CORRESPONDENCE

TO THE EDITOR IN CHIEF:

In his reponse to Professor Franck, in the January 1987 issue of this *Journal* (p. 195), Allan Gerson—invoking the terms of reference of the United Nations Administrative Tribunal (UNAT)—appears to suggest that a candidate with a strong background in U.S. labor law is as qualified to sit on UNAT as a person who has spent most of his professional life as a distinguished practitioner of international law and international organization law, including 6 years on UNAT. For students of international administrative law, Mr. Gerson's approach gives rise to some perplexity.

UNAT does not apply U.S. labor law and does not perform labor arbitrations. Ranging far beyond contracts of employment, UNAT's jurisprudence is based on a wide range of sources of international law and international administrative law, including the Charter of the United Nations and general principles of law; Staff Regulations adopted by resolutions of the General Assembly; Staff Rules promulgated by the Secretary-General, which must be consistent with the regulations; administrative instructions, which elaborate on the Staff Rules; and personnel directives.[1]

In its practice, the Tribunal has routinely scrutinized the exercise of discretion by the Secretary-General according to the yardsticks of reasonableness and due process of law. In the political, multinational context in which the policies of the Secretariat operate, UNAT has questioned discriminatory practices and decisions based on extraneous or political considerations.[2] Some of its decisions have turned on compliance by the Secretary-General with the principles stated in Articles 100[3] and 101[4] of the Charter, which have become the subject of challenge.[5] To state the obvious, the broad range of issues addressed by the Tribunal clearly requires expert knowledge of the law and practice of international organization. The legal and political importance of a number of cases that have come up for UNAT's decision is demonstrated by the recent reference, on the initiative of the United States, of the *Yakimetz* case to the International Court of Justice for an advisory opinion.[6] It is surely because of recognition of the complexity and significance

[1] *See generally* T. MERON, THE UNITED NATIONS SECRETARIAT 60–66 (1977).

[2] *Id.* at 159–71.

[3] Article 100 states, in part, that the Secretary-General shall not seek or receive instructions from any government or from any other authority external to the United Nations, and that each member state shall respect the exclusively international character of the responsibilities of the Secretary-General.

[4] Article 101(3) provides, in part, that the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity.

[5] *See generally* Meron, In re Rosescu *and the Independence of the International Civil Service,* 75 AJIL 910 (1981); Estabial v. Secretary-General of the United Nations, UN Doc. AT/DEC/310 (1983).

[6] Yakimetz v. Secretary-General of the United Nations, UN Doc. AT/DEC/333 (1984), was an appeal against the nonextension of the appointment of a staff member from the Soviet Union after his application for asylum in the United States. On Aug. 28, 1984, the Committee on

of the issues and of the international law norms implicated in UNAT's proceedings that, in the past, the United States has nominated to the Tribunal UN experts of the stature of Francis Plimpton and Herbert Reis; France, such distinguished international lawyers as Professors Suzanne Bastid and Roger Pinto; and Hungary, Professor Endre Ustor.

Of course, nominating generalists is very much in our national tradition, but UNAT is an institution for which a specialist is clearly called for. The decision of the administration in this case is even more difficult to understand because it declined to renominate a specialist who has performed with great distinction.

I am confident that Mr. Jerome Ackerman will serve the Tribunal ably and conscientiously. But I am distressed by the decision to search for an alternative to Vice-President Reis. His replacement by anyone but an outstanding expert in the law of international organization does not further our national interest to have the strongest possible representation on UN judicial bodies.

THEODOR MERON

TO THE EDITOR IN CHIEF:

November 24, 1986

My short essay, *Superior Orders vs. Command Responsibility,* was published in the July 1986 issue of the *Journal* (80 AJIL 604), accompanied by a Comment by Professor Howard S. Levie. He undertook to demonstrate, by an analogy to a hypothetical Cosa Nostra situation, that my essay "raised a straw man that will be blown down by a very slight puff of wind" (p. 610).

While many readers may read the two essays and judge the merits for themselves, I want to make a brief rejoinder to Professor Levie for the record.

Although I appreciate Professor Levie's taking the time to respond to my essay, the analogy he uses is entirely irrelevant. What makes the problem of "superior orders" in the laws of war so difficult is precisely the fact that the army command situation requires that orders be obeyed and that, from the soldier's point of view, his commander's orders are presumptively legal. In a Cosa Nostra situation, a "soldier" ordered to make a "hit" is not operating under even the remotest notion that the order to commit murder is legal. Of course the "hit man" is guilty of murder. Of course the person who hired him to do it is also guilty. But these conclusions say absolutely nothing about the problem of superior orders in a true military situation.

Since Professor Levie bases his entire argument against my essay on this analogy, which is clearly irrelevant, little needs to be added here. Yet, for those who like intellectual puzzles, it might be interesting to work out what the result would be in the Cosa Nostra case if Professor Levie's analogy *were* relevant. Is the "godfather" really responsible for giving the illegal "hit"

Applications for Review of Administrative Tribunal Judgments decided that there was substantial basis for the application for review. The International Court of Justice has not, as yet, pronounced its advisory opinion on the *Yakimetz* case.

order? Rather, is he not responsible for *hiring* the hit man? What is the *force* of the order itself, taken apart from the situation in which someone is hired to commit an act? In the military situation, the force comes from the apparent legality of the order. Since that apparent legality is absent in the Cosa Nostra situation, the force may come instead from an exchange of money. Hence, it is possible, using my analysis in the essay, to look more deeply into the question of domestic criminal law to find the true elements of murder-for-hire or coconspiracy. Professor Levie's Comment may thus have opened up an interesting inquiry into domestic criminal law even if it had little to do with superior orders and command responsibility.

ANTHONY D'AMATO

TO THE EDITOR IN CHIEF:

February 12, 1987

In his reply to Larry Garber's letter (81 AJIL 185 (1987)), John Moore suggests that Donald Fox and I, authors of a 1985 report on contra human rights abuses,[1] were duped by officials of the Nicaraguan Government. "Sincere,"[2] but "naive"[3] and "sloppy,"[4] we allowed Sandinista propagandists to sway our conclusions through manipulation of our methodology.

Moore endeavors to discredit our report by attacking not its findings but its methodology. He does not dispute its findings for good reason: every impartial, independent human rights organization that has investigated contra activities has reached the same conclusion—that the contras are engaged in frequent and significant abuses of the rights of Nicaraguan civilians. Americas Watch, for example, reported in March 1985 that the contras "practice terror as a deliberate policy."[5] Amnesty International in March 1986 found that operational tactics of the contras included routine "torture and summary execution" of captives.[6] Another Americas Watch report, filed in February 1987, said that the contras "still engage in selective but systematic killing of persons they perceive as representing the Government, in indiscriminate attacks against civilians or in disregard for their safety, and in outrages against the personal dignity of prisoners"; and that the "contras also engage in widespread kidnapping of civilians, apparently for purposes of recruitment as well as intimidation."[7] The report continued: "the escalating brutality of contra practices . . . leads Americas Watch to conclude that disregard for the rights of civilians has become a de facto policy of the contra forces."[8]

[1] D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA (1985) [hereinafter cited as REPORT].

[2] Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43, 123 n.333 (1986) [hereinafter cited as Moore].

[3] Moore, Reply to the letter by Larry Garber, 80 AJIL 186, 193 (1987) [hereinafter cited as Reply].

[4] *Id.*

[5] AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981–85, at vi (March 1985).

[6] AMNESTY INTERNATIONAL, NICARAGUA: THE HUMAN RIGHTS RECORD 32 (March 1986).

[7] AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA: 1986, at 5 (February 1987).

[8] *Id.* at 18–19.

Moore, again, does not purport to *refute* these charges because he cannot. There are no contradictory data from the Department of State on which he might rely. As one high-ranking State Department official candidly told us, the United States policy has been one of "intentional ignorance."[9] The CIA, he said, had not been "tasked" to ascertain what the contras were doing to Nicaraguan civilians.[10] As a consequence, another said, the State Department is not aware of the validity of "any or all" of the allegations of contra abuses.[11] It is thus no surprise that two requests from Amnesty International over the last year for State Department comment on reports of contra abuses should yield the same response—no answer.[12]

I.

The report's methodology, therefore, is of necessity Moore's target. Essentially, he makes six points.[13]

First, he criticizes the composition of the delegation. Fox, he suggests, was not qualified to participate because some relative of Fox's wife works for the Nicaraguan Government. Who? How distant a relative? How significant a government job? When did Fox's wife last see the relative? Has Fox, indeed, ever met the relative? Moore evidently has no idea, but none of this matters: Fox has an "appearance" of conflict of interest and should not have been selected. In fact, Fox has family, friends and acquaintances on both sides of the Nicaraguan conflict. And "appearance" of conflict of interests is easily created—in connection with either side—through the selective identification of associations.

But that appearance would be misleading. To whatever extent it might be relevant, all I knew about Fox's wife's politics I learned before the investigation began, and that is that she was a supporter of President Reagan and an opponent of the Sandinistas. I was not involved in Fox's selection, but if I had been—knowing everything I know now—I would have picked him without hesitation. He is a person of integrity, judgment and skepticism, and I considered it a privilege to work with him.

Moore suggests that the mission was "overly narrow"[14] and would have been more effective had it included more people and different sponsors. He prefers a mission modeled after a mission to El Salvador in which he participated, with "a number of congressmen and senators."[15] I am a strong believer in visits by members of Congress to foreign countries; such trips can be highly educational as consciousness-raising activities. That purpose needs

[9] *See* REPORT, *supra* note 1, at 21. [10] *Id.* at 20.

[11] *Id.*

[12] Telephone interview with Kathleen Smith, Press Officer, Amnesty International (Feb. 11, 1987).

[13] Apparently intending rhetorical effect, Moore raises a variety of objections that have no bearing on the reliability of our methodology or the probity of the report's conclusions. He complains, for example, that a public relations firm that had some relationship with the sponsoring organizations also had Maurice Bishop's Grenada as a client. Similarly, he writes that Fox "may not even have been aware," Reply, *supra* note 3, at 191 n.16, of my meeting with Reichler and an Interior Ministry official, and that one of us—he does not specify which—"expressed doubts about the questioning of the other," *id.* at 193. This comment considers only those of Moore's remarks that have some bearing on the point he tries to establish.

[14] *Id.* at 190. [15] *Id.*

to be distinguished, however, from the objectives of a human rights fact-finding mission focused on antigovernment rebels. Such a mission can involve riding in the back of a dusty pick-up truck, sleeping on the floor and listening to machine-gun fire as one falls asleep. The congressional delegations in which I have participated would not easily have adapted to those conditions. It is hard to see how such a delegation could be more effective than two or three low-profile investigators who are able, with minimal security, to move quietly about the countryside. I would be delighted if "distinguished" individuals would go to Nicaragua and talk to the people we interviewed, as Moore seemingly suggests. But their absence from our mission did not seem to me reason to cancel it.

The relevance of Moore's observation that the Washington Office on Latin America (WOLA) is "well known for its opposition to U.S. policy in Central America"[16] is unclear. (Moore has difficulty determining which human rights organization is the most pernicious in its anti-American bias. It may be a close call, but Americas Watch, Moore concludes, "seems to be the most sympathetic toward the Sandinistas."[17]) Apparently, Moore means to impugn the objectivity of groups critical of the administration. Precisely what makes them unobjective, we are not told. The implication seems to be that they are untrustworthy to the extent that their assessment of the contras does not match that of the State Department, which is, to Moore, a shining temple of investigative probity (a conclusion unaffected by the fact that, with respect to the contras, the State Department is not even in the investigation business). I suppose "objectivity" is a subjective concept, but here it seems to relate not to the identity of the researcher, but to an identity of findings by different researchers using different methodologies.

Second, Moore asserts that our inquiry "seems to have been intertwined with the Government of Nicaragua."[18] As a preliminary matter, it is worth noting that respected human rights scholars have perceived no impropriety in contacts with a government even when its own trial procedures are being investigated by a fact-finding team. Professor Weissbrodt, for example, *recommends* that trial observers make contact with governmental officials for the purpose not only of expediting their mission but also of gaining information:

> Depending upon the sponsor's instructions and the nature of the case, the observer should contact not only individuals who can facilitate matters such as entry into the courtroom, but also the Ministry of Justice and other government officials who can provide background information, or who should be contacted as a courtesy. The observer should explain that he or she has been sent by the sponsoring organization to observe the trial and prepare a report, but that he or she does not . . . represent the organization in a more general capacity.[19]

Moore, seemingly unaware of accepted practice, offers the following evidence of our wrongdoing:

> • Nicaragua's lawyer, Paul Reichler, apparently suggested to the sponsoring organizations that they look into allegations of contra abuses. Well, how many other people made the same suggestion? Shouldn't a

[16] *Id.* at 191.

[17] Moore, *supra* note 2, at 123 n.335.

[18] Reply, *supra* note 3, at 191.

[19] Weissbrodt, *International Trial Observers*, 18 STAN. J. INT'L L. 27, 119 (1982).

human rights group *expect* to get such requests? Is there a shred of evidence that Reichler—or anyone else connected with the Nicaraguan Government—*actually influenced* the outcome of the inquiry in any way? The answer, I can attest, is: absolutely not.

• Our inquiry "was significantly channeled toward evaluating a report produced with substantial Sandinista involvement."[20] Not so. As we indicated in our report, both we and our sponsors were aware that Reed Brody had received assistance from the Nicaraguan Government in preparing a report on contra abuses. It was for this reason, we were told, that our sponsors wished us to look into the report before they decided what to do with it. Specifically, as our report says, we were asked to investigate the probative value of a random sample of the 145 affidavits appended to Brody's study.[21] This seemed to me an eminently responsible step for our sponsors to take, and one for which they should be commended, not criticized. In any event, our inquiry was not "significantly channeled" toward Brody's; as Moore himself acknowledges, fewer than one-third of the statements we took were from persons Brody had interviewed[22] (Moore, in fact, later criticizes us for interviewing too *few* of Brody's affiants, not too many[23]). Moore's use of the word "channeled" apparently is intended to imply some sort of compelled, preordained direction—something he can only imply, not corroborate, inasmuch as there is not a scintilla of evidence to support the innuendo.

• I met with Reichler at the time of our arrival. It was improper, Moore suggests, to permit Nicaragua's lawyer to expedite us through customs.[24] I disagree. We decided in Washington, before leaving, that this procedure would comport with standard practice. Time was of the essence (Moore later criticizes us for spending too little time in Nicaragua[25]) and we believed that every minute should be spent on the business of the trip. Moore ought to understand our desire for expedition, accepting as he did the services of a U.S. government helicopter to ferry him about El Salvador. Clearing customs quickly made possible the meeting that occurred afterwards, to which Moore objects—though he is unaware of its purposes and seemingly unconcerned about them. The first was to interview Reichler, who, we thought, might either have information about contra abuses, or could at least direct us to an official in the Nicaraguan Government responsible for monitoring them. He did in fact give us the name of an official to whom we later spoke.[26] Given our inclusion in the report of the statement taken at that interview, it is hard to understand how anyone might feel deceived by our excluding from the report the interview with Reichler. The standard applied for inclusion, as will be discussed below, was materiality, and with all respect to Reichler, my interview with him was otherwise unhelpful. The second purpose was to meet with an Interior Ministry official to obtain a telephone number to call in the event we were arrested, surrounded by the contras or detained. Perhaps Moore

[20] Reply, *supra* note 3, at 191.
[21] *See* REPORT, *supra* note 1, at 2.
[22] Reply, *supra* note 3, at 192.
[23] *Id.*
[24] *Id.* at 191.
[25] *Id.* at 192, 194.
[26] Moore's reliance on this interview is most interesting. *See infra* text accompanying notes 61–62.

would have taken no security precautions. Given his own preferred mode of transportation, it is understandable that he should find it difficult to relate to mundane considerations like physical safety. In any event, those were the only purposes of the meeting. The suggestion that it was somehow tied to my subsequent testimony before the International Court of Justice (which I was not asked to do until months after the report was filed) is unworthy of comment.

• Our report is "significantly flawed" by the "use of a Sandinista car and driver."[27] Nowhere did Moore acknowledge, although our report is explicit on the point, that the car was rented at market rates or that the driver was hired; Moore does note that the car was unmarked, and that we indicated in the report that the driver kept clear of our interviews.[28] Neither Fox nor I was able to detect the faintest effect of hiring a car and driver on our inquiry and I am unable today—as is Moore—to point to any reason to believe that these arrangements tainted our conclusions. The best he can come up with is conjecture: we "seem insensitive to the fact that [our] government driver could certainly know [our] whereabouts."[29] Apparently, Moore intends to suggest that while Fox and I were interviewing, our driver was out and about rounding up witnesses. I did check up on the fellow from time to time during breaks in our interviews and can report that his primary objective appeared to be to catch up on his sleep.

Third, Moore maintains that the "procedures for the selection of persons interviewed" were unreliable.[30] The problem, it appears, is nothing specific in either our selection criteria or the manner in which they were applied; the problem is that some Nicaraguan defector is reported to have claimed that some foreign visitors were intentionally exposed to certain Nicaraguans. But what exactly were his responsibilities for the Nicaraguan Government and what qualifies him to know this? What foreign visitors were involved? Where? When? Were they told lies? On what subjects? Moore, again, apparently has no idea—indeed, he candidly acknowledges that the fellow's statements "have not been independently cross-checked" by him[31] —or, evidently, by anyone else.

Fourth, we spent only 4 days in the field; after so little time, how can we really be so sure that the contras are doing these things? The question contains the answer: if in that relatively short period it is possible to encounter credible evidence of 16 murders, 44 kidnappings, one rape, and numerous instances of beatings and destruction of property,[32] there is every reason to believe that those numbers could be extended—and extended substantially[33] —by a longer investigation.

Fifth, we do not quantify precisely our methodology; we do not, for example, say what percentage of interviews were cross-checked, or what percentage of incidents were cross-checked. Moore provides us with an "instructive" example in the "specificity with which cross-check methodology is developed and discussed":[34] a study purporting to have calculated, through statistical techniques, the number of persons killed in Vietnam after the war

[27] Moore, *supra* note 2, at 123 n.333.
[28] *See* REPORT, *supra* note 1, at 9.
[29] Reply, *supra* note 3, at 192.
[30] *Id.*
[31] *Id.* at 189 n.7.
[32] REPORT, *supra* note 1, at 18.
[33] *Id.*
[34] *See* Reply, *supra* note 3, at 192.

ended.[35] In fact, there is *no* quantification of cross-checking described anywhere in that report. The closest that the authors come is to indicate that "a substantial number" of victims were named by more than one person interviewed (all of whom were refugees): "A substantial number of our fully identified victims were named by more than one respondent, and were therefore duplicates. That diverse respondents independently reported the execution of the same individual gave us confidence in the reliability of our data."[36] There is *no* indication as to "what percentage of interviews relied upon were cross-checked."[37] There is *no* indication as to "what percentage of incidents discussed were corroborated through cross-checks."[38] Moreover, there is no indication that any "techniques were used to verify that those perpetrating incidents" were actually officials of the Vietnamese Government.[39] The authors openly admit that they simply *assumed* "that people who reported in convincing detail about persons who were incarcerated or executed were probably telling the truth."[40] So far as I can see, they do not even use the word "cross-check." Although, as noted above, they describe statements that in some respects happened to be duplicative, *they do not claim to have made any special effort to cross-check so much as a single statement or a single incident.* An "instructive" model indeed!

I wish to be clear: I do not fault the "Vietnam blood bath" researchers for failing to quantify cross-checking. Standard human rights fact-finding techniques simply do not lend themselves to mathematically precise quantification of that sort. Statistical methods might provide specious support for a given study, but however easy it would be, such buttressing would be precisely that—specious. Statistics concerning these matters say nothing about the relationship of the persons interviewed to each other, their demeanor or credibility, the extent of their recall or basis of their knowledge. These and multiple other factors affect the weight that can be accorded their statements.

It thus will come as no surprise that none of the developing literature on the subject of on-site human rights investigations recommends such statistical smoke screens.[41] Our report makes clear that we believed that any pretense of mathematical precision would inevitably be misleading—and that analogical verbal formulations were similarly suspect. We rejected, for example, any use of the term "pattern" in reference to violations. It is "unclear," we said, "what level of frequency is required before a high level of frequency is properly called a 'pattern,' or before a pattern is called a 'consistent pattern.'"[42] We acknowledged that the methodology employed could not "provide knowledge to a certainty," but only a "level of probabilit[y]":

> How frequently do such abuses occur? There are, in general, two methods of seeking to determine whether a "pattern" exists of these sorts of violations. The first is to canvass all available evidence—in this case, to interview everyone alleging some abuse by the Contras, and to delve thoroughly into the facts related by those interviews. This kind of comprehensive review is the only way of knowing with certainty

[35] Desbarats & Jackson, *Vietnam 1975–1982: The Cruel Peace*, WASH. Q., Fall 1985, at 169.
[36] *Id.* at 176.
[37] *See* Reply, *supra* note 3, at 192.
[38] *Id.*
[39] *Id.*
[40] Desbarats & Jackson, *supra* note 35, at 176.
[41] *See infra* note 48.
[42] REPORT, *supra* note 1, at 19.

> whether an actual pattern exists. It obviously was not possible to conduct such a review in the period of one week we spent in Nicaragua.
>
> The second method is to gather as much information as possible, to make reasonable efforts to distinguish between probative and non-probative evidence, and to draw reasonable inferences from the evidence that appears probative. This method does not produce knowledge to a certainty; it merely alleges varying levels of probabilities, depending upon the care with which each stage of the investigatory process is conducted. The limited time and amount of resources available made it necessary to employ this second, inferential method. *We have framed our conclusions accordingly, using concepts such as the "rebuttable presumption," "prima facie," and "shifting the burden of persuasion" to reflect the measure of reliability we believe those conclusions merit.*[43]

(I comment below on this important element, which Moore understandably ignores altogether; namely, the calibration of the findings to reflect the level of exactness afforded by the methodology. It is worth underscoring that investigatory findings need not be binary, that a report need not be painted only in blacks and whites, and that there are such things as qualification and nuance—with which this particular report happens to be filled.)

Sixth, Moore faults our questioning of witnesses. One of his criticisms is that our questions are not included in the report. The "instructive" Vietnam blood-bath study[44] from which Moore learned so much contains not a single interviewer's question. We excluded our questions, as well as some statements, because our sponsors did not have the financial resources to reproduce every interview conducted over the course of our investigation.[45] Moore, however, infers sinister designs and jumps reflexively to a conspiracy theory: statements concerning membership in the Catholic Church or the Communist Party are evidence of manipulation by those orchestrating the "Sandinista public affairs"[46] campaign. The truth is that I asked all the persons we interviewed, or just about all, about their religion and politics, and those comments were their responses.

[43] *Id.* at 17–18 (emphasis added).

[44] Desbarats & Jackson, *supra* note 35.

[45] This procedure, it is worth noting, comports with Professor Weissbrodt's Proposed Draft Model Procedures for NGO Fact-Finding:

> [I]t does not seem unreasonable to suggest that nongovernmental organizations should expressly state their fact-finding methodology at least in substantial reports on human rights situations. Obviously, every letter, appeal, press release, etc., could not contain such methodological statements—for reasons of economy and effectiveness. But major factual inquiries representing considerable effort and involving a substantial result, such as a report, might contain a sketch of the basic methodology used in deriving the report. Indeed, most sizeable NGO human rights reports do contain at least a paragraph or two concerning methodology used.

Weissbrodt & McCarthy, *Fact-Finding by Nongovernmental Organizations*, in INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS 186, 216 (B. Ramcharan ed. 1982).

Our report devoted six pages to describing the methodology used. As in the case of other proposed model rules, our report complies fully with each of Professor Weissbrodt's 12 proposed guidelines, with one exception (paragraph 6). We did not indicate which of us conducted each interview. In fact, we probably conducted 90% of them jointly.

[46] Reply, *supra* note 3, at 9.

With respect to the exclusion of witness statements, we applied, as indicated above, a standard of materiality. We included some in the report because the words of the victims seemed to us to have a certain poignancy that would be lost in a sterile summary. Few human rights reports include *any* witness statements, let alone questions; they consist entirely of paraphrases and synopses. The Vietnam blood-bath piece[47] does not set forth a single entire statement. It contains only two- or three-sentence excerpts from about a dozen witness statements—out of a total of 615 refugees interviewed. No "contrary" statement is included. Again, I do not object; I assume that the authors thought, as we did, that the inclusion of a few witness statements would give readers a sense of the horror experienced by real people with real names.

In sum, the growing body of literature on human rights fact-finding[48] is all but devoid of any support for Moore's apparent belief that all witness statements, including questions, should have been included in their entirety. Nor, for that matter, does the literature provide any support for his protests concerning nonquantification. Our report comports fully, for example, with the Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions,[49] which in this regard require only that "the mission's report should contain the findings of the majority as well as any views of dissenting members."[50] The Belgrade Rules do not suggest the desirability of including witness statements, let alone interviewers' questions. Our report also is in complete accord with apposite provisions of the Draft Rules of Procedure Suggested by the UN Secretary-General for *Ad Hoc* Bodies of the United Nations Entrusted with Studies of Particular Situations Alleged to Reveal a Consistent Pattern of Violations of Human Rights.[51] In short, our report includes each of the "matters [usually] covered in the reports of fact-finding bodies dealing with [particular] situations."[52]

Moore's real objection is a metaphysical grievance that there is no such thing as "full" disclosure. I agree. As Martin Heidegger put it, "where there is disclosure there is also concealment," meaning that the decision to disclose one thing necessarily is a decision to ignore something else.[53]

[47] Desbarats & Jackson, *supra* note 35.

[48] *See, e.g.*, Weissbrodt & McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981); Franck & Fairley, *Procedural Due Process in Human Rights Fact-finding by International Agencies*, 74 AJIL 308 (1980); Norris; *Observations "in loco": Practice and Procedures of the Inter-American Commission on Human Rights*, 15 TEX. J. INT'L L. 46 (1980); Report of the Secretary-General on Methods of Fact-finding, UN Doc. A/5694 (1964).

[49] Franck, Current Developments Note, 75 AJIL 163 (1981). These were drawn up after 4 years of study by a special subcommittee of the International Law Association, which consisted of representatives from Austria, Bulgaria, Cyprus, Ghana, Kenya, the Netherlands, Singapore, the United Kingdom, the United States and Uruguay. The 59th ILA Conference, held in Belgrade on Aug. 18–23, 1980, approved the rules by consensus. *Id.*

[50] *Id.* at 165. Fox's and my findings and conclusions were unanimous.

[51] *Reprinted in* Ramcharan (ed.), *supra* note 45, at 239.

[52] These are: (1) appointment, mandate; (2) organization of work; (3) procedure adopted; (4) facts alleged; (5) comments on allegations or rebuttals; (6) evidence obtained, including sources of evidence used and evidentiary criteria followed; (7) standards relied upon; (8) discussions of issues; (9) conclusions and recommendations; and (10) annexes, such as rules of procedure or comments of governments concerned. Van Boven, *The Reports of Fact-Finding Bodies, reprinted in id.* at 182.

[53] L. ABEL, IMPORTANT NONSENSE (1987).

Moore also contends that cross-examination is a technique largely useless except for purposes of impeachment. I disagree.[54] Cross-examination in a fact-finding investigation (unlike cross-examination conducted during a trial) is not aimed, as Moore suggests, at breaking down a witness,[55] but at assessing demeanor and thus credibility. As one authority has put it, "The demeanor of a witness may indicate the person's confidence or nervousness, from which a finder of fact may infer the veracity of statements made or merely that the individual has a nervous disposition."[56] As our report indicates, we excluded statements that were, in our judgment, of doubtful veracity.[57] Cross-examination facilitated making those judgments.

Moore complains that the "report does not fully present to the reader any contrary views heard by the delegation."[58] What exactly is a "contrary view"? That the individual interviewed has *not* been victimized by the contras?

Well, we did not accept hearsay; we did not "rely on the statements of persons who had not seen or heard personally the events described."[59] That, of course, is why statements taken during interviews with persons such as Patricia Baltadono (head of the Nicaraguan human rights group critical of the Nicaraguan Government) and Cardinal Obando y Bravo are not included in the report. We did speak with them for background information and we did seek their impressions concerning the scope of contra abuses (which we alluded to in the report in a reference to other similar hearsay[60]), but neither individual had any personally observed incident to report.

The one exception we made was to include in our report the remarks of Luis Carrión, the Deputy Minister of the Interior. We considered it important to speak with persons in both the Nicaraguan and United States Governments responsible for collecting information concerning the nature and scope of damage inflicted by the contras. (We interviewed him after we returned to Managua, as we did Harry Bergold, United States Ambassador to Nicaragua. The latter interview is not included because Ambassador Bergold asked that it not be.)

It is illuminating to review Carrión's statement—and Moore's use of it—in light of Moore's accusation of imbalance in the selection of statements in the report, as well as Moore's misgivings about our interrogative techniques. In response to a question I asked, Carrión responded: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time."[61] In his earlier *Journal* article, Moore had no hesitation in relying on Carrión's statement:

> Luis Carrión, the Sandinista Vice-Minister of the Interior and a principal witness for Nicaragua before the World Court in the *Nicaragua*

[54] I should note, however, that here the Vietnam blood-bath report is consistent with Moore's approach. It contains no indication that the authors made any effort through cross-examination to determine the veracity of any of the persons interviewed. Rather, if they related enough detail, they apparently were assumed to be telling the truth. Desbarats & Jackson, *supra* note 35, at 176.

[55] Reply, *supra* note 3, at 192.

[56] Weissbrodt & McCarthy, *supra* note 45, at 208.

[57] *See* REPORT, *supra* note 1, at 22.

[58] Reply, *supra* note 3, at 193.

[59] REPORT, *supra* note 1, at 10.

[60] *Id.* at 12.

[61] *Id.*, App. III at 34.

> case, while reiterating the party line that Nicaragua is not giving support to the insurgents in El Salvador, recently made a statement to a human rights investigating team that indirectly confirmed Nicaraguan involvement: "We are giving no support to the rebels in El Salvador. I don't know when we last did. We haven't sent any material aid to them in a good long time." Interestingly, this statement was reported by a witness for Nicaragua in the World Court case and contradicts the sworn affidavit submitted to the Court by the Nicaraguan Foreign Minister . . . .[62]

Now, Carrión's statement concerning assistance to the Salvadoran guerrillas was elicited through the use of the same techniques that Moore has complained of, yet there is not a hint on Moore's part that that statement is anything less than credible—no concern about leading questions, no concern about cross-checking, no concern about flaccid cross-examination, nothing. Why? I submit that, quite simply, it is because what Carrión said *supports* Moore's contentions.

II.

Moore's approach in attacking our report is summed up in two precepts.

First: *comb innuendo over the bald spots in your evidence.* Do not know whether the sponsors were ever in touch with Nicaragua's lawyer? Stick in a "has-been-said."[63] Unclear whether someone was actually present at a meeting? Sprinkle in an "apparently."[64] Cannot be sure about a firm's clients? Say "there have also been reports that. . . ."[65] Then, when no one is looking, drop the tentativeness and present a firm conclusion: "None of these interactions. . . ."[66] Preface all this with a few pages on "context": i.e., repeat uncorroborated assertions of duplicity by a disaffected expatriate with an obvious axe to grind, even though none of his accusations purport to relate to the report under discussion.[67] Make no effort to verify their accuracy.[68] Mix it all together and you have the makings for an "objective, hard-hitting" analysis[69] that does not come out and *say* the targets are Communist dupes, but then, does not need to.

Second: *avoid any reference to material that does not support your accusations.* Let me reiterate that the findings and conclusions Fox and I reached were meticulously framed to reflect the degree of reliability afforded by our methodology. We made no finding to the effect that there existed a "pattern" of contra abuses.[70] We recognized that "[i]t is possible that some of the statements we took are false or exaggerated."[71] In addition to excluding hearsay, we "construed narrowly any doubtful, ambiguous, or equivocal evidence."[72] Yet we made no claim that our methodology was foolproof or our powers of inference divinely inspired; "[f]inding a fact," says the Amer-

[62] Moore, *supra* note 2, at 66.
[63] Reply, *supra* note 3, at 191.
[64] *Id.*
[65] *Id.* at 191–92.
[66] *Id.* at 192.
[67] *Id.* at 188–89.
[68] *Id.* at 189 n.7.
[69] *Id.* at 190—which is the kind Moore wants.
[70] REPORT, *supra* note 1, at 19.
[71] *Id.* at 22.
[72] *Id.* at 18.

ican Law Institute's Model Code of Evidence, means merely "determining that its existence is more probable than its non-existence,"[73] and that is all we tried to do.

Our findings accurately described probative evidence we encountered: "Substantial credible evidence exists that Contra violence is . . . directed with some frequency at individuals who have no apparent economic, military, or political significance and against persons who are hors de combat."[74] We cast our conclusions in terms of a preponderance of the evidence: "given the number of persons interviewed, the variety of sites at which the interviews took place, the multiplicity of contacts by which we identified witnesses, and the cross-checking that was on occasion feasible, *the preponderance of the evidence indicates that the Contras are committing serious abuses against civilians.*"[75]

Concerning the Brody report, our conclusion states only probability and makes no claim whatsoever concerning numbers: "Based on our random sampling of these affidavits, and the other samplings performed by Americas Watch and others, the probability is that other of the affidavits relied on by Mr. Brody are also probative."[76]

We spoke only of "prima facie" validity: "In the absence of any showing to the contrary, the evidence now extant of grievous Contra violations of the rights of protected persons under international law must be presumed prima facie valid."[77] And, far from implying that the matter was free from doubt, we assiduously avoided claims of finality or categorical conclusions. Rather, we suggested only that the burden of persuasion had shifted:

> The burden of persuasion has effectively shifted to those who assert that the Contras have conducted themselves in a manner that permits the support of the United States. Unless it can be established that the Contras do not engage in . . . acts of illegal terroristic violence, regardless of any other considerations, further support by the United States is indefensible.[78]

None of this, of course, is mentioned by Moore; it just does not fit into the picture he tries to paint.

III.

Fox and I concluded our report with the following thought:

> We believe that it should be possible to forge a policy that seeks to . . . discriminate between a Catholic peasant who admires the United States and a Marxist bureaucrat who does not, a policy precisely calibrated to safeguard legitimate American interests without trampling ground on which the United States need not walk. Many vexing questions face the policy-maker who undertakes such a task. The objective may be unattainable. The enterprise may be fraught with false starts. Mid-course corrections may be required. But there is one initiative that clearly should be eliminated from any such process, and that is a renewal of United States military assistance to the Contras.[79]

[73] MODEL CODE OF EVIDENCE Rule 1(5) (1942).
[74] REPORT, *supra* note 1, at 15.
[75] *Id.* at 22 (emphasis in original).
[76] *Id.*
[77] *Id.* at 23.
[78] *Id.*
[79] *Id.* at 28.

Since our report was written, the United States, sadly, has renewed aid to the contras. Our Government is now indifferent not only to the rights of Nicaraguan peasants, but also to the Judgment of the International Court of Justice and to the U.S. treaty obligation to comply with that Judgment.[80]

A national dialogue on these issues is desperately needed—a dialogue that focuses on the *issues,* not on diversionary insinuations, innuendo and aspersions directed at the motives and integrity of participants in that dialogue.

The issues demand discussion because the United States holds itself up as a nation that respects human rights. It has long sought to occupy the high ground in condemning states that support terrorism to further their national interests. This nation's standing to condemn state-sponsored terrorism is undermined if the only difference is that the condemned are not *our* terrorists. Human rights concerns, to be credible, must be reciprocal, applying with equal force to those we support as well as those we oppose.

International law and human rights aside, these issues warrant discussion purely for reasons of benevolent self-interest. Like most other policies, support for the contras involves costs. The U.S. national interest is ill-served if those costs are concealed. Even if the supporters of aid to the contras succeed in channeling the discussion away from issues of international law—as they have to date—they must still demonstrate that the benefits of that policy outweigh the costs. They must succeed with a war-is-hell argument—one made, thus far, mostly behind closed doors, for the reason that it views intentional terror directed at Nicaraguan civilians as a means necessarily pursued in the process of overthrowing the Nicaraguan Government.

I think they cannot sell such a policy, involving as it does the repudiation of cherished principles at the heart of this nation's self-image. But I should dearly like to see them *try:* to drop the tactics of deflection, to debate contra terrorism on its merits, to *try* to sell the real policy they support.

Then, I submit, the American people would genuinely have an opportunity to find the "[t]ruth [that is] of particular importance in a politically sensitive ongoing war."[81]

MICHAEL J. GLENNON

[80] UN CHARTER art. 94, para. 1.

[81] Reply, *supra* note 3, at 193.