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Law in Support of Policy in Panama

Colonel James P. Terry, U.S. Marine Corps

Operation “Just Cause,” the December 1989 military intervention in Panama by the United States to restore order, protect U.S. lives, and ensure the integrity of the Panama Canal Treaty,¹ was the fifth such incursion into that nation by the United States in this century.² When this use of force is judged from the dual perspectives of law and U.S. policy, the U.S. initiative, unlike our intervention in Nicaragua earlier in the decade, can be justified under conventional and customary international law as a legitimate use of American military power in defense of U.S. and Panamanian national interests.

Under the best of circumstances, the use of the military instrument will lead to international criticism. Operation “Just Cause” was no exception. The Soviet Union used traditional cold war rhetoric to denounce the action, while all the neighboring Latin American nations condemned the incursion—individually, within the Organization of American States (OAS), and within the United Nations.³ (Strangely, their criticism was far more vocal than when Noriega nullified the victory of the Endara government over his puppet regime the preceding May.) Britain and other Western nations were supportive of the operation.

This use of military power in Panama emphasized that criticism will be short-lived when both the people of the nation in which the intervention occurs, as well as the opposition party of the intervenor-nation, support the action as within their national interests. For the people of Panama, the intervention represented fulfillment of the ongoing civic movement for democratization, their vital economic interest in political change (they recognized that U.S. economic sanctions would only be lifted if Noriega were

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deposed or surrendered to face U.S. drug and conspiracy charges), and an appeasement of the new critical attitude in the international community over conditions in Panama.

The Threat to U.S. National Interests

For more than two years prior to the 20 December 1989 intervention by U.S. Southern Command (SOUTHCOM) forces, the U.S. government had attempted to resolve the crisis in Panama through negotiation. That effort was directed toward protecting the 35,000 Americans in Panama, combating the drug transshipment trade from Colombia, which was being orchestrated in Panama City, and ensuring that the operation of the Canal remained secure.

Our concern had grown in May 1989 when opposition candidates on a slate headed by Guillermo Endara in the national election appeared to have beaten the Noriega puppet-slate by a wide margin. Noriega quickly nullified the election. Memories remain fresh of Second Vice President-Elect Guillermo Ford's brutal beating by thugs from the "Dignity Battalions" on the day following the national elections.

Harassment of U.S. military personnel and their dependents increased significantly after the election. On Friday, 15 December 1989, General Noriega declared his military dictatorship to be in a "state of war" with the United States. This followed a declaration by his puppet regime that he was "Maximum Leader" of the Panamanian people. Noriega's declaration of war was coupled by not-so-veiled threats against Americans, including statements to the effect that he looked forward to seeing U.S. corpses floating in the Panama Canal.

On 16 December, forces under his command shot and killed an unarmed Marine Corps officer (1st Lieutenant Robert Paz) and wounded another. Both were assigned to U.S. forces in Panama pursuant to the Panama Canal Treaty. Shortly after that incident, a naval officer similarly assigned and traveling with his wife in Panama City was arrested without cause and brutally beaten. His wife was interrogated and then threatened with sexual abuse.

Believing that this pattern of violence against U.S. citizens would continue, President Bush acted to protect U.S. lives and interests and to restore democracy in Panama on behalf of the legitimately elected Panamanian government.

Application of International Law

The law supporting U.S. intervention can be found in both international agreement and custom. The cornerstone of the law regulating coercion between states is found in the minimum world order system represented by Articles 2(4), 2(7) and 51 of the U.N. Charter.⁴ The provisions of Article 2

preclude the use of armed force by one state against another. The provisions of Article 51 authorize one exception, the inherent right to use military force in self-defense. The United Nations Charter system requires strict accountability, however, before the projection of force into the territory of another state can be justified.

The U.S. intervention in Panama must be tested against each of the several conditions required to justify the use of military force in self-defense under Article 51. The first condition is the existence of an armed attack, or the imminent threat of armed attack upon the territory or citizens of the United States. In December 1989, U.S. citizens lawfully resident in Panama pursuant to Panama Canal Treaty provisions, their property, and an international waterway vital to U.S. national power projection were all imminently threatened with armed attack. Not only had there been dangerous rhetoric (including a declaration of war) placing the Canal Treaty provisions in imminent risk, but attacks on U.S. citizens, coupled with allusions by Noriega to further "corpses," made more attacks likely. Further, there was every evidence that this threat would continue as long as General Noriega remained in power.

A further condition to be satisfied relates to the possibility of an alternative to military force which might have returned the U.S.-Panamanian relationship to an acceptable status quo. The Charter contemplates a hierarchy of responses with armed force authorized only when other responses have been attempted and have failed, or are obviously without application. In the case of Panama, all other reasonable measures had been addressed. Every form of diplomatic (including the recall of our ambassador), economic (including sanctions) and legal initiative (including indictment of Noriega) had been attempted, yet conditions had only worsened.

Although the use of force has been seriously questioned by some international legal scholars⁵ and certain Latin nations, a detailed scholarly analysis brings one to the same conclusion held by President Bush. Sir Gerald Fitzmaurice, former jurist on the International Court of Justice (ICJ), notes that international law "by no means permits [self-defense] in every case of illegality, but on the contrary, confines it to a very limited class of illegalities."⁶ Professor Ian Brownlee of Oxford University sets the parameters clearly when he states ". . . provided there is control by the principal, the aggressor state, and an actual use of force by its agents, there is an 'armed attack.'"⁷ This view was further expanded by the International Court of Justice in their 1979 ruling Concerning United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*). The Court found Iranian actions in seizing our diplomats to be an armed attack on the United States.⁸

Professor John Norton Moore of the University of Virginia clearly brings actions such as were carried out by Noriega's forces against U.S. citizens and interests within the scope of an "armed attack" when he concludes that "a

state is entitled to respond against aggressive attack, whether that is a direct attack using armies on the march, or whether it is low intensity conflict or guerrillas or terrorist attack.”⁹

The more significant legal issue may not have been whether the United States might respond to attacks on its personnel, however, but whether it could take those actions necessary to preempt reasonably anticipated future acts of violence against its citizens in Panama through removal of Noriega. The U.S. position has always been that Article 51 of the U.N. Charter does not create a new principle, but rather reiterates the inherent right of self-defense recognized by customary international law.¹⁰

As such, the right of self-defense is not limited to responding to an actual armed attack but also includes preemptive or anticipatory self-defense. Former Secretary of State Shultz reaffirmed this view during the Libyan crisis in 1986 when he stated the United States “is permitted to use force to preempt future attacks, to seize terrorists, or to rescue its citizens when no other means are available.”¹¹

Four basic arguments in favor of anticipatory self-defense have been advanced and each has application with respect to our intervention in Panama.¹² First, Article 51 of the Charter embraces the inherent right of self-defense (which includes anticipatory self-defense). Second, it is very difficult to distinguish those acts which constitute preparation for aggression (but which might not justify responding coercion under a restrictive view) and those that constitute elements of an attack. Third, the destructive power of modern weaponry makes it unreasonable to expect a state to await a first strike before responding.¹³ Finally, a more restrictive position would only benefit an aggressor.¹⁴

A further requirement of the “minimum world order system,” represented by Articles 2 and 51 of the U.N. Charter, against which the U.S. intervention in Panama must be tested is the customary international law principle of proportionality. Although the corresponding requirement of “necessity”¹⁵ is directly embraced, at least implicitly, within Article 51, the same arguably cannot be said for “proportionality of response.” Professor Myres McDougal and Dr. F. Feliciano of Yale University Law School have defined the rule as follows: “Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion.”¹⁶ This definition simply requires a rational relationship between the intensity of the attack and the intensity of the response. Although the relationship need not approach precision, a nation subjected to a number of

state-sponsored attacks on its citizens is not entitled, for example, to destroy in its entirety the capital city of the offender state.

Other canons of military practice, such as conservation of resources, support this principle of restraint in defense. The United Nations has condemned as reprisals those defensive actions which greatly exceed the provocation.¹⁷ Where a continuation of hostile acts beyond the triggering event or events is reasonably to be expected, however, as was the case in Panama, a response which anticipates requirements of a continuing nature beyond the scope of the initial attack would be legally appropriate.

The addition on 20 December of some 9,500 troops from Fort Bragg and Ford Ord, among others, to the 13,000 soldiers within the U.S. forces already in Panama can hardly be viewed as exceeding the parameters established by this rule, given the significant forces under Noriega's control.

Application of Regional Agreements

In addition to the regime established by the United Nations Charter, the United States and Panama are bound by the Charter of the Organization of American States (OAS),¹⁸ the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)¹⁹ and the 1977 Panama Canal Treaty.²⁰ Our Latin neighbors are particularly sensitive to the provisions of the Rio and OAS agreements because of their view that the United States violated provisions of those agreements during the years 1981-84 when the United States was involved in laying mines in Nicaraguan ports, and in participating in the planning and direction of attacks on Nicaraguan ports, oil installations and naval bases.

The International Court of Justice (ICJ) ruled in the case of *Nicaragua v. U.S.*²¹ that the support given by the United States to the military and paramilitary activities of the Contras by financial support, training, supply of weapons, intelligence, and logistics support, constituted a clear breach of the principles of non-intervention under provisions of the OAS and Rio accords. The ICJ further found in that case that the actions of Nicaragua against its neighbors did not, as the United States maintained, amount to an armed attack which could have authorized the collective countermeasures taken by the United States. In making these findings, the ICJ ruled that the U.S. actions in Nicaragua had resulted in an infringement of territorial sovereignty under both agreements, as well as the U.N. Charter.²² It is small wonder, then, that the Latin nations expressed concern over the U.S. intervention in Panama.

OAS Charter

The prohibitions against the use of force in the OAS Charter are phrased in language that is even more categorical than that of Article 2(4) of the U.N.

Charter, reflecting the long and painful history of the Latin American states. Article 13 establishes, for example: "No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and social elements." Article 20 is equally clear with respect to territorial integrity: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatsoever."

The one exception to these comprehensive prohibitions, and the one relied upon by the United States in taking action to protect U.S. citizens and interests in Panama, is Article 22, which provides: "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20." The measures addressed in Article 22 include the right of self-defense under Article 51 of the U.N. Charter, as well as diplomatic and economic actions, to the extent they are not considered regional enforcement initiatives pursuant to Article 53 of the U.N. Charter. Because the U.S. measures in Panama satisfy the self-defense criteria of the U.N. Charter, they likewise trigger the exception specified in Article 22 of the OAS Charter.

Another important article within the OAS Charter is relevant to the U.S. military action. Article 3d provides: "The solidarity of the American States and the high aims which are sought through it require political organization of those States on the basis of the effective exercise of representative democracy." Not only had General Noriega violated this provision in May 1989 when he had refused to allow the Endara government to assume power, but the abuses heaped upon his opponents also violated similar provisions of the 1953 American Declaration on the Rights and Duties of Man.²³ While the ICJ in the past has opined (most recently in *U.S. v. Nicaragua*) that the commitment of states under Article 3d of the OAS Charter is political, rather than legal in nature,²⁴ the Court also asserted that there is nothing which precludes a state from assuming a binding and enforceable international commitment of this kind.²⁵ When Panama committed itself to the multilateral 1953 Declaration pledging to preserve these rights for its people, a binding obligation was created which could be enforced by other states party to the Declaration.²⁶

The Rio Treaty

This multilateral agreement authorizes self-defense measures similar to those within the OAS Charter and the U.N. Charter. Article 3 provides that the parties undertake ". . . to assist-in-meeting the attack in the exercise of

the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.” This provision reinforces the U.S. right in the U.N. and OAS Charters to take measures in self-defense when the criteria established for an armed attack is met.

Panama Canal Treaty

The strongest tenet underlying U.S. actions was the bilateral Canal Treaty²⁷ itself. Under Article 4, the United States has not only the right, but the duty to protect the waterway. The basic U.S. responsibility is to operate and defend the Panama Canal until its transfer to Panama at the end of this century. Even after the Noriega regime’s illegal seizure of power, the United States continued to do what it has done since the entry into force of the treaty in 1979—provide for the safe and orderly transit of vessels through the canal while assuring increased Panamanian participation in its management and operation.

During 1988 and 1989, however, the Noriega regime engaged in a systematic campaign to harass and intimidate U.S. and Panamanian employees of the Panama Canal Commission and the U.S. forces. In 1989 alone, there were over 300 violations of the U.S. military bases by Panamanian Defense Forces (PDF) personnel, over 400 U.S. personnel were detained, and 140 U.S. personnel were endangered.²⁸ When this dangerous and provocative behavior reached an intolerable level in mid-December, President Bush was required to act to end the threat to American and Panamanian lives as well as to canal operations.

Meeting the Weinberger Criteria for Intervention

From the perspective of the U.S. Congress, the fact that the initiative met the carefully circumscribed criteria established by former Secretary of Defense Caspar Weinberger for intervention in 1984 was critical. Senate Majority Leader George Mitchell stated immediately after the intervention: “I support the President’s decision. It was made necessary by the actions of General Noriega.”²⁹ House Speaker Thomas S. Foley echoed these sentiments when he stated: “I support that decision. The President made a convincing argument. . . . The President asked for my support, and I gave him that assurance. The decision is justified.”³⁰

These statesmen were two of the principal protagonists in the 1984 debate concerning the use of military force following the Beirut bombing and Grenada intervention. That debate, precipitated by the military services over the appropriate circumstances in which the government may place American military personnel in harm’s way, led to the clear articulation of six criteria for intervention by then-Defense Secretary Weinberger before the National

Press Club on 28 October 1984. These tests, applauded then and since by the Congress, require that:

- Any use of force be predicated upon a matter deemed vital to our national interest.
- The commitment be with the clear intention of winning.
- We have clearly defined political and military objectives.
- The forces committed be sufficient to meet the objective.
- There be reasonable assurance we have the support of the American people.
- The commitment of U.S. forces to combat be a last resort.³¹

The intervention in Panama met each of these tests, and because it did, the support of the American people and the Congress was overwhelming. If we have learned one lesson from Panama, it is that legal criteria and political criteria are not unrelated. Where use of military force can be defended as necessary and proportional under the canons of international law, the American people will support its use as a proper exercise of national power.

Notes

1. President Bush cited these as the objectives of the intervention in his speech to the nation at 0740 (Eastern) on 20 December 1989.

2. In 1908, U.S. forces landed in Panama, which had gained independence from Colombia in 1903 with U.S. support, in the first of four landings in that nation in the next decade. (Although not an intervention *per se*, in 1964, 23 persons were killed and 300 injured during "flag" riots against the U.S. presence. U.S. forces assigned in Panama were used to quell the nationalist riots.)

3. See "Many Governments Condemn Use of Force in Panama," *The Washington Post*, 21 December 1989, p. A34; also see "OAS Votes to Censure U.S. for Intervention," *The Washington Post*, 23 December 1939, p. A7.

4. *U.N. Charter*, 59 Stat. 1031; TS 993; 3 Bevans 1153. Signed at San Francisco, 26 June 1945. Entered into force 24 October 1945. Reprinted in U.S. Department of State Publication 2368, pp. 1-20.

5. Two weeks after the intervention, 69 politicians and political activists, including 1972 Presidential nominee George McGovern, took out a full page ad in *The New York Times* decrying the Panama initiative. The open letter to the President stated: "Your invasion of Panama is illegal . . . a violation of the Constitution . . . the U.N. Charter, the OAS and Canal Treaties."

6. Sir Gerald Fitzmaurice, "The Problem of the Authority of International Law and the Problem of Enforcement," *Modern Law Review*, v. 19, 1956, p. 1.

7. Ian Brownlee, *International Law and the Use of Force by States* (Oxford, England: Oxford Univ. Press, 1963), p. 373.

8. See Concerning United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), merits, 1980 International Court of Justice (ICJ), paras. 17, 24, 25, 57, and 91. See also J. P. Terry, "The Iranian Hostage Crisis: International Law and U.S. Policy," *JAG Journal*, v. 32, 1982, pp. 94-117.

9. John Norton Moore, "International Law and Terrorism," ROA National Security Report 4, no. 10, October 1986.

10. See Article 0915, *U.S. Navy Regulations*, 1973.

11. George P. Shultz, quoted in *The New York Times*, 16 April 1986, p. A8.

12. Richard J. Erickson, *Legitimate Use of Military Force Against State Sponsored International Terrorism* (Maxwell AFB, Alabama: Air Univ. Press, 1989), pp. 138-139 for a full discussion of each of these principles.

13. See George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review*, May-June 1986, pp. 69-80.

14. See Marjorie Whiteman, *Digest of International Law*, v. 12, pp. 49-50.

15. "Necessity" embodies the concept that the use of military force to protect or defend vital national interests, U.S. citizens, or U.S. territory from armed attack or the imminent threat of armed attack shall be resorted to only after all other lesser means have been exhausted. See William V. O'Brien, "The

Meaning of Military Necessity in International Law," *World Polity*, v. 1, 1966, p. 166; and William Gerald Downey, Jr., "The Law of War and Military Necessity," *American Journal of International Law*, v. 47, 1953, p. 251.

16. Myres McDougal and F. Feliciano, *Law and Minimum World Public Order* (New London: Yale, 1961), p. 242.

17. See the Security Council's discussion in 36 U.N. SCOR (2232-2285) mtgs; U.N. Docs. S/PV 2285-2288 (1981).

18. *Revised Charter of the Organization of American States*, 2 UST 2394; TIAS 2361; 119 UNTS 3. Amendments, 21 UST 607; TIAS 6847. Entered into force for the U.S. 13 December 1951. Amendments entered into force 27 February 1967.

19. *Inter-American Treaty of Reciprocal Assistance*, 62 Stat. 1681; TIAS 1838; 4 Bevans 559; 21 UNTS 77. Done at Rio de Janeiro 2 September 1947; entered into force 3 December 1948.

20. *Panama Canal Treaty*, with Annex, Agreed Minute, and related letter, TIAS 10031. Signed at Washington 7 September 1977; entered into force 1 October 1979, subject to reservations and understandings.

21. *U.S. v. Nicaragua*, Judgement, International Court of Justice (ICJ) Reporter, 1986; reprinted in *American Journal of International Law*, v. 80, 1986, pp. 785-807.

22. *Ibid.*

23. Res. XXX of the Ninth International Conference of American States (1953), reprinted in *Human Rights: The Inter-American System*, v. 1, pt. 1, Ch. 4, p. 1, eds. T. Buergenthal and R. Norris, 1984.

24. *U.S. v. Nicaragua*, *supra* note 21, ICJ Reporter, para. 259, p. 131.

25. *Ibid.*

26. The United States was certainly entitled to make this claim, as a party to the *Declaration*.

27. *Supra* note 20.

28. These figures are provided in U.S. Department of State, Bureau of Public Affairs, Current Policy No. 1240, 22 December 1989.

29. Quoted in *The Washington Post*, 21 December 1989, p. A35.

30. *Ibid.*

31. Secretary Weinberger's speech was reprinted verbatim in *The New York Times*, 29 October 1984, pp. A1, A4.



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