSS, *supra* note 2.

16. *See id.*, at Intro., para. 7 (stating "[t]he events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states").

17. *See id.*, at 1 (stating "[t]he United States possesses unprecedented—and unequaled—strength and influence in the world").

18. *See id.*

19. *See id.*, at Intro., para. 1 (referencing "freedom, democracy and free enterprise" as "a single sustainable model for national success" for all countries of the world).

relations values, such as the avoidance of violent conflict and non-intervention in domestic affairs.[20]

In retrospect, it can be seen that the NSS could well have been part of an advance preparation for the U.S.-led invasion of Iraq in 2003.[21] Some of its provisions are explicit endorsements of the currently much-discussed concept of preemptive self-defense.[22] For example, in a prominently criticized paragraph regarding the dangers of terrorism,[23] the NSS states:

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20. *See id.* Prominent traditional values of international law are non-intervention in internal affairs, territorial integrity, non-use of force, and equality of voting in the United Nations General Assembly. *See generally* MALCOLM N. SHAW, INTERNATIONAL LAW 39 (5th ed. 2003). These values are based in the basic state-oriented character of world politics, and spring from the notions of equal sovereignty in law and equal possession of the basic attributes of statehood among states. *See id.* Accordingly, these values derive from the sovereign equality of states. J.L. Brierly traces the notion of the sovereign equality of states to Emerich de Vattel. *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 37 (6th ed. 1963) (quoting a translated passage from Emerich de Vattel's *Le Droit des Gens* (1758) asserting that "nations or sovereign states must be regarded as so many free persons living together in the state of nature"). Brierly maintains that Vattel concluded that "since men are naturally equal, so are states." *Id.* Brierly himself, however, had less use for a doctrine of the sovereign equality of states, stating that the doctrine of the equality of states is "contradicted by obvious facts, for by whatever tests states are measured[,] they are not equal." *Id.* at 131. Brierly believed that most principles used to justify a sovereign equality of states could be derived, not from a purported equality of states, but from their mutual interdependence. *Id.* at 131-34.

21. *See* Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L. L. 599, 600 (2003) (stating that the Bush Administration issued the NSS at a time when "President Bush was focused on trying to build domestic and international support for a final effort to disarm and dislodge Saddam Hussein").

22. In addition to preemptive self-defense, there is anticipatory and preventive self-defense. It is possible to distinguish between the three. *See, e.g.*, Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 1 (2003). Graham states:

> Arguably, the term anticipatory self-defense could imply action against a truly imminent, alleged threat, while preventive war could be addressed to a threat that is yet to fully mature, with preemptive attack somewhere in between. Even though the three terms are somewhat different, the lines between them are not clear, and they all involved aggressive action.

Id. For purposes of this Essay, the distinctions among these terms are not tremendously significant, although some authorities discern a difference. *See* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L. L. 607, 619 (2003). Frank observes that President Bush appeared in the NSS "to be exponentially expanding the range of permissible preemption, from that of the *Caroline* doctrine, which requires a 'necessity of . . . self-defence [that] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation,' to something like a balancing of reasonable probabilities." *Id.* (quoting letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), *quoted in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906)).

23. Among the most academically prominent criticisms of the NSS preemptive self-defense provisions are those discussed in *supra* notes 18-22 and accompanying text and *infra* notes 24-41 and accompanying text. However, even in the more

> We will disrupt and destroy terrorist organizations by . . . identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against such terrorists . . . .[24]

Similarly, and more explicitly, the NSS advances the notion of preemptive action in the more generalized context of national security and the dangers of weapons of mass destruction.[25] The NSS states, "[t]he United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."[26]

These provisions have been decried by commentators. For example, a recent issue of the *American Journal of International Law* contains an academic colloquium debating the consequences to international law of the current conflict in Iraq.[27] The NSS figures prominently in this discussion, and several of the commentators are critical.[28] Thomas Franck, a professor at the New York University School of Law and a former President of the American Society of International Law, maintains in this discussion that the NSS provisions on preemptive self-defense are antithetical to the Charter of the United Nations (U.N. Charter).[29] Professor Franck acknowledges that a doctrine of *anticipatory* self-

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popular foreign-relations press, criticism of the NSS is well documented. In a recent issue of *Foreign Affairs* magazine, U.S. Secretary of State Colin Powell acknowledges such criticism, but notes that the critics have "exaggerated both the scope of preemption in foreign policy and the centrality of preemption in U.S. strategy as a whole." Colin Powell, *A Strategy of Partnerships*, 83 FOR. AFFAIRS 22, 24 (2004). In the same issue, Lee Feinstein and Anne-Marie Slaughter note that the "limits" of the preemption strategy of the NSS "are demonstrated daily in Iraq," although in their view the problem with the strategy "may be that it does not go far enough." Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOR. AFFAIRS 136, 136 (2004). Mr. Feinstein is the Acting Director of the Washington Program of the Council on Foreign Relations; Anne-Marie Slaughter is the Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and the current President of the American Society of International Law. *Id.*

24. NSS, *supra* note 2, at 6.

25. *Id.* at 14-15.

26. *Id.* at 15.

27. Colloquim, *Agora: Furute Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003).

28. *See, e.g*, Franck, *supra* note 22, at 607 (providing a critical analysis of the consequences of the Iraqi invasion on the world of international law).

29. *See id.* at 619 (criticizing these statements as setting out "the doctrine that the nation is free to use force against any foe it perceives as a potential threat to its security, at any time of its choosing and with means at its disposal").

defense can be reasonable, and has "gained a certain credibility" in the course of the last two centuries.[30] The classic version of anticipatory self-defense, in his view, requires a "necessity of . . . self-defense [that] is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[31] When those emergency circumstances exist, the classic view would allow for self-defense in anticipation of the clearly observable threat.[32]

On the other hand, Professor Franck finds the NSS view of preemptive self-defense to be out of line with this tradition, because it dispenses with the "instant, overwhelming and leaving no choice of means" requirement.[33] Instead, the NSS formulation, in his view, provides for "a right by the United States to determine for itself whether, and when, the conditions exist to justify recourse to this expanded right."[34] This degree of unilateral power in the United States would so far exceed what is authorized in the U.N. Charter as to "stand the Charter on its head."[35]

Jane Stromseth, a law professor at Georgetown University Law Center, acknowledges in the same colloquium that the NSS "grapples frankly and openly with the exceedingly difficult security challenges posed by terrorists and by rogue states."[36] However, she maintains that the preemptive self-defense provisions of the NSS are quite broad and open-ended.[37] She says that these provisions, in their "expansive" form, have "the potential to be destabilizing."[38] She suggests that if the other countries were to follow the lead of the United States on this point, all manner of countries around the world could begin feeling more justified launching preemptive strikes, thereby decreasing international stability.[39]

Also in the same colloquium, national security expert Miriam Sapiro criticizes the NSS preemptive self-defense provisions as not

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30. *Id.*

31. *Id.* (quoting 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906) (explaining the so-called *Caroline* doctrine)).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Jane E. Stromseth, *Law and Force After Iraq; A Transitional Moment*, 97 AM. J. INT'L L. 628, 635 (2003).

37. *Id.*

38. *Id.* at 636 (discussing how the expansive nature of the NSS could pose challenges to the United Nations framework).

39. *Id.* (citing W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L. L. 82 (2003)). Reisman states that NSS could result in a lower threshold to warrant acts of self-defense. *Id.* at 89.

reflecting the current state of international law.[40] In her view, international law prior to the adoption of the U.N. Charter in 1945 might have allowed for a comparatively broad view of preemptive self-defense, but the adoption of the U.N. Charter makes the doctrine considerably more problematic.[41]

In spite of the antagonism it has garnered among commentators, several aspects of the NSS are significant for purposes of this discussion. It was issued as both a detailed and comprehensive text.[42] Comparatively lengthy for a foreign policy doctrine, it amounts to thirty-one single-spaced printed pages in fairly small type. It covers a broad range of policy issues, including the proper approach to international alliances,[43] terrorist use of weapons of mass destruction,[44] trade policy,[45] and the development of democracy.[46] At the same time, its statements are focused and detailed enough to arguably serve as a somewhat meaningful guide to future U.S. foreign policy. The NSS includes numerous statements that provide fairly specific indications of U.S. foreign policy goals in such areas as regional conflicts,[47]

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40. *See* Sapiro, *supra* note 21, at 600.

41. *Id.* at 600-01 (explaining that Article 2(4) of the U.N. Charter imposes a prohibition against the use of threats or force against another state).

42. *See infra* notes 113-115 and accompanying text (discussing the length and format of the NSS).

43. *See id.* at 5-7 (entitled "Strengthen Alliances to Defeat Terrorism and Work to Prevent Attacks Against Us and Our Friends"). This section emphasizes the role of U.S. allies in fighting terrorism, referencing the need to co-ordinate efforts to stem the availability of financing for terrorists, the importance of ranking terrorism in the international community on a par with slavery, piracy and genocide, and the policy of supporting moderate and modern government in the Muslim world. *Id.*

44. *Id.* at 13-16 (entitled "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction"). This segment focuses specifically on weapons of mass destruction, and states policy goals regarding nonproliferation of WMD, effective consequence management upon the use of WMD, and improved intelligence regarding WMD. *Id.*

45. *See id.* at 17-20 (containing several strategies, both specific and general, assertedly to help expand global trade and economic growth. These include working with the IMF to streamline lending, facilitating the continuation of the WTO's Doha Round of negotiations, and participating in or encouraging the development of regional trade areas).

46. *Id.* at 21-24 (setting forth measures designed to assist less developed countries in their further development, with the stated goal of fostering and encouraging stable democracy). It cites a proposed fifty percent increase in the core development assistance to be given by the United States, further support for the World Bank's International Development Association, and further assistance to education. *Id.*

47. *See id.* at 9-10 (discussing the need for America to "stand committed to an independent and democratic Palestine" and the need for "Israel forces . . . to withdraw fully to positions they held prior to September 28, 2000").

international environmental controls,[48] assistance to developing countries,[49] and foreign relations strategy.[50] Much of the NSS is admittedly of a political and rhetorical character, but statements such as these are sufficiently precise and definite to constitute statements of policy, rather than mere posturing.

Lending further support to the proposition that the NSS constitutes a policy statement is the fact that the Bush Administration itself issued the document.[51] The Administration did not rely on cabinet officers or others to state the doctrine, and since it was issued in detailed written form there is no doubt about its content.[52] Also, the doctrine was issued over the internet, a medium ideally suited and designed for rapid and broad public dissemination.

In these respects the NSS can be profitably compared to the Reagan Doctrine, an analogous doctrine of U.S. foreign policy that had substantial effects in the international arena[53] some seventeen years before the NSS was issued.[54] This Essay will now turn to an examination of the Reagan Doctrine, the different ways in which it was viewed in its time, and the objections of some of its critics, followed by a direct comparison of the two doctrines.

III. The Reagan Doctrine and Its Critics

The Reagan Doctrine was based in various discrete

48. NSS, *supra* note 2, at 17-20 (stating that "[o]ur overall objective is to reduce America's greenhouse gas emissions . . . by 18 percent over the next 10 years," and stating that the United States remains "committed to the basic U.N. Framework Convention [on greenhouse gas emissions] for international cooperation," and that the United States will "increase spending on research and new conservation technologies, to a total of $4.5 billion").

49. *See id.* at 21-24 (describing the "Millennium Challenge Account" which proposes "a 50 percent increase in the core development assistance given by the United States," and states that "[t]he U.S. will increase its own funding for education assistance by at least 20 percent, with an emphasis on improving basic education and teacher training").

50. *See id.* at 25-28 (confirming "our commitment to the self-defense of Taiwan under the Taiwan Relations Act," and calling this "one . . . profound disagreement" that the United States has with China; including non-proliferation; "we expect China to adhere to its nonproliferation commitments").

51. The document was issued by the Bush Administration via the internet as a compilation of President Bush's speeches. *See* NSS, *supra* note 2.

52. *Id.*

53. *See infra* notes 86-90 and accompanying text (noting that the Reagan Doctrine was the basis for the "assistance provided by the U.S. to the Contra movement from 1981 to 1986" in Nicaragua).

54. *See infra* notes 57-58 and accompanying text (indicating that the earliest statement by President Reagan enunciating the contours of a Reagan Doctrine was his State of the Union address in February of 1985).

statements that Ronald Reagan made during the course of his presidency.[55] President Reagan never enunciated the doctrine as a detailed policy statement, but commentators pieced it together from his statements and the statements of his Cabinet officers and advisors.[56]

Two statements from President Reagan are the most cited for enunciations of the Reagan Doctrine. [57] The first of these was a portion from his February 1985 State of the Union address in which he stated:

> We must stand by our democratic allies. And we must not break faith with those who are risking their lives—on every continent, from Afghanistan to Nicaragua—to defy Soviet supported aggression and secure rights which have been ours from birth. . . . Support for freedom fighters is self-defense . . . .[58]

The second was a portion of his 1985 speech at the Bitburg Air Force Base in what was then still West Germany. There Reagan stated:

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55. *See generally* JEANE KIRKPATRICK, THE REAGAN DOCTRINE & U.S. FOREIGN POLICY (1985) [hereinafter KIRKPATRICK].

56. *Id.* at 10. The primary exponent of the Reagan Doctrine was Jeane Kirkpatrick. However, others who made contemporary statements evoking or deriving from the Reagan Doctrine included Secretary of State George P. Shultz and U.S. Representative Jack Kemp. Shultz stated:

> The American People have a long and noble tradition of supporting the struggle of other peoples for freedom, democracy and independence. . . . So long as communist dictatorships feel free to aid and abet insurgencies in the name of 'socialist internationalism,' why must the democracies—the target of this threat—be inhibited from defending their own interests and the cause of democracy itself? . . . Our nation's vital interest and moral responsibility require us to stand by our friends in their struggle for freedom . . . .

George P. Shultz, *New Realities and New Ways of Thinking*, 63 FOREIGN AFF. 705, 713 (1985). Similarly, Kemp stated:

> The Reagan Doctrine in foreign policy takes as its central theme the idea that America is the leader of the Free World. This is not rhetoric, it is principle; and it carries with it responsibility. It is the guiding force behind our acts: to protect freedom where it exists, and to advance freedom where it is denied.

Jack Kemp, *Introduction*, *in* KIRKPATRICK, *supra* note 55, at 1.

57. Jeane Kirkpatrick herself cited these two statements in one of her most direct statements of the Reagan Doctrine. KIRKPATRICK, *supra* note 55, at 10-11. The State-of-the-Union quotation appeared prominently in a contemporary Cato Institute policy analysis. Ted Galen Carpenter, *U.S. Aid to Anti-Communist Rebels: The 'Reagan Doctrine' and Its Pitfalls*, 74 CATO POL'Y ANALYSIS 1986. Kirkpatrick again included the Bitburg quotation in her contributing essay to *Right v. Might*. Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* LOUIS HENKIN, ET AL. RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 19, 22 (2d ed. 1991).

58. President's Address before a Joint Session of Congress on the State of the Union, 1985 PUB. PAPERS 135 (Feb. 6, 1985).

> Twenty-two years ago, President John F. Kennedy went to the Berlin Wall and proclaimed that he, too, was a Berliner. Well, today freedom loving people around the world must say: I am a Berliner. I am a Jew in a world still threatened by anti-Semitism. I am an Afghan, and I am a prisoner of the Gulag. I am a refugee in a crowded boat foundering off the coast of Vietnam. I am a Laotian, a Cambodian, a Cuban and a Miskito Indian in Nicaragua. I, too, am a potential victim of totalitarianism.[59]

Taken together, these announcements evince a solidarity with countries that were considered to be controlled by Communist regimes allied with the Soviet Union. They bear the mark, particularly in their equation of communism with totalitarianism, of the intellectual influence of Jeane Kirkpatrick.[60] Ms. Kirkpatrick was the U.S. Ambassador to the United Nations under President Reagan from 1981 to 1985, and was very influential in the formulation of his foreign policy.

Kirkpatrick came to President Reagan's attention through the publication of a now-famous essay in the magazine *Commentary*.[61] She therein drew a distinction between what she regarded as totalitarian and authoritarian regimes: totalitarian regimes (such as communist regimes and the theocracy in Khomeini's Iran) denied their people all freedoms, including religious tolerance, whereas merely authoritarian regimes (such as Somoza's Nicaragua and the Shah's Iran) imposed somewhat less comprehensive restrictions on liberties.[62] She maintained that totalitarian regimes were worse than authoritarian regimes, because authoritarian regimes could be more likely to change and develop democratically.[63] Accordingly, there was a basis for treating authoritarian regimes more favorably than totalitarian

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59. President's Remarks at a Joint German-American Military Ceremony at Bitburg Air Base in the Federal Republic of Germany, 1985 PUB. PAPERS 567 (May 5, 1985).

60. Kirkpatrick consistently had the confidence of President Reagan throughout her term of service at the United Nations. GERSON, *supra* note 4, at 40 (noting that "she had the confidence of President Reagan, and was told by him that he would treat her as a full-fledged Cabinet member and not simply as someone who held Cabinet rank . . . ."); *see also id.* at 68 (asserting that "[p]erhaps more than any other U.S. Permanent Representative in the past, she would use her warm and sympathetic reception in the Oval Office to good political advantage").

61. Jeane J. Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34-45, *reprinted in* JEANE J. KIRKPATRICK, DICTATORSHIPS AND DOUBLE STANDARDS 49-52 (1982).

62. *See* GERSON, *supra* note 4, at xv (describing this distinction and providing these specific examples).

63. *Id.*

regimes in U.S. foreign policy.[64] This thesis appealed to President Reagan, and Kirkpatrick continued to enjoy his confidence throughout her tenure at the U.N.[65]

Indeed, Ms. Kirkpatrick had various opportunities to speak and elucidate upon the Reagan Doctrine. The most authoritative of these was in a group study sponsored by the Council of Foreign Relations in 1989, which was published in book form under the title *Right v. Might*.[66] In some senses, *Right v. Might* is entirely about the Reagan Doctrine. The issues that instigated the convocation of the study all occurred during Reagan's presidency: the 1983 Grenada invasion, the bombing of Libya in 1986, the mining of Nicaraguan harbors by the CIA and covert and overt aid to the Contras.[67] All of these occurrences evinced President Reagan's approach to foreign relations. It is accordingly only natural that in discussing them, the Reagan Doctrine would regularly surface in the *Right v. Might* essays, even if not all of them directly involved application of the Doctrine.

The contributors to the group study included some of the most prominent foreign policy commentators of the day. In addition to Ms. Kirkpatrick, they included Louis Henkin, Stanley Hoffman of Harvard University, William D. Rogers, a former Assistant Secretary of State, and David Scheffer, who is currently at the Georgetown University Law Center. Each of these observers commented at length on aspects of the Reagan Doctrine. They had quite divergent views, not only as to its merits but also as to what it actually said. This divergence of views as to actual content no doubt existed, at least in substantial part, because President Reagan never provided a single detailed formulation of

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64. It was on this basis that Kirkpatrick considered, for example, President Carter's policies regarding the replacement of the Somoza regime in Nicaragua by the leftist Sandinistas as blameworthy. *Id.* at xv.

65. The *Commentary* essay was one of the prime bases for her appointment to the U.N. post. *Id.* at xv. *See also supra* note 60. *See also* Naomi B. Lynn, *Jeane Kirkpatrick: From the University to the United Nations*, *in* WOMEN LEADERS IN CONTEMPORARY U.S. POLITICS 91, 96 (Frank P. Le Veness & Jane P. Sweeney eds., 1987) (asserting that "[t]here is little doubt that Jeane Kirkpatrick has had a substantial impact on the Reagan administration's foreign policy. During her tenure as U.S. ambassador she had easy and direct access to the president, often to the chagrin of two secretaries of state").

66. HENKIN ET AL., *supra* note 57 (this book was first published in 1989 and then in this expanded form two years later). An earlier authoritative source was Kirkpatrick's monograph published by the Heritage Foundation. *See* KIRKPATRICK, *supra* note 55. The 1979 *Commentary* article, discussed above and cited in *supra* note 61, was also certainly a substantial precursor to the Reagan Doctrine.

67. John Temple Swing, *Foreword*, *in* HENKIN ET AL., *supra* note 57, at vii, x.

the Reagan Doctrine.[68]

Most of those who were critical of the Reagan Doctrine viewed it as a broad and bald assertion of the United States' right to simply intervene, by direct military force if necessary, in any country around the world in which democratic rule was threatened. Louis Henkin described the Doctrine as espousing "the right to intervene by force in another state to preserve or impose democracy."[69] David Scheffer also described the Reagan Doctrine as the "rhetorical promotion of democracy . . . as a justification for the use of force."[70]

In this context, the Reagan Doctrine could be seen as a response to the Brezhnev Doctrine, named for the Soviet leader during the *détente* era.[71] After the Soviet invasion of Czechoslovakia in 1968, Brezhnev asserted that the Soviet Union had the inherent authority to maintain communism in any existing communist state when that system became threatened.[72] A formal statement of the Brezhnev Doctrine appeared as part of a 1968 article in *Pravda* in which Brezhnev stated:

> The peoples of the socialist countries and Communist parties certainly do have and should have freedom for determining the ways of advance of their respective countries.
>
> However, none of their decisions should damage either socialism in their country or the fundamental interests of other socialist countries, and the whole working class movement, which is working for socialism.
>
> This means that each Communist party is responsible not only to its own people, but also to all the socialist countries, to the entire Communist movement. Whoever forgets this, in stressing only the independence of the Communist party,

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68. *See supra* notes 56-59 and accompanying text.

69. HENKIN ET AL., *supra* note 57, at 44.

70. David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq and the New World Order*, *in* HENKIN ET AL., *supra* note 57, at 119.

71. Leonid Brezhnev became general secretary of the Soviet Communist Party in 1966, and Chairman of the Presidium of the Supreme Soviet in 1977. PAUL J. MURPHY, BREZHNEV: SOVIET POLITICIAN 248-49, 313 (1981). He held both posts until his death in 1982.

72. *See generally* John Norton Moore, *The Brezhnev Doctrine and the Radical Assault on the Legal Order*, *in* JOHN NORTON MOORE & ROBERT F. TURNER, INTERNATIONAL LAW AND THE BREZHNEV DOCTRINE 1 (1987).

> This doctrine, most explicitly formulated in connection with the 1968 Soviet invasion of Czechoslovakia, asserts a legal right for the Soviet Union to intervene militarily anywhere in the world to make certain that once a nation adopts a communist system it will never be permitted to change its form of government—that is, it will never depart from the 'socialist' camp.

Id. at 9.

becomes one-sided. He deviates from his international duty.[73]

Although Brezhnev's statements professed respect for the self-determination of people within these countries, he made it clear that the paramount value was actually the maintenance of socialism and "the fundamental interests of other socialist countries" in waging the "struggle for socialism."[74] By this view, the Reagan Doctrine was simply the mirror image of the Brezhnev Doctrine, the latter attempting to make the world safe for socialism, the former attempting to make the world safe for democracy. Indeed, Stanley Hoffman maintained, apparently with some degree of sarcasm, that the Reagan Doctrine was a "provocative stratagem [to] reciprocate for the evil designs of the Brezhnev Doctrine . . . ."[75]

IV. A Narrower View of the Reagan Doctrine

Although the critics of the Reagan Doctrine tended to view it as a broad assertion of U.S. military authority, its primary exponent stated the Doctrine in more limited terms. Jeane Kirkpatrick noted the tendency of critics to describe a broad variety of actions by the Reagan Administration as illustrations of the Reagan Doctrine. Among the illustrations she noted were the U.S. intervention in Grenada in 1983, the bombing of Libya in 1986, and the mining of Nicaraguan harbors in 1984.[76] However, by her description, none of these actions was an apt illustration of the Doctrine. Instead, she contended that the Reagan Doctrine was narrowly focused on the "moral legitimacy" of U.S. support for indigenous insurgencies in communist states, which maintained governments against the popular will and with the substantial

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73. *Id.* at 10 (citing N.Y. TIMES, Sept. 29, 1968, at 3).

74. Kirkpatrick and Gerson provide the following quote as a statement of the Brezhnev Doctrine:

> There is no doubt that the peoples of the socialist countries and the Communist parties have and must have freedom to determine their country's path of development. However any decision of theirs must damage neither socialism in their country, nor the fundamental interests of other socialist countries, nor the world-wide workers' movement, which is waging a struggle for socialism.

Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights and International Law*, *in* HENKIN ET AL., *supra* note 57, at 29, *citing* 20 CURRENT DIGEST OF THE SOVIET PRESS 10-12 (Joint Committee on Slavic and East European Studies, Oct. 16, 1968), *quoting* S. Kovalev, *Sovereignty and the International Obligations of Socialist Countries*, PRAVDA, Sept. 26, 1968.

75. Stanley Hoffman, *Ethics and Rules of the Game Between the Superpowers*, *in* HENKIN ET AL., *supra* note 57, at 71.

76. Kirkpatrick & Gerson, *supra* note 74, at 19.

material support of the Soviet bloc or other communist sources.[77] Accordingly, the Reagan Doctrine required for its application both a state governed within the ambit of Soviet influence and an indigenous resistance movement battling against the regime.

One basis for insisting on such a narrow view was the legal and philosophical foundation on which Kirkpatrick pinned the Doctrine. She argued that the Reagan Doctrine was based on the core values of the United States Declaration of Independence, which embodies the right of self-determination.[78] She quoted the famous sentence from the Declaration that "governments are instituted among men, deriving their just powers from the consent of the governed," in order to secure the rights of "life, liberty and the pursuit of happiness."[79] A government that was instituted in contravention of the consent of those it governed, and that did not secure "life, liberty and the pursuit of happiness," was, therefore, not legitimate.

It might have been objected, of course, that the Declaration of Independence was an instrument of the U.S. domestic legal and political tradition, rather than of international law. In particular, Article 2(4) of the U.N. Charter articulated the principle of non-intervention into the governments of other countries.[80] By transposing the Declaration of Independence and the American values it embodied into the context of international law, she introduced an interesting rhetorical (and perhaps analytical) strategy.

She noted, without specifically citing, the U.N. Charter's generalized purposes as stated in Article 1.[81] These purposes

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77. *Id.* at 20, stating that:

> The Reagan Doctrine, as we understand it, was above all concerned with *the moral legitimacy of U.S. support—including military support—for* insurgencies under certain circumstances: where there are indigenous opponents to a government that is maintained by force, rather than popular consent; where such a government depends on arms supplied by the Soviet Union, the Soviet bloc, or other foreign sources; and where the people are denied a choice regarding their affiliations and future.

Id.

78. *Id.* at 23 ("Mirroring basic American Constitutional principles, the Reagan Doctrine rests on the claim that *legitimate* government depends on the consent of the governed and on its respect for the rights of citizens.").

79. *Id.* at 22-23.

80. U.N. CHARTER art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

81. Kirkpatrick & Gerson, *supra* note 74, at 25. ("Moreover, the Charter clearly declares that United Nations member-states will respect human rights (which encompass democratic freedoms), be peace-loving, and be committed to the

include solving international problems of a humanitarian nature, "promoting and encouraging respect for human rights and for fundamental freedoms," and advancing respect for the principle of equal rights and self-determination of peoples.[82] The Article 1 purposes also include the maintenance of international peace and security, the prevention of threats to the peace, and the suppression of acts of aggression.[83] Although these broader purposes could be viewed as being in tension with the Reagan Doctrine, such objections could be addressed by saying that Soviet-backed regimes were themselves threats to international peace and security because of their totalitarian policies.

Jeane Kirkpatrick's was a highly selective reading of Article 1, but it at least facially allowed her to take the next step, asserting that the U.N. Charter, created to advance these values,[84] should not be interpreted to inhibit actions designed to bring about the achievement of these purposes. The U.N. Charter, "which was essentially American in design, was neither created nor viewed as providing a protective shield for the expansion of repressive dictatorships or empires."[85] Accordingly, the application and enforcement of the Reagan Doctrine, narrowly construed, could not violate the U.N. Charter because it only intended to curtail this expansion.

The key ingredients in this approach were the necessity, in any country in which it might be applied, for an indigenous liberation movement and the existence of foreign totalitarian-supported domination of its regime. Without the indigenous liberation movement, even by Kirkpatrick's analysis, self-determination of the type heralded in the Declaration of Independence would not be at issue. And without foreign domination, it could be more difficult to claim that the ruling government, even if communist, was imposed without the consent

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maintenance of world peace.").

82. U.N. CHARTER, art. 1, paras. 2, 3.

83. U.N. CHARTER, art. 1, para. 1.

84. Although the Charter provisions described above do refer generally to such concepts as "the principle of equal rights" (*id.* at art. 1, para. 2) and "respect for human rights" (*id.* at art. 1, para. 3), they include these concepts principally as a means of assuring international co-operation rather than as substantive guarantees of the values they represent. For example, Article 1, Section 2 of the Charter references "the principle of equal rights" as one of several "appropriate measures to strengthen universal peace," rather than stating equality as a specific guarantee granted to individuals under the Charter. *Id.* at art. 1, para. 2. Other documents, such as the Universal Declaration of Human Rights perform this function. G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

85. Kirkpatrick & Gerson, *supra* note 74, at 25-26.

of the governed.

The primary action in U.S. foreign policy that Kirkpatrick conceded represented the Reagan Doctrine was the assistance provided by the United States to the Contra movement from 1981 to 1986.[86] The Contras were a group of Nicaraguan insurgents using violent means to destabilize and overthrow Nicaragua's leftist Sandinista regime.[87] That Kirkpatrick could say that only this example was a true illustration of the Reagan Doctrine, while others included a whole raft of U.S. actions, resulted in part from the lack of an authoritative statement of the Doctrine's content from the President himself.[88] Indeed, as noted earlier, President Reagan seemed somewhat diffident in describing the Doctrine that came to bear his name. In a 1988 speech at Fort McNair in Washington, D.C., Reagan's diffidence was evident:

> Around the world, in Afghanistan, Angola, Cambodia and, yes, Central America, the United States stands today with those who would fight for freedom. We stand with ordinary people who have had the courage to take up arms against Communist tyranny. This stand is at the core of *what some have called* the Reagan Doctrine.[89]

President Reagan's refusal to clearly state that the Doctrine was his own, and his choice to use the "what some have called" locution, seems to indicate a lack of complete comfort with enunciating his policy as a formal doctrine. At the same time, his formulation at this speech does reflect the two essential ingredients from Kirkpatrick's description: the indigenous rebellious groups ("ordinary people who have had the courage to take up arms") and foreign domination ("Communist tyranny").[90]

Despite Jeane Kirkpatrick's attempts to justify the Reagan Doctrine in terms of the U.N. Charter, some in the international

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86. President Reagan campaigned on a platform of cutting all aid to the leftist Sandinista regime, and as President (having taken office in 1981), he stepped up U.S. activities against them. LAWRENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS 1 (1993). Congress prohibited the CIA from spending money to help overthrow the Sandinista regime in 1982 (Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793 (1982)). However, through the now-discredited "Iran-Contra" operation, de facto U.S. support for the Contras continued surreptitiously until November 1986. WALSH, *supra*, at 24. At that point, the Administration admitted to Congress that the operations had continued contrary to law; certain persons who had been involved left the Administration. *Id.*

87. WALSH, *supra* note 86, at 1.

88. *See supra* notes 56-57 and accompanying text.

89. President's Remarks at the National Defense University on Signing the Department of Veterans Affairs Act, 1988-89 PUB. PAPERS 1381, 1382 (Oct. 25, 1988) (emphasis added).

90. *Id.*

community disagreed with her assessment. Indeed, the International Court of Justice (ICJ) was given the singular opportunity to review the legality of the real-world application of the Reagan Doctrine when it decided the case brought before it in 1984, by Nicaragua against the United States.[91]

V. The Reagan Doctrine Before the ICJ

On June 27, 1986, the ICJ at The Hague delivered its judgment in *Military and Paramilitary Activities*.[92] The ICJ determined that the United States, "by training, arming, equipping, financing and supplying the *contra* forces . . . against Nicaragua, has acted . . . in breach of its obligation under customary international law not to intervene in the affairs of another state."[93] Since this pattern of training and arming the Contras was consistent with, and indeed an impetus for the Reagan Doctrine, the ICJ essentially determined that the Reagan Doctrine, at least under the facts of that case, violated international law.

However, apologists for the Reagan Doctrine could still take comfort in various aspects of the situation surrounding the ICJ judgment. First, and most formally, one could argue that the ICJ had no jurisdiction to decide the case. Before the ICJ, the United States had several arguments for a lack of jurisdiction. These were principally that Nicaragua had never effectively submitted to the compulsory jurisdiction of the court,[94] that the United States had effectively withdrawn from the compulsory jurisdiction of the court prior to the filing of Nicaragua's claim,[95] and that not all parties to the relevant treaties were parties to the case before the court.[96] In a preliminary ruling specifically devoted to the issue of

91. Nicaragua filed its Application before the ICJ on April 9, 1984. The ICJ decided the case principally in two phases, the first judgment addressing the question of its jurisdiction in 1984, and the second judgment addressing the merits in 1986. *See infra* notes 92-98 and accompanying text (stating the Court's rulings both on the merits and the jurisdictional points).

92. Military and Paramilitary Activities, (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

93. *Id.* at 146.

94. *See* Military and Paramilitary Activities, (Nicar. v. U.S), 1984 I.C.J. 392, 398-413 (Nov. 26) (addressing in paragraphs 15-47 the United States' argument that a Nicaraguan declaration of compulsory jurisdiction dated September 24, 1929 was ineffective).

95. *Id.* at 415-21 (addressing in paragraphs 52-66 the United States' argument that on April 6, 1984 the United States had effectively deposited with the U.N. Secretary-General a document withdrawing the previous U.S. declaration of compulsory jurisdiction).

96. *Id.* at 421-26 (addressing in paragraphs 67-76, the United States' argument

jurisdiction, the ICJ dismissed all of the United States' arguments,[97] and determined that it did indeed have jurisdiction.[98] However, if the ICJ's jurisdictional judgment was wrongly decided, its judgment over the United States' support of the Contras should be a nullity in virtually any tradition. For this reason, apologists for the Reagan Doctrine could ignore the ICJ's determination on the merits.[99]

Second, and only somewhat less formally, decisions by the ICJ are not supposed to have precedential effect. The Statute of the ICJ,[100] executed and ratified simultaneously with the U.N. Charter, explicitly states that its decisions have "no binding force except between the parties and in respect of that particular case."[101] This provision can be rationally interpreted to mean that decisions of the ICJ do not take on the effects of *stare decisis*. Accordingly, it can serve as a basis for an assertion that prior ICJ decisions should not limit policy options of states acting later in time. Nevertheless, even though ICJ decisions do not have formal binding effect, they are cited in ICJ proceedings, and in political

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that the terms of the U.S. declaration of compulsory jurisdiction required the participation of all parties to certain treaties stated in Nicaragua's Application before the court.

97. *Id.* at 413 (concluding in paragraph 47 that Nicaragua's subsequent behavior "constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court," thus negating the first U.S. argument described above); *id.* at 421 (concluding in paragraph 65 that the April 6, 1984 document deposited by the United States afforded inadequate notice for an effective withdrawal from compulsory jurisdiction, thus negating the second U.S. argument described above); *id.* at 425-26 (concluding in paragraph 76 that the U.S. objection to a failure of participation by certain parties "does not possess . . . an exclusively preliminary character," thereby negating the third U.S. argument described above).

98. *Id.* at 442 (stating the court's judgment in favor of jurisdiction).

99. Regardless of one's perspective on the Reagan Doctrine, the ICJ's jurisdictional ruling was subject to substantial criticism. For example, Thomas Franck, among others, has noted that the ICJ's jurisdictional determinations in the Nicaragua case had real effects in the United States, lessening the stature of the court in the eyes of many Americans:

> At least as far as Americans are concerned, the World Court did not do itself a favor when it dismissed opportunities to duck the case brought by Nicaragua against the United States. No doubt the majority of judges believed themselves bound in law and honor not to turn a deaf ear to demands for justice by a small state claiming to have been victimized by a more powerful one. But in giving Nicaragua the benefit of several procedural and jurisdictional doubts, the World Court put itself into a position of fundamentally damaging its relations with its most important constituent: the United States.

THOMAS M. FRANCK, JUDGING THE WORLD COURT 53 (1986).

100. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

101. *Id.* at art. 59, 59 Stat. at 1062, 3 Bevans at 1190.

discourse, for their persuasive effect.[102]

Finally, when the voters of Nicaragua ultimately had the freedom to vote, they elected the opposition to the Sandinista regime. In the sense of realpolitik, this can be seen as a kind of vindication for the underlying assumptions of the Reagan Doctrine. After all, the Reagan Doctrine, as stated by Kirkpatrick, relied on a conception of self-determination.[103] The U.S. intervention was assertedly designed to facilitate that self-determination by means of covert military operations, and once an election took place within Nicaragua, the forces against which those operations were directed, in fact, were also defeated at the polls.

The ICJ decision in the Nicaragua case indicates much of the international community's disapproval of the Reagan Doctrine. However, the decision did not put the Doctrine completely to rest, either in narrow legal terms or in the much broader geopolitical sense. Thus, a future United States foreign policy, according to which the United States could insert itself into the internal affairs of other countries when legitimate threats were thought to exist, remained possible.

VI. The National Security Strategy—More Radical than the Reagan Doctrine

The NSS is significant because, as indicated above, it seems to have presaged, and served as part of the policy basis for, the

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102. One leading authority, who has devoted much of an entire book to issues in this area, summarizes the point in this way:

> There is no reason to believe that any lawyer from anywhere has any special difficulty in coming to terms with the methods of reasoning employed by the [ICJ]. It is possible, however, that a lawyer formed in the traditions of the common law may feel rather at home, if somewhat strangely so, in the way the Court has recourse to its previous decisions in the process of determining the law. The principal difference, he will be told, is that *stare decisis* does not apply; and, indeed, largely because of this important fact, it is sometimes said that it is not right to speak of 'precedents' in the case of decisions of the Court. But the fact that the doctrine of binding precedent does not apply means that decisions of the Court are not binding precedents; it does not mean that they are not 'precedents'. The term occurs in the jurisprudence of the Court; it occurs also in the pleadings of counsel and in the writings of publicists.

MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 2 (1996) (citations omitted).

103. *See* Kirkpatrick & Gerson, *supra* note 74, at 22-23 (describing Jeane Kirkpatrick's reliance on the U.S. Declaration of Independence, and its idea that, in her words, "the legitimacy of a government depends on its respect for individual rights and on the consent of the governed," as a basis for a narrow view of the Reagan Doctrine).

U.S.-led invasion of Iraq in March of 2003. This was a momentous event on the world stage, and the policy statement was designed to furnish a foundation for it in principle. What is the relationship between that policy statement and the Reagan Doctrine?

In comparison to the narrow conception of the Reagan Doctrine, the modern Bush Doctrine is much more radical. Most obvious is the Reagan Doctrine's insistence on the existence of an indigenous rebellion in order for the Doctrine to apply. When the NSS, on the other hand, calls for preemptive action against terrorists,[104] or for preemptive action to forestall or prevent hostile acts by our adversaries,[105] it does not require an indigenous rebellion. This shows a fundamental difference in purpose between the two doctrines: the Reagan Doctrine purports to aid self-determination in the face of communist domination, while the Bush Doctrine operates in self-defense against terrorism. However, a direct comparison is still legitimate, because both serve as policy bases for the use of force, indirect in one case and direct in the other, for intervention in foreign states.

This distinction is significant in terms of the primary real-world consequence of the NSS so far, the U.S.-led invasion and occupation of Iraq. The U.S. and British governments stated that, prior to the invasion, the Iraqi population was being victimized by Saddam Hussein's regime.[106] However, there was no pretense that there was a substantial indigenous armed resistance movement that the invasion was primarily designed to assist.[107] Rather, the invasion was simply an instance of direct military intervention in a particular state by the armed forces of other states. This distinguishes the Iraqi invasion from the U.S. support for the Contras.[108]

Thus, at least in this sense, the NSS approach is more radical than the narrow conception of the Reagan Doctrine. If the Reagan Doctrine's insistence on the existence of an indigenous rebel group is no longer required for the use of force, an important restraint on

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104. NSS, *supra* note 2, at 6.

105. *Id.* at 14-15.

106. *See, e.g.*, Associated Press, *Bush Tells Iraqi People: Regime Being Removed*, HOUSTON CHRON., Apr. 10, 2003, http://www.houstonchronicle.com/.

107. Although resistance groups had been active in Iraq during earlier periods, they had been suppressed by Saddam Hussein's regime. By the time the U.S. and U.K. forces mounted their principal invasion in March of 2003, most such groups could offer minimal assistance at best.

108. It does not necessarily distinguish the Iraqi invasion from the U.S. mining of Nicaraguan harbors, but Ambassador Kirkpatrick had asserted that the mining operation was not an aspect of the Reagan Doctrine. Kirkpatrick & Gerson, *supra* note 74, at 19.

the use of force is absent. Accordingly, the NSS approach tends to allow for a more unbridled use of force against other states than would have been permitted under the Reagan Doctrine.

The Reagan Doctrine itself may have been a radical departure from established mores, in part because it purported to allow external support for insurgents against an established government. The U.N. Charter does not explicitly forbid military assistance to insurgents in other countries, but Article 2(4)'s prohibition of force against the territorial integrity and political independence of states has been interpreted to prevent such external armed support for insurgents.[109] However, to the extent that the situation in Nicaragua was a civil war, the Reagan Doctrine becomes less radical. There is at least some authority for the proposition that outside armed assistance for one or the other party in a civil war does not violate Article 2(4) as long as the externally supported use of force is "bona fide and the intervenor was not seeking to dominate the side it supported and establish a puppet regime."[110]

Another basis for distinguishing the NSS from the Reagan Doctrine is their respective manners of propagation. As noted earlier, the Reagan Doctrine was never clearly adopted as such by President Reagan himself.[111] Ambassador Kirkpatrick, not Reagan or the White House, ultimately declared its existence and tried to limit its scope.[112] However, there was enough ambiguity among the various presidential and cabinet pronouncements that particular manifestations could be adopted or denied depending on the wishes of various political actors from one instance to the next.

By comparison, the propagation of the NSS has been startlingly bold. It was announced, in effect, on official White House stationery by means of posting over the internet at the White House website. It even appears under the electronic signature of President Bush. It is florid and expansive,[113] in

109. *See* HENKIN, *supra* note 11, at 303-08 (asserting that military intervention in a civil war was not acceptable under traditional international law).

110. *Id.* at 307.

111. *See, e.g., supra* notes 89-90 and accompanying text (analyzing a public statement made by President Reagan regarding the Reagan Doctrine, in which he said that "some have called" his views the "Reagan doctrine," and noting that Reagan's diffidence is evident).

112. *See, e.g., supra* notes 76-77 and accompanying text (describing statements made by Jeane Kirkpatrick suggesting that "the Reagan Doctrine was narrowly focused on the 'moral legitimacy' of U.S. support for indigenous insurgencies in communist states").

113. A suitable example illustrating the florid and expansive tendencies of the NSS is the following:

contrast with the comparatively sparse and terse statements of President Reagan.[114] Much of the focus of the NSS is broad,[115] and can be susceptible to varying interpretations in varying contexts. However, this simply expands the scope of the yardstick by which later policy can be judged. The NSS may be broad enough to support a wide array of policies, but by the same token that very breadth makes it easier for detractors to challenge later actions as inconsistent with the policy. The comparative boldness of the enunciation of the NSS is a radical change from the diffident, and initially almost furtive, manner in which the Reagan Doctrine was announced and expanded.

The NSS offers a more radical vision of foreign policy as well. One of the aspects of the Reagan Doctrine, perceived as an advantage at the time, was its comparatively "low-risk character."[116] Because the narrow Reagan doctrine relied on the existence of indigenous armed rebels, the scope of U.S. involvement would necessarily be lessened in effectuation of the Doctrine. The United States might supply extra armaments, but it would not be responsible for the entire military operation. Similarly, the United States might supply training and advisors, but the role of infantry or its equivalent would be fulfilled by the indigenous rebels. Indeed, this was largely the pattern for most of the U.S. assistance provided to the Contras, at least insofar as that assistance was representative of the Reagan Doctrine.[117]

The NSS, however, involves both specifically and by implication the out-and-out use of U.S. armed forces to engage in military operations in foreign states.[118] The U.S. military can be responsible for all phases of the operation, and much more can be at risk, both in terms of lives and economic resources. This is a

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> Freedom is the non-negotiable demand of human dignity; the birthright of every person—in every civilization. Throughout history, freedom has been threatened by war and terror; it has been challenged by the clashing wills of powerful states and the evil designs of tyrants; and it has been tested by widespread poverty and disease. Today, humanity holds in its hands the opportunity to further freedom's triumph over all these foes. The United States welcomes our responsibility to lead in this great mission.

NSS, *supra* note 2, at Intro.

114. *See supra* notes 58-59, 89 (discussing the 1984 State of the Union address, the Bitburg Air Force Base address, and the address at Fort McNair, respectively).

115. *See supra* notes 43-46 (describing the focus of Parts III, V, VI, and VII of the NSS, respectively, cited there for the proposition that the NSS "covers a broad range of policy issues").

116. ROBERT W. TUCKER, INTERVENTION & THE REAGAN DOCTRINE 8 (Ethics & Foreign Policy Lecture Series, 1985).

117. *See generally* WALSH, *supra* note 86.

118. *See supra* notes 21-41 and accompanying text.

radical departure from the precepts of the Reagan Doctrine.

Conclusion

The preceding review of the Reagan Doctrine and President Bush's National Security Strategy has uncovered two distinct points of comparison that seem to cut in opposite directions. First, the NSS represents a widely disseminated and publicly stated official White House declaration.[119] It is broad in scope and contains statements of general outlook and priorities on the part of the Bush Administration.[120] At the same time, many of its statements are sufficiently precise and directed to constitute meaningful indications of particular policies.[121] The issuance of any such document, as a formal matter, can have salutary effects on the development of customary international law. This is because the enunciation of principles can help encourage both predictability and consistency of action, and also the formation of *opino juris*.

Second, however, the substantive import of the NSS, to the extent it addresses preemptive self-defense, is intensely problematic for international law. The assertions stated in the NSS run counter to many established understandings of the U.N. Charter and the ICJ's ruling in the Nicaragua case.[122] The NSS, a more radical departure than the Reagan Doctrine, may be an indication of the particular status of the United States.[123] It was one thing for the United States to assert the right to assist others as a matter of self-determination, but quite another for the United States to assert the capacity to unilaterally invade other countries whether indigenous resistance movements are present or not.[124]

Accordingly, declarations such as the NSS are a potentially positive development for international law, while the substance of the NSS itself presents potentially negative aspects for international law. This dichotomy may become characteristic of the foreign policy operations of the United States if it continues to occupy the role of a sole superpower. On the one hand, its position of strategic primacy may provide the United States with the security necessary to make detailed and wide-ranging pronouncements about its intentions, goals, and priorities, and

119. NSS, *supra* note 2.
120. *Id.*
121. *Id.*
122. *Supra* notes 107-110 and accompanying text.
123. *Supra* Part VI.
124. *Supra* Part VI.

may also give it the independence to make good on such pronouncements. Such behavior can increase the predictability and consistency of U.S. foreign policy and its effect on international law. On the other hand, the same primacy may encourage the United States, as a substantive matter, to stake out positions that are more problematic under international law, seeking greater advantage for itself on the world stage.

This dual character of U.S. foreign policy operation can thus serve both positive and negative results in the development of international law and the conduct of foreign relations in general. Time will tell if the pattern becomes general and a fixture of international affairs in the years to come.