

The Legality of the United States Invasion of Panama

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International law permits one state to use force against another state only in certain narrowly defined situations. A state may use force in self-defense in the event of an "armed attack" by another state. Additionally, treaties may give a state the right to use force in designated situations. Apart from these exceptions, however, the prohibition against the use of force is quite strict.

In its December 1989 invasion of Panama, the United States asserted both these grounds as legal justifications. It argued that it had been attacked by Panama, and that its use of force was therefore defensive. It also claimed that Panama had violated bilateral treaties regulating the Panama Canal, and that those treaties gave the United States the right to use force against the government of Panama. This article explores the validity of these two asserted legal justifications for the United States actions in Panama.

I. Factual Background

In December 1989 the United States, using troops stationed both in Panama and in the United States, attacked and defeated the Panamanian Defense Forces (P.D.F.), removed the existing government of Panama, and installed a group that had been the apparent victors in elections held earlier that year. The United States justified its action on two grounds: (1) that it was defending United States personnel against attacks by Panama; and (2) that Panama had interfered with the operation of the Panama Canal, giving the United States a right to intervene under treaties regulating the Canal. United States officials also identified two additional objectives of the invasion: (1) the restoration of democracy in Panama; and (2) the seizure of General Manuel Noriega, the head of Panama's government, in order to try him on drug trafficking charges. Congress

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reacted favorably to the invasion, but some legal scholars challenged the action as a violation of international law.¹

The invasion occurred against a backdrop of escalating confrontation between Panama and the United States. A major element in the tension was the Panama Canal, which the United States was in the process of transferring to Panamanian control. The Canal Zone has a long and controversial history. Following the refusal of Colombia's Senate in 1903 to approve a treaty² for the right to construct a canal across the Panamanian isthmus,³ which was then part of Colombia, the United States encouraged a revolt against the Colombian government in the isthmus⁴ and used its navy to hold Colombia's navy at bay.⁵ The United States then concluded with Panama the Isthmian Canal Convention,⁶ which gave the United States the rights it would have "if it were the sovereign" in what came to be called the Canal Zone, "to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."⁷ The United States constructed the Canal through the Zone territory, a ten mile wide strip in which the United States also established governmental institutions and set up military bases that became the center of operations for the United States military in Latin America.⁸

Following the 1964 civil disorders in the Canal Zone, which were sparked by nationalist sentiment and popular discontent with the status of the Zone,⁹ and a 1973 United Nations Security Council draft resolution — vetoed by the United States — urging the United States and Panama to negotiate a new Canal treaty,¹⁰ Panama and the United States

1. *U.S. Cites Self-Defense; Legal Scholars Skeptical*, Wash. Post, Dec. 21, 1989, at A36, col. 3; see also *Letter to President George Bush*, N.Y. Times, Jan. 10, 1990, at A28, col. 1.

2. Convention on Construction of a Ship Canal, Jan. 22, 1903, United States-Colombia, 3 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA: 1776-1976 447 (C. Wiktor ed. 1977).

3. A. URIBE, COLOMBIA, ESTADOS UNIDOS Y PANAMÁ 90-98 (1976); 2 G. CAVELIER, LA POLÍTICA INTERNACIONAL DE COLOMBIA 305-07 (1960).

4. A. URIBE, *supra* note 3, at 103-05; 2 G. CAVELIER, *supra* note 3, at 308-09.

5. 3 J. MOORE, DIGEST OF INTERNATIONAL LAW 46 (1906); A. URIBE, *supra* note 3, at 105; M. ARTEAGA HERNANDEZ & J. ARTEAGA CARVAJAL, HISTORIA POLÍTICA DE COLOMBIA 502 (1986); D. HOWARTH, PANAMA 235 (1966).

6. Construction of a Ship Canal to Connect the Waters of the Atlantic and Pacific Oceans, Nov. 18, 1903, United States-Panama, 33 Stat. 2234, T.S. No. 431.

7. *Id.* art. 3.

8. See generally *Panama: Troubled Passage for a U.S. Ally*, N.Y. Times, Nov. 22, 1981, at F79, col. 3 (discussing strategic importance and role of bases in Panama); 18 U.S.C. § 3241 (1989) (providing jurisdiction for U.S. District Court in Canal Zone).

9. See T. WEIL, J. BLACK, H. BLUTSTEIN, D. McMORRIS, F. MUNSON & C. TOWNSEND, AREA HANDBOOK FOR PANAMA 232 (1977); Editorial Comment, *Legal Aspects of the Panama Case*, 58 AM. J. INT'L L. 436, 437 (1964); *Panama Suspends U.S. Tie and Charges Aggression After Riot in Canal Zone*, N.Y. Times, Jan. 10, 1964, at A1, col. 8.

10. Draft Res., 28 U.N. SCOR Supp. (Jan.-Mar. 1973) at 58, U.N. Doc. S/10931/Rev.1 (1973) ("[u]rges the Governments of the United States of America and the Republic of Pan-

concluded new treaties regarding the Canal in 1977. The Panama Canal Treaty¹¹ abrogated the Isthmian Canal Convention.¹² According to its terms, the United States was to dismantle its governmental institutions in the Canal Zone immediately¹³ and phase out its control over the Canal.¹⁴ Final transfer of the Canal to Panama was to occur on December 31, 1999.¹⁵ By a separate but simultaneous treaty, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal,¹⁶ Panama and the United States agreed that the Canal would remain open permanently to the shipping of all states.

In 1983 General Manuel Noriega became the head of the Panamanian military and the *de facto* head of Panama's government. General Noriega, who had for some years supplied intelligence information to the United States, cooperated with the Drug Enforcement Administration in efforts to stop the importing of cocaine into the United States from South America; at the same time, however, the United States received information that General Noriega was facilitating drug smuggling into the United States.¹⁷ General Noriega also cooperated with the Central Intelligence Agency in supporting the Nicaraguan rebels (*contras*); in particular, he helped the C.I.A. open a "southern front" for the *contras* in Costa Rica.¹⁸ When that cooperation broke down, the U.S.-Noriega relationship began to deteriorate.¹⁹

ama to continue negotiations in a high spirit of friendship, mutual respect and co-operation and to conclude without delay a new treaty aimed at the prompt elimination of the causes of conflict between them"); 28 U.N. SCOR (1704th mtg.) at 7, U.N. Doc. S/PV.1704 (1973).

11. Panama Canal Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. 39, T.I.A.S. No. 10030, *reprinted in* 16 I.L.M. 1022 (1977) [hereinafter 1977 Panama Canal Treaty].

12. *Id.* art. 1.

13. *Id.* art. 3(10).

14. *Id.* art. 3(8).

15. *Id.* art. 2(2).

16. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, 33 U.S.T. 1, T.I.A.S. No. 10029, *reprinted in* 16 I.L.M. 1040 (1977) [hereinafter Neutrality Treaty].

17. *Panama Strongman Said to Trade in Drugs, Arms and Illicit Money*, N.Y. Times, June 12, 1986, at A1, col. 1.

18. *Id.* (Administration officials say Noriega provided C.I.A. with sensitive information regarding Nicaragua and helped U.S. combat insurgencies in Central America.); *A man, a plan, a canal, Panama*, ECONOMIST, Jan. 6, 1990, at 17 (stating that Gen. Noriega "for years worked with and for the United States (helping in, among other things, the *contras*' fight for Nicaragua)"); *Papers Seized from Noriega Could Help Iran-Contra Case*, N.Y. Times, Jan. 12, 1990, at A16, col. 1 (1985 agreement for *contras* to train in Panama); *Officials Say Bush Heard '85 Charge Against Noriega*, N.Y. Times, May 8, 1988, at A1, col. 4.

19. Eagleburger, *The OAS and the Panama Crisis*, 89 DEP'T ST. BULL. 67, 72 (Nov. 1989).

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In 1988, General Noriega was indicted on charges of facilitating cocaine imports into the United States.²⁰ The United States also encouraged Panamanian military officers to overthrow General Noriega.²¹ To pressure General Noriega to relinquish power, President Bush froze Panamanian government assets in the United States²² and forbade U.S. citizens and companies from making payments (including tax payments) to the Panamanian government.²³

In 1989 the United States criticized General Noriega for violating civil rights in Panama, and in particular for nullifying the results of a May 1989 presidential election in which an opposition group headed by Guillermo Endara was the apparent victor.²⁴ The Organization of American States was also critical of General Noriega and urged him to cede power to a civilian administration.²⁵ The Central Intelligence Agency aided a Panamanian military force that formed in neighboring Costa Rica to overthrow General Noriega.²⁶

The tension between the United States and Panama escalated. In August 1989, the United States complained to the United Nations Security Council that Panama's government had harassed United States' military personnel and intimidated civilian personnel operating the Canal.²⁷ In

20. *Noriega Indicted by U.S. for Links to Illegal Drugs*, N.Y. Times, Feb. 6, 1988, at A1, col. 6 (one indictment in Miami, one in Tampa); Eagleburger, *supra* note 19, at 70-71 (Acting Secretary of State describing charges at Aug. 24, 1989 O.A.S. meeting).

21. *U.S. Withholds a Canal Payment in New Steps to Oust Panamanian*, N.Y. Times, Mar. 12, 1988, at A1, col. 4.

22. Exec. Order No. 12,635, 31 C.F.R. §§ 565.201-206 (1988), reprinted in 50 U.S.C.A. § 1701, at 271 (Supp. 1989) [hereinafter Executive Order]; *U.S. Withholds a Canal Payment in New Steps to Oust Panamanian*, *supra* note 21; *U.S. Orders Private Citizens to Halt Payments to Panama*, N.Y. Times, Apr. 9, 1988, at A1, col. 5; Leich, *Contemporary Practice of the United States Relating to International Law*, 82 AM. J. INT'L L. 566, 573 (1988).

23. Executive Order, *supra* note 22; *U.S. Orders Private Citizens to Halt Payments to Panama*, *supra* note 22; Leich, *supra* note 22, at 573; see also Eagleburger, *supra* note 19, at 74. In February 1988 the Panamanian National Assembly removed the President from office; nevertheless, the U.S. recognized him, rather than the factual leadership, as the government of Panama and directed that payments be made to accounts controlled by him.

24. *Noriega Stealing Election, Carter Says*, N.Y. Times, May 9, 1989, at A1, col. 6; *Bush Urges Effort to Press Noriega to Quit as Leader*, N.Y. Times, May 10, 1989, at A1, col. 6; *Transcript of Bush's News Conference on the Panama Vote*, N.Y. Times, May 10, 1989, at A10, col. 1; *Hemispheric Group Asks Noriega to Yield Power*, N.Y. Times, May 18, 1989, at A8, col. 3 (O.A.S. charges election abuses).

25. *O.A.S. Draws Latin Fire for Stand on Panama*, N.Y. Times, June 4, 1989, at A10, col. 1; *Latin Envoys Report No Progress in Their Effort to Dislodge Noriega*, N.Y. Times, June 20, 1989, at A8, col. 1; *Diplomats Urge Noriega to Resign by Sept. 1*, N.Y. Times, July 20, 1989, at A6, col. 4; *Diplomacy: Haunting Noriega Issue Stirs Great Hope and Low Expectation as O.A.S. Meets Again*, N.Y. Times, Aug. 22, 1989, at A20, col. 5; *U.S. Is Faulted on Military Maneuvers in Panama*, N.Y. Times, Aug. 24, 1989, at A3, col. 1.

26. Avirgan, *Panama Contrasts?*, THE NATION, Sept. 18, 1989, at 263-65; *An Untold Guerrilla War: Noriega Foes Rule Border*, N.Y. Times, Jan. 10, 1990, at A8, col. 5.

27. *Panama, United States Again Before Council*, U.N. MONTHLY CHRON. 20 (Dec. 1989).

the same month, the United States military conducted maneuvers of its troops stationed in Panama.²⁸ Further, the Department of State declared that it would not accept any candidate for Canal Administrator appointed by the Panamanian government,²⁹ even though the 1977 Panama Canal Treaty provided that a Panamanian was to replace a United States national as Administrator on January 1, 1990.³⁰ The government of Panama viewed this pressure by the United States as interference in Panama's internal affairs and as an indication that the United States might renege on its treaty obligation to transfer control of the Canal to Panama. It complained about the maneuvers to the Security Council, portraying them as an attempt to intimidate Panama.³¹

In September 1989, when the newly-installed government took office, the United States refused to recognize it and suspended the importation of Panamanian sugar.³² In October, the United States played a role in encouraging an unsuccessful military coup against General Noriega;³³ in November, the United States military made serious contingency plans to invade Panama. Moreover, on November 30, the United States added an additional economic sanction, refusing to permit Panamanian-registered ships to dock at U.S. ports.³⁴ Since Panama gained significant revenue by allowing ships to use Panamanian registry as a "flag of convenience," this action dealt a major blow to Panama's economy.³⁵

In response to this sanction, on December 15, 1989, the National Assembly of Panama adopted a resolution stating that Panama and the United States were "in a state of war."³⁶ The following day, P.D.F. soldiers shot and killed a U.S. military officer in Panama City. On December 17, the United States decided to invade Panama.³⁷ On December 20 it carried out the invasion, forcing General Noriega from power and

28. *U.S. Is Faulted on Military Maneuvers in Panama*, *supra* note 25.

29. *Aide to Noriega Is Sworn In; U.S. Won't Recognize Him*, N.Y. Times, Sept. 2, 1989, at A3, col. 5.

30. 1977 Panama Canal Treaty, *supra* note 11, art. 3(3)(c).

31. *Panama, United States Again Before Council*, *supra* note 27; *Panama Urges U.N. to Send Observers*, N.Y. Times, Aug. 12, 1989, at A3, col. 4.

32. *U.S. Severs Diplomatic Contact with Noriega Regime*, 89 DEP'T ST. BULL. 69 (Nov. 1989) (President's Statement of Sept. 1, 1989); *Economic Measures Against Panama*, 89 DEP'T ST. BULL. 69 (Nov. 1989) (Department Statement of Sept. 12, 1989); *U.S. Expands Its Sanctions Against Panama*, N.Y. Times, Sept. 13, 1989, at A5, col. 1.

33. *Bush Aides Admit a U.S. Role in Coup, and Bad Handling*, N.Y. Times, Oct. 6, 1989, at A1, col. 6.

34. *US Imposes Ban on Ships under Panamanian Flag*, Wall St. J., Dec. 1, 1989, at B2, col. 5.

35. *Rivals Try to Flag Down Panama Ship Business*, L.A. Times, Dec. 19, 1989, at A8, col. 1.

36. *Noriega Appointed "Maximum Leader"*, Wash. Post, Dec. 16, 1989, at A21, col. 1.

37. *Excerpts From Briefing on U.S. Military Action in Panama*, N.Y. Times, Dec. 21, 1989, at A20, col. 1.

facilitating the installation of Guillermo Endara as president but remaining for the time being in military occupation of Panama.³⁸

The United States, as indicated, put forward only two legal bases for the invasion. In statements to the United Nations and to the Organization of American States, the Department of State said that these bases were: (1) self-defense; and (2) protection of the Panama Canal.³⁹ While it is possible that neither was the motivating factor behind the invasion, the invasion would be lawful nonetheless if either reason provides a justification under applicable principles of international law. This article proceeds next to analyze these two asserted justifications. It then addresses the two additional objectives cited by the United States but not asserted as legal justifications: the promotion of democracy in Panama, and the arrest of General Noriega in order to prosecute him on drug trafficking charges.

II. The Claim of Self-Defense

The first of the United States legal justifications was self-defense, which it claimed on three bases: (1) that the National Assembly had declared war on the United States on December 15; (2) that the December 16 shooting was an attack on the United States; and (3) that paramilitary elements affiliated with the Panamanian government were planning to attack United States civilians in Panama.

A. *Declaration by Panama of a State of War*

On December 15, the Panama National Assembly adopted a resolution stating: "It is declared that the Republic of Panama is in a state of war while there is aggression against the people of Panama from the United States of America."⁴⁰ "Aggression" referred to the United States economic sanctions and recent military maneuvers.⁴¹ The resolution was a reaction to United States pressure, which most recently had been intensified by the declaration of a new policy of forbidding Panamanian-registered vessels to dock in United States ports.⁴² By the same resolution, the

38. *U.S. Forces Gain Wide Control in Panama; New Leaders Put In But Noriega Gets Away*, N.Y. Times, Dec. 21, 1989, at A1, col. 6.

39. BUREAU OF PUB. AFF., U.S. DEP'T OF STATE, CURRENT POLICY NO. 1240, PANAMA: A JUST CAUSE 1 (1990) [hereinafter PANAMA: A JUST CAUSE] (statement of T. Pickering, U.S. Permanent Representative to the United Nations); *id.* at 3 (statement of L. Einaudi, U.S. Permanent Representative to the O.A.S.).

40. *U.S. Forces Gain Wide Control in Panama; New Leaders Put In But Noriega Gets Away*, *supra* note 38, at A18, col. 3.

41. *Noriega Appointed "Maximum Leader"*, *supra* note 36; *Noriega's "State of War" Seen as Quest for Backing*, Wash. Post, Dec. 20, 1989, at A32, col. 1.

42. *US Imposes Ban on Ships under Panamanian Flag*, *supra* note 34.

National Assembly appointed General Noriega as the "chief of government" and as the "maximum leader of national liberation" to deal with the situation created by the "state of war."⁴³ President Bush cited this resolution as a factor that, among others, gave the United States a right to intervene.⁴⁴

B. *December 16 Attack on U.S. Nationals*

Administration officials also cited incidents of violence that occurred in Panama City on December 16. A U.S. military officer, Marine Lieutenant Robert Paz, was killed at a P.D.F. checkpoint near the P.D.F. headquarters in Panama City.⁴⁵ Four off-duty U.S. officers in an automobile drove past the checkpoint, whereupon P.D.F. soldiers fired at them, killing Lieutenant Paz. A P.D.F. communiqué claimed that the four U.S. officers fired first, wounding two Panamanian civilians and one soldier.⁴⁶ According to the U.S. Department of Defense, however, the four officers, unarmed, stopped at the checkpoint, having lost their way. P.D.F. soldiers pointed weapons at them and reached into the car and pulled at their clothing. Fearing for their safety, the officers drove away.⁴⁷ The P.D.F. soldiers fired immediately, killing Lieutenant Paz and wounding another officer.

The Department of Defense also stated that a United States Navy officer and his wife witnessed this incident and were observed by other, reportedly intoxicated,⁴⁸ P.D.F. soldiers, who took them into custody and held them for four hours, during which time the soldiers questioned them, beat the officer, and sexually threatened his wife.⁴⁹

Leonardo Kam, Foreign Minister of Panama, called the checkpoint incident "a grave escalation in the permanently hostile policy of provocation" of Panama by the U.S. military; President Bush labelled it an "outrage," and a White House spokesperson denounced it and the December 15 resolution, stating that they created a "climate of aggression."⁵⁰ Even though the P.D.F. claimed that the U.S. personnel had been at fault in

43. *Noriega Appointed "Maximum Leader"*, *supra* note 36.

44. *A Transcript of Bush's Address on the Decision to Use Force in Panama*, N.Y. Times, Dec. 21, 1989, at A19, col. 1.

45. *Pair of Incidents Pushed Bush Toward Invasion*, Wash. Post, Dec. 24, 1989, at A16, col. 2.

46. *U.S. Assails Panama in Killing of GI*, Wash. Post, Dec. 18, 1989, at A1, col. 6; *President Calls Panama Slaying a Great Outrage*, N.Y. Times, Dec. 19, 1989, at A1, col. 1.

47. *Excerpts From U.S. Account of Officer's Death in Panama*, N.Y. Times, Dec. 18, 1989, at A8, col. 3.

48. *Pair of Incidents Pushed Bush Toward Invasion*, *supra* note 45.

49. *Excerpts From U.S. Account of Officer's Death in Panama*, *supra* note 47.

50. *President Calls Panama Slaying a Great Outrage*, *supra* note 46.

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the incident, P.D.F. personnel told U.S. officials that the checkpoint incident was an isolated and unintended one.⁵¹ This communication, while short of an apology, suggested that the incident was not part of a plan to attack U.S. personnel.

Explaining the intervention, President Bush said that he “took this action only after reaching the conclusion that . . . the lives of American citizens were in grave danger.”⁵² Secretary of State Baker said that the decision to invade was made on December 17, the day following these incidents.⁵³ The White House statement announcing the intervention linked the National Assembly’s resolution to the December 16 incidents: “Last Friday, Noriega declared a state of war with the United States. The next day, the P.D.F. shot to death an unarmed American serviceman, wounded another, seized and beat another serviceman and sexually threatened his wife. Under these circumstances, the President decided he must act to prevent further violence.”⁵⁴

C. Possible Future Attacks on U.S. Citizens

Throughout 1988 and 1989, the United States had complained of harassment of U.S. military personnel by the P.D.F. It protested a November 1988 incident in which P.D.F. soldiers allegedly beat and threatened to kill a noncommissioned officer after he parked a military vehicle in a no-parking zone at the Panama City airport.⁵⁵ In discussions before the Organization of American States, the United States alleged harassment since February 1988 of both U.S. personnel and Panamanian Canal workers, but acknowledged in August 1989 that “[r]ecently this harassment of canal workers and of our military personnel has diminished notably.”⁵⁶

The United States, in justifying the invasion as necessary to protect its nationals from continued harassment, cited these past incidents. Echoing the 1988 and 1989 complaints, Ambassador Pickering described a two-year “systematic campaign to harass and intimidate U.S. and Panamanian employees of the Panama Canal Commission and the U.S. forces” and referred to hundreds of incidents of “provocative and intoler-

51. *Id.*

52. *A Transcript of Bush’s Address on the Decision to Use Force in Panama*, *supra* note 44.

53. *Excerpts From Statement by Baker on U.S. Policy*, N.Y. Times, Dec. 21, 1989, at A19, col. 3.

54. *Text of Statement by Fitzwater*, N.Y. Times, Dec. 21, 1989, at A19, col. 2.

55. *Beating in Panama Protested by U.S.*, N.Y. Times, Jan. 13, 1989, at A8, col. 1.

56. *Eagleburger*, *supra* note 19, at 73.

able behavior" which "reached a peak last Friday"⁵⁷ and "threatened American and Panamanian lives as well as canal operations."⁵⁸

President Bush also stated that General Noriega had "publicly threatened the lives of Americans in Panama,"⁵⁹ although the Administration produced no firm evidence of such statements.⁶⁰ Secretary Baker said that the U.S. had information that General Noriega was preparing "an urban commando attack on American citizens in a residential neighborhood" in Panama City.⁶¹ Baker admitted, however, that he could not prove that this information was reliable; furthermore, he indicated that it had been received subsequent to December 17, and thus had not been known at the time of the decision to invade.⁶² Thus, the acts on which the United States relied in its self-defense argument were the December 15 National Assembly resolution, the December 16 incidents, and the prior P.D.F. harassment of U.S. personnel.

III. *Assessment of the Self-Defense Claim*

Asserting that these incidents — the resolution of a "state of war" and the killing of Lieutenant Paz — gave rise to an anticipation of further attacks on U.S. nationals, the Bush Administration claimed that the United States had a right to invade Panama under the doctrine of self-defense. For instance, Secretary Baker said that the U.S. action was

57. For a discussion of the incidents of Dec. 16, 1989, see *supra* text accompanying notes 45-54.

58. PANAMA: A JUST CAUSE, *supra* note 39, at 2.

59. *A Transcript of Bush's Address on the Decision to Use Force in Panama*, *supra* note 44. This claim was an apparent reference to a statement in a speech by General Noriega to the National Assembly on December 15, at the session at which it resolved that Panama was in a "state of war" with the United States. Noriega said, at one point, "We will sit by the canal and watch the bodies of our enemies float by." *Noriega Appointed "Maximum Leader"*, *supra* note 36. Unnamed White House officials said that this statement was a factor in President Bush's decision to invade. "It Will Only Get Worse," *Bush Told Aides; Attacks on U.S. Servicemen Were Key Factor in Decision*, Wash. Post, Dec. 21, 1989, at A31, col. 5. Abraham Sofaer, Legal Adviser to the Department of State, cited this statement as a threat against United States nationals, saying that it was "extremely hostile and charged." Abraham Sofaer, Remarks at American Society of International Law, Proc. Am. Soc'y Int'l L. (84th ann. mtg.), in Washington, D.C. (Mar. 30, 1990) [hereinafter Remarks of Abraham Sofaer]. General Noriega made this statement, however, in explaining that Panama would not disrupt shipping in the Canal, as indicated by the fact that his next sentence was, "But we will never destroy the canal." *Noriega Appointed "Maximum Leader"*, *supra* note 36. He was saying that the P.D.F. would do whatever it could to protect the canal. He was not threatening imminent assaults on United States nationals resident in Panama.

60. *But see US-Panama Tensions High After Slaying of US Officer*, Christian Sci. Monitor, Dec. 19, 1989, at 6, col. 1 (unnamed member of Panama National Assembly says appropriate policy is to "kill gringos").

61. *Excerpts From Statement by Baker on U.S. Policy*, *supra* note 53.

62. *Id.*

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fully in accordance with international law. The United States, under international law, has an inherent right of self-defense, as recognized in Article 51 of the United Nations Charter and Article 21 of the O.A.S. Charter, which entitles us to take measures necessary to defend our military personnel, our United States nationals and U.S. installations.⁶³

The United States, however, asserted self-defense in the face of a strong prohibition in international law against use of force by one state against another. Under the United Nations Charter, states must settle disputes by peaceful means⁶⁴ and may not use force "against the territorial integrity or political independence" of other states.⁶⁵ The Charter provides that, by way of exception, force may be used in self-defense by a state "if an armed attack occurs" against it.⁶⁶

The states of the Western Hemisphere wrote an even stronger prohibition against the use of force into the Charter of the Organization of American States, to which both Panama and the United States are parties.⁶⁷ Drafted against the background of a series of military interventions by the United States in Central America in the early twentieth century,⁶⁸ the Charter states in Article 18 that "[n]o 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."⁶⁹ In Article 20, the Charter declares that "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 whatever."⁷⁰

Before the United States can claim a right of self-defense arising from the National Assembly's resolution and the December 16 incidents, it must demonstrate that these actions constituted an "armed attack" on the United States within the meaning of Article 51 of the United Nations Charter.

63. *Id.* "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." Charter of the Organization of American States, art. 21, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 [hereinafter O.A.S. Charter]. This provision is generally read to be consistent with the restrictive interpretation of self-defense under Article 51 of the U.N. Charter. See A. THOMAS & A. THOMAS, *THE ORGANIZATION OF AMERICAN STATES* 252-53 (1963). For this reason, this article explicitly analyzes the right to self-defense under the U.N. Charter, although implicit in these discussions is the proposition that the analysis would be the same under the O.A.S. Charter.

64. U.N. CHARTER arts. 2(3), 33.

65. *Id.* art. 2(4).

66. *Id.* art. 51.

67. O.A.S. Charter, *supra* note 63.

68. R. STEEL, *PAX AMERICANA* 194-98 (1970).

69. O.A.S. Charter, *supra* note 63, art. 18.

70. *Id.* art. 20.

In this case, the December 15 resolution did not demonstrate an intent to undertake military action against the United States. It was a statement that the United States had committed aggression against Panama by economic means.⁷¹ (This position finds some support in the Charter of the Organization of American States, which provides that "[n]o State may use . . . coercive measures of an economic . . . character in order to force the sovereign will of another State.")⁷² The resolution was more a statement that the United States had initiated war with Panama than it was a statement of Panamanian intent to initiate war against the United States.⁷³

The December 15 resolution was not Panama's first reference to a "state of war" with the United States. In August 1989, the United States held military maneuvers in Panama. Described in the press as "conspicuous," they included the sending of armored personnel carriers through streets near Panama City.⁷⁴ Panama charged that U.S. soldiers had engaged in "unauthorized searching of civilians" and had committed "acts of intimidation against the population."⁷⁵ Panama asserted before the United Nations Security Council that the maneuvers violated the Canal treaties and created "a state of imminent war."⁷⁶ Yet no violent acts by Panama against the United States or its nationals immediately followed this reference to a "state of war."

A state the size of Panama could not easily commence a war against a state the size of the United States, particularly with 12,000 U.S. troops stationed in its territory, and there are no indications that Panama intended to start such a war or to systematically assault U.S. nationals in Panama. Instead, the pronouncement of a state of war with the United States was evidently a predicate for granting General Noriega the position of "chief of government."⁷⁷

Thus, the National Assembly's resolution was not an "armed attack" that would invoke a right of self-defense under Article 51 of the United

71. *Noriega Appointed "Maximum Leader"*, *supra* note 36.

72. O.A.S. Charter, *supra* note 63, art. 19.

73. *See US Policy of Grinding Down Noriega Stalls*, *Christian Sci. Monitor*, Dec. 20, 1989, at 1, col. 3.

74. *U.S. Is Faulted on Military Maneuvers in Panama*, *supra* note 25.

75. *Panama Urges U.N. to Send Observers*, *supra* note 31.

76. *Id.*; *see also Panama, United States Again Before Council*, *supra* note 27.

77. *Noriega Appointed "Maximum Leader"*, *supra* note 36; *Noriega's "State of War" Seen as Quest for Backing*, *supra* note 41. White House Press Secretary Fitzwater said that both the resolution about a "state of war" and the elevation of General Noriega to maximum leader were aimed at forcing the rule of General Noriega on the Panamanian people. *Panama Assembly Names Noriega Government Chief*, *L.A. Times*, Dec. 16, 1989, at A4, col. 1.

Nations Charter.⁷⁸ Panama's National Assembly did not declare war on the United States. But even if it had, the declaration would not constitute aggression. A nation commits aggression only when it mounts an "armed attack," and a verbal declaration of war is not an "armed attack."⁷⁹ Self-defense requires an attack — under one view an attack that has commenced, and under another, an attack that is imminent.⁸⁰ The fact that an attack may be planned some time in the future is not sufficient.

The United States claimed that it acted to prevent imminent attacks on U.S. personnel, both military and civilian. But such attacks do not constitute an attack on the United States. The General Assembly Definition of Aggression includes, as aggression, an attack on the armed forces of another state.⁸¹ It does not, however, include attacks on civilians. A state which attacks the civilian nationals of another state is liable for reparations to that state,⁸² but its actions do not constitute an armed attack on it.⁸³

Under prevailing principles governing the use of force, the United States could not validly claim self-defense as a justification for its invasion of Panama. Its assertion of self-defense, however, does represent a logical progression in a series of expansive interpretations the Department of State gave to the right of self-defense during the 1980s. In a number of instances in which it used force against other states in the past decade, the United States justified its actions with arguments that exceeded accepted international law norms in four respects. In particular, the United States (1) gave a broad reading to the concept of anticipatory self-defense; (2) did not demonstrate facts necessary to justify its uses of force; (3) asserted that attacks on its citizens could constitute an attack

78. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

79. *Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), reprinted in 13 I.L.M. 710 (1974) [hereinafter *Definition of Aggression*]; A. RIFAT, *INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW* 267-77 (1979).

80. See *infra* notes 84-86.

81. *Definition of Aggression*, *supra* note 79, art. 3(d).

82. *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. (special supp.) 133 (1929) (art. 7).

83. Attacks on individual military personnel also do not to constitute aggression against the state under the General Assembly's Definition of Aggression, which requires an attack "on the land, sea or air forces, or marine and air fleets of another State." *Definition of Aggression*, *supra* note 79, art. 3(d). This formulation appears to contemplate attacks on organized forces rather than assaults on individual military personnel. This conclusion is reinforced by the statement in article 2 that an act that might otherwise qualify as aggression should not be so considered if "the acts concerned or their consequences are not of sufficient gravity." *Id.* art 2.

on itself as a state; and (4) ignored the requirement of proportionality between the levels of force used by the attacking state and the United States.

A. *Anticipatory Self-Defense*

The assertion of self-defense for the Panama intervention was not a claim that an "armed attack" had occurred but a claim that such an attack was anticipated. It was thus a claim of a right to use force in expectation of the use of force by Panama. Given the United Nations Charter Article 51 requirement that an armed attack occur before force may be used, most publicists deny that a state may attack in anticipation of an expected attack,⁸⁴ and few states have invoked the concept.⁸⁵ Those publicists who support the doctrine have said that the force anticipated must be imminent.⁸⁶ In several incidents in the 1980s when it used force against another state, the United States relied on a claim of anticipatory self-defense under circumstances in which the imminence of the target state's use of force was not self-evident.

In its 1983 invasion of Grenada, for example, the Department of State relied on an asserted likelihood that Grenada would attack neighboring states. President Reagan said Grenada was "being readied as a major military bastion to export terror and undermine democracy."⁸⁷ President Reagan relied on a request to the United States for intervention from the Organization of Eastern Caribbean States (O.E.C.S.), a request that the O.E.C.S. made on the theory that Grenada might attack other Caribbean states.⁸⁸ Neither President Reagan nor the O.E.C.S., however, claimed

84. P. JESSUP, A MODERN LAW OF NATIONS 166-67 (1948); L. HENKIN, HOW NATIONS BEHAVE 141-45 (1979); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963) [hereinafter I. BROWNLIE, INTERNATIONAL LAW]; Brownlie, *The Principle of Non-Use of Force in Contemporary International Law*, in THE NON-USE OF FORCE IN INTERNATIONAL LAW 17, 24 (W. Butler ed. 1989) [hereinafter Brownlie, *Principle*].

85. Brownlie, *Principle*, *supra* note 84, at 24; Schachter, *In Defense of International Rules on Use of Force*, 53 U. CHI. L. REV. 113, 123 (1986) [hereinafter Schachter, *In Defense*] (stating that most U.N. members favor restrictive interpretation of article 51, limiting it to an "armed attack" that has occurred). One of the most often cited examples of anticipatory self-defense is Israel's attack on Egypt in June 1967, to which the international reaction was mixed. The reason for the lack of wide condemnation was due in part to the fact that Israel initially claimed, falsely, that Egypt had attacked first, and this claim was believed by many states. When it later acknowledged having attacked first and asserted anticipatory self-defense, many states did not understand that in fact Israel had not expected an attack by Egypt when it invaded. See J. QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE 161-67 (1990).

86. D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 184-93 (1958).

87. Reagan, *America's Commitment to Peace*, 83 DEP'T ST. BULL. 1, 4 (Dec. 1983).

88. Grenada: *Collective Action by the Caribbean Peace Force*, 83 DEP'T ST. BULL. 68 (O.E.C.S. Statement).

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that any such attacks were imminent.⁸⁹ The United States also claimed that Grenada planned to take United States citizens in Grenada as hostages, but it produced no information about the imminence of any expected hostage-taking, and there was little reason to believe that such acts would occur.⁹⁰

In 1986, the United States bombed sites in Libya, inflicting substantial loss of life and property damage,⁹¹ and asserted in justification that Libya was likely to undertake terrorist attacks against U.S. citizens in the future.⁹² Claiming to possess information about specific attacks planned on United States installations,⁹³ the Reagan Administration stated, "It is our hope this action will pre-empt and discourage Libyan attacks against innocent civilians in the future."⁹⁴

In Panama, the United States claim of self-defense rested on what the United States claimed was a threat of force by Panama. Some commentators have suggested that force should be permissible in self-defense in the face of a credible, serious threat of force, and they cite as an example the situation in Europe on the eve of World War II.⁹⁵ The rationale is that the other European powers could have prevented the war by preemptive

89. Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 U. MIAMI INTER-AM. L. REV. 271, 305 (1986-87).

90. Quigley, *supra* note 89, at 281; Brownlie, *Principle*, *supra* note 84, at 23.

91. Hersh, *Target Qaddafi*, N.Y. Times, Feb. 22, 1987, § 6 (Magazine), at 17; Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 179 (1987).

92. *Plots on Global Scale Charged*, N.Y. Times, Apr. 15, 1986, at A1, col. 3.

93. *Id.*; *Announcement by Speakes*, N.Y. Times, Apr. 15, 1986, at A13, col. 5; Intoccia, *supra* note 91, at 185, 190-91 (Administration asserted Libyan responsibility for Mar. 25, 1986 bombing of discotheque in West Germany frequented by U.S. servicemen); *id.* at 190 (Administration said it had "solid evidence about other attacks Qadhafi has planned against the United States' installations and diplomats and even American tourists").

94. *Announcement by Speakes*, *supra* note 93. For an analysis that suggests that the attack was a reprisal rather than an act of self-defense, see Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 729-32 (1986).

Although it was not directed against another state, the United States use of force in 1985 to divert an Egyptian airliner to detain suspected terrorists in the *Achille Lauro* hijacking raises similar issues. Claiming that "Americans are . . . targets of continued terrorism," President Reagan justified the action as a deterrent to future terrorist acts by the suspects or other terrorists. *Transcript of White House News Conference on the Hijacking*, N.Y. Times, Oct. 12, 1985, at A6, col. 1. The Legal Adviser's Office did not raise a claim of self-defense in that instance, but argued instead that the action was a lawful countermeasure to Egypt's breach of its obligation to either try or extradite the suspects. Concerning that theory, see *Plane Diversion Raises Legal Issues*, N.Y. Times, Oct. 11, 1985, at A11, col. 4.

Moreover, in the United Nations Security Council discussion of a similar aircraft diversion by Israel in 1986, the United States vetoed a resolution condemning the diversion as an unlawful use of force. The United States representative stated that "the ability to take such action in carefully defined and limited circumstances is an aspect of the inherent right of self-defense recognized in the United Nations Charter." 41 U.N. SCOR (2655th mtg.) at 113, U.N. Doc. S/PV.2655 (1986).

95. Schachter, *In Defense*, *supra* note 85, at 134.

action against Germany on the eve of its initiation of the war.⁹⁶ Whatever the validity of such an approach, the purported Panamanian threat was far from being so clear and significant that waiting would have jeopardized the United States.

B. *Proof of Facts to Show That an Attack Might Occur*

One component of demonstrating that an attack is imminent is proving before "an impartial international tribunal" that it will occur at all.⁹⁷ Before the International Court of Justice in *Nicaragua v. U.S.*, the United States argued that the Court did not have jurisdiction under the United Nations Charter over issues involving an ongoing use of force, and that therefore the United States did not have to present evidence to justify to the Court its assertion of the need for use of force in self-defense.⁹⁸ It contended that a decision by the Court against the United States would have "the effect of impairing the inherent right of a State to engage in individual or collective self-defense," as guaranteed by Article 51 of the United Nations Charter.⁹⁹ The Legal Adviser to the Department of State said that "[f]or the United States to recognize that the ICJ has authority to define and adjudicate with respect to our right of self-defense . . . is effectively to surrender to that body the power to pass upon our efforts to guarantee the safety and security of this nation."¹⁰⁰

The International Court of Justice disagreed with the United States argument.¹⁰¹ In his dissenting opinion in *Nicaragua v. U.S.*, Judge Schwebel agreed with the majority that a self-defense claim raises a justiciable issue. In support he quoted Hersch Lauterpacht, who wrote that a claim that self-defense is "above the law and not amenable to evaluation by law" is

self-contradictory, inasmuch as it purports to be based on legal rights, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the

96. *Id.*

97. D. BOWETT, *supra* note 86, at 105.

98. Counter-Memorial Submitted by the United States of America (The Questions of the Jurisdiction of the Court to Entertain the Dispute and of the Admissibility of Nicaragua's Application) (*Nicar. v. U.S.*), 1984 I.C.J. Pleadings (1 Military and Paramilitary Activities In and Against Nicaragua) ¶ 451 (Aug. 17, 1984) [hereinafter U.S. Counter-Memorial]; *id.* at ¶ 516.

99. *Id.* at 345.

100. *U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs, House of Representatives*, 99th Cong., 1st Sess. 28 (1985) (statement of A. Sofaer, Legal Adviser, Dep't of State).

101. Case Concerning Military and Paramilitary Activities In and Against Nicaragua, Merits, Judgment (*Nicar. v. U.S.*), 1986 I.C.J. 14, 27 [hereinafter *Nicaragua: Merits*].

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question of the right of recourse to war in self-defense is in itself capable of judicial decision.¹⁰²

Another analyst has said, respecting the rules on use of force, that it is "incompatible with the concept of law that an entity subject to the law should have the final authority to determine whether a legal rule applies to it."¹⁰³ One author has further suggested that the apprehensions of a state purportedly acting in self-defense "must be confirmed by objective factors reflective of an attack reasonably certain to occur."¹⁰⁴ The International Court took that approach with its finding of justiciability in *Nicaragua v. U.S.* and its assessment of the United States basis for apprehension.¹⁰⁵

No firm standard of proof has been devised for the determination of issues of fact in international litigation. The International Court of Justice imposes proof burdens with respect to facts at issue, typically placing the burden on the state asserting a position.¹⁰⁶ Only rarely, however, have international tribunals referred to or addressed the question of standard of proof, probably because of the influence of Continental legal systems, which do not draw the distinctions developed in the common law between proof by a preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt, but refer only to the need to establish the truth, without indicating a degree of certainty.¹⁰⁷

Whichever standard of proof might be required, the United States did not meet it with respect to its action in Panama. It provided little proof of future attacks. The Department of State provided no information beyond the press statements made on the day of the invasion and brief statements before the Organization of American States and United Nations.¹⁰⁸ Nor, in the indicated instances of use of force by the United

102. *Id.* at 286.

103. Schachter, *In Defense*, *supra* note 85, at 120.

104. Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, 19 CASE W. RES. J. INT'L L. 129, 151 (1987).

105. *Nicaragua: Merits*, *supra* note 101.

106. *Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 39 (Lauterpacht, J., sep. op.); S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 580 (1985).

107. See generally J.-F. Lalive, *Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de justice*, 7 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT/ANNUAIRE SUISSE DE DROIT INTERNATIONAL 77 (1950). For a rare example of reference to standard of proof, see *Costello Case*, quoted in D. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 170 (1975) (requiring "concrete and convincing evidence" from claimant state before U.S.-Mexico arbitral tribunal).

108. PANAMA: A JUST CAUSE, *supra* note 39.

States in Grenada and Libya during the 1980s, did it demonstrate the likelihood of the attacks that it said justified its actions.¹⁰⁹

C. *Attack on Citizens as Attack on the State*

The claim of self-defense to justify the Panama action reflects another position taken by the United States during the 1980s, namely, that an attack on its citizens may constitute an "armed attack" giving rise to a right of self-defense. The United States justified the invasion of Grenada, in part, on a claim that United States citizens in Grenada might be victimized by the government of Grenada.¹¹⁰ It defended its bombing of Libya, as indicated, as a pre-emption of possible future attacks by Libya on United States citizens.¹¹¹ In each of these incidents, the United States took the position that an attack on United States citizens abroad constitutes an attack on the United States itself, entitling it to use force in self-defense.

When the United Nations General Assembly wrote a definition of aggression in 1974, it included attacks on a state's armed forces, but not on its citizens.¹¹² Nevertheless, according to one view, a state has a right to intervene militarily in another state to protect its nationals if they are in danger; this right is said to flow from the right of self-defense.¹¹³ The danger to the nationals, however, must be "actual or imminent,"¹¹⁴ and such action is "an exceptional measure, available as a last resort to prevent irreparable injury."¹¹⁵

This asserted justification for intervention has seldom been invoked since the United Nations Charter entered into force. It has been criticized on the ground that it is open only to more powerful states, and that it is susceptible to abuse by a state that actually desires to intervene for another reason.¹¹⁶ It has been regarded with particular suspicion in situations such as the instant one, where the intervening state removed the existing government.¹¹⁷ Although an intervening state might argue that the only way to protect endangered nationals is to change the govern-

109. See *supra* notes 87-94 and accompanying text.

110. Quigley, *supra* note 89, at 275.

111. *Plots on Global Scale Charged*, *supra* note 92.

112. *Definition of Aggression*, *supra* note 79.

113. D. BOWETT, *supra* note 86, at 87; A. MCNAIR, *THE LAW OF TREATIES* 209-10 (1961); Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 *RECUEIL DES COURS* 451, 503 (1952).

114. D. BOWETT, *supra* note 86, at 88, 99; Waldock, *supra* note 113, at 503 (justification if an "instant and overwhelming need of action to save the life of nationals").

115. D. BOWETT, *supra* note 86, at 98.

116. I. BROWNLIE, *INTERNATIONAL LAW*, *supra* note 84, at 338-39.

117. Schachter, *The Right of States to Use Armed Force*, 82 *MICH. L. REV.* 1620, 1632 (1984) [hereinafter Schachter, *Right of States*].

ment, that reasoning has not gained acceptance. For example, when the United States intervened in 1965 in the Dominican Republic, its assertion of a need to change the government cast doubt on the good faith of the original claim of a need to protect its nationals.¹¹⁸ And when the United States made the same argument to justify its Grenada invasion, there too it was met with suspicion, in part because the United States removed the existing government from power.¹¹⁹

Although states have typically condemned unilateral interventions justified by the intervening state as protection of endangered nationals, the reactions have not gone beyond condemnatory resolutions. Nevertheless, the lenient reactions do not indicate that the condemnation is not genuine. It is a reflection, rather, of the state of international organization and of the inability of the international community to cope with military conflict. The condemnation has typically come from both developing and developed states, although the former have generally been harsher in their criticism and less willing to consider the circumstances that led the intervening state to act.¹²⁰ This difference reflects the fact that a rule permitting intervention to protect endangered nationals threatens the developing states more than it does the developed states. The developing states are more concerned about pretextual use of the doctrine, since intervening states invoking it have often acted for other reasons.¹²¹

While the International Court of Justice has never ruled on the validity of an intervention to protect nationals, its ruling in the *Corfu Channel* case¹²² suggests that intervention is not justified even if the intervening state does not intend to change the government of the other state, and even if it is acting in response to action by that state that is both unlawful and hazardous to human life. While acknowledging that Albania had violated international law by failing to notify shippers of the existence of mines in its waters that had killed personnel on British ships and that constituted a continuing threat to shipping, the Court ruled that Britain

118. M. BENNOUNA, *LE CONSENTEMENT À L'INGÉRENCE MILITAIRE DANS LES CONFLITS INTERNES* 180 (1974); cf. *Presidential Text*, N.Y. Times, Apr. 29, 1965, at A14, col. 1 (President Johnson states that he is dispatching troops to Dominican Republic "to protect American lives"); see also *Text of Johnson's Address on U.S. Moves in the Conflict in the Dominican Republic*, N.Y. Times, May 3, 1965, at A10, col. 1 (President Johnson says U.S. intervened "to protect American lives"; also that U.S. was responding to danger of establishment of Communist government in Dominican Republic).

119. Quigley, *supra* note 89, at 278-80; Brownlie, *Principle*, *supra* note 84, at 23.

120. See, e.g., *infra* notes 126-27 and accompanying text.

121. Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 277 (1985).

122. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4 [hereinafter *Corfu Channel*].

had no right to violate Albanian territorial sovereignty to remove the mines.¹²³

The Court regarded "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot . . . find a place in international law."¹²⁴ It criticized such a right of intervention as one that, "from the nature of things," could be used only by "the most powerful States."¹²⁵

Military interventions to assist endangered nationals have been controversial even when the danger was obvious and the intervening state did not try to overthrow the government of the target state. When Israel intervened militarily in Uganda in 1976, sending troops to free nationals held hostage, the Organization of African Unity condemned the action,¹²⁶ and in United Nations Security Council discussions most Third World and socialist states did likewise, although most Western states found it justifiable.¹²⁷

Nevertheless, even if it were acceptable to use force to rescue endangered nationals, such a rule would not justify the United States action in Panama, since, as indicated, there was no showing of an imminent danger to United States nationals. Furthermore, such a justification would fail for the additional reason that overthrowing Panama's government was a disproportionate response to the purported danger. This aspect of the operation requires exploration of the doctrine of proportionality in the law of self-defense.

D. *Requirement of Proportionality in Use of Force*

While no treaty norm addresses the issue of proportionality, a state acting in self-defense may use only such force as is necessary to repel an attack.¹²⁸ This rule flows from the concept that a state may use force defensively only to the extent necessary.¹²⁹ Thus, a requirement of proportionality is implicit in the United Nations Charter Article 51 provi-

123. *Id.*

124. *Id.* at 35.

125. *Id.*

126. 31 U.N. SCOR (1941st mtg.) at 48, U.N. Doc. S/PV.1941 (1976) (statement of Mr. Salim, Tanzania).

127. Brownlie, *Principle*, *supra* note 84, at 23; 13 U.N. MONTHLY CHRON., Aug.-Sept. 1976, at 15, U.N. Doc. S/PV.1941 (1976); McDowell, *United Nations: Security Council Debate and Draft Resolutions Concerning the Operation to Rescue Hijacked Hostages at the Entebbe Airport*, 15 I.L.M. 1224 (1976).

128. I. BROWNLIE, INTERNATIONAL LAW, *supra* note 84, at 261-64; Schachter, *Right of States*, *supra* note 117, at 1637-38; D. BOWETT, *supra* note 86, at 105 (as applied to force against another state to assist endangered nationals).

129. I. BROWNLIE, INTERNATIONAL LAW, *supra* note 84, at 261.

sion on self-defense. In this case, both the overthrow of Noriega's regime and the actual means employed to bring about this result exceeded the bounds of proportionality.

Issues of proportionality have typically arisen where the putative aggressor has used a given amount of force, and the putative defender has responded with counter-force. The counter-force then can be measured against the original force. But the application of the proportionality rule to force used in anticipatory self-defense is problematic. Where no force has been used by the putative aggressor, there is no standard by which to establish how much force can lawfully be used by the putative defender. This problem has led one authority to conclude that to use force "when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality."¹³⁰ Stated differently, any anticipatory use of force is out of proportion.

But assuming *arguendo* that Panama was about to attack, that anticipatory use of force is permissible, and that force against nationals is an "armed attack" against their state, the level of force used by the United States would still render its self-defense claim problematic. The United States claimed a need to remove the existing government of Panama in order to ensure that attacks would not occur against United States nationals. The United Nations Security Council, however, has at other times condemned military action as unlawful when it went that far. In analyzing responsive military action, the Security Council has frequently declared that the scale of the response rendered the action unlawful.¹³¹ In Panama, it is doubtful that a massive troop invasion¹³² to overthrow the existing government was a proportional response to any attack that Panama might have been planning.¹³³

Furthermore, the amount of destruction inflicted by the invasion exceeded the bounds of proportionality. In assaulting the P.D.F. headquarters in Panama City, United States forces, using aerial bombardment, levelled several city blocks in the vicinity of the headquarters.¹³⁴ It is estimated that between two hundred and several thousand

130. *Id.* at 259.

131. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 11-13, 33-36 (1972). Legal Adviser Sofaer said that "only that result [the removal of Gen. Noriega from power] could end the attacks on Americans." Remarks of Abraham Sofaer, *supra* note 59.

132. *Officials Say Panama Taking More Time and Troops Than Expected*, Wash. Post, Dec. 23, 1989, at A6, col. 6.

133. *U.S. Cites Self-Defense; Legal Scholars Skeptical*, *supra* note 1 (quoting Prof. Schachter that invasion violated requirement of proportionality).

134. *With the Dictator Disabled, Panama Looks to Rebuild*, Christian Sci. Monitor, Dec. 27, 1989, at 1, col. 4.

persons were killed¹³⁵ and an additional several thousand persons were wounded in the attack.¹³⁶

If a threat of a Panamanian attack actually existed, and if international law permits the use of force in anticipation of an attack on nationals, the United States might justifiably have made a show of force against Panama — for example, by stationing naval vessels off its coasts. But even given such a threat, the United States would not have been justified in causing such extensive damage to persons and property in Panama.

In Panama the United States exceeded proportionality, not only in the invasion itself, but also by interning large numbers of Panamanians. The United States forces detained some 4,800 Panamanians for varying periods, including some who had engaged in military action against U.S. forces and others who had not, but who supported General Noriega.¹³⁷ The United States Army Staff Judge Advocate for the Southern Command classified all the internees as “belligerents” and justified the internments on the grounds of self-defense of the United States forces and protection of the Panama Canal.¹³⁸ But the sheer number of detentions constituted a use of force that was difficult to justify in terms of necessity.

135. *No More Panamas, Bush Aides Predict*, N.Y. Times, Jan. 8, 1990, at A9, col. 1 (estimate of 400 by Deputy Secretary of State Lawrence Eagleburger, estimate of a minimum of 1,000 by former Attorney General Ramsey Clark); *The Invasion's Civilian Toll: Still No Official Count*, N.Y. Times, Jan. 10, 1990, at A9, col. 3; *Panamá sumida en el caos y Noriega continúa prófugo*, La Prensa (Buenos Aires), Dec. 23, 1989, at 1, col. 3 (estimate by representative of overthrown Panamanian government of between 6,000 and 7,000 killed); *Acusan a EE.UU. de esconder una matanza*, La Prensa (Buenos Aires), Dec. 26, 1989, at 2, col. 3 (Red Cross representative says “at least two thousand killed; the morgues of the hospitals are overflowing and there is no more room”); *Invasion Took Its Toll in Deaths, Human Suffering*, Christian Sci. Monitor, Dec. 29, 1989, at 3, col. 1 (estimate of 1,000 civilians killed); *Report from Panama*, GUILD NOTES (Nat'l Law. Guild), Mar.-Apr. 1990, at 1, 5 (estimate of 2,000 civilians killed); Wicker, *Panama and the Press*, N.Y. Times, Apr. 19, 1990, at A25, col. 1 (Army's Southern Command announces 202 civilians and approximately 50 Panamanian soldiers killed).

136. *In Invasion's Wake, Disorder Reigns in Panamanian Capital*, Christian Sci. Monitor, Dec. 22, 1989, at 1, col. 1 (estimate of over 1,000 wounded); INTERNATIONAL COMMITTEE OF THE RED CROSS, BULL. NO. 169, US MILITARY INTERVENTION IN PANAMA 2 (1990) (hospitals in Panama City were “inundated with civilian and military casualties. Over 800 people were treated during the first few days . . . medicines and medical material were in short supply.” The I.C.R.C. brought in two plane-loads of medical supplies to make up the shortfall). Legal Adviser Sofaer justified the tremendous force used by the United States, saying, “[w]ithout total victory the P.D.F. and/or Noriega would have utilized their massive store of weapons to make democratic government impossible. A protracted operation would have been a tactical disaster and would have exposed U.S. civilians to continuing danger.” Remarks of Abraham Sofaer, *supra* note 59.

137. *Captured Panamanians Pose Test of Changing Rules on POWs*, Wash. Post, Dec. 31, 1989, at A18, col. 1; *U.S. Declares It's Releasing Panama Invasion Captives*, N.Y. Times, Jan. 19, 1990, at A9, col. 1.

138. *Captured Panamanians Pose Test of Changing Rules on POWs*, *supra* note 137. Nevertheless, the Staff Judge Advocate stated: “All of the traditional rules were written for the

The United States claim of self-defense in the Panama invasion depends on facts that did not demonstrate an "armed attack." Its reliance on the disputed doctrines of anticipatory self-defense and protection of endangered nationals are undercut by the lack of solid evidence indicating a plan by Panama to attack United States nationals in Panama. Moreover, even if the United States had grounds for some military action against Panama, the action it took exceeded the bounds of proportionality.

The article next turns to the other legal justification asserted by the United States for its action in Panama: the protection of the Panama Canal.

IV. The Claim of Protection of the Panama Canal

President Bush, explaining the invasion, referred to the United States obligation to turn the Canal over to Panama in the year 2000 and said that "[t]he actions we have taken . . . will permit us to honor these commitments."¹³⁹ Secretary Baker said that one objective was "to defend the integrity of United States' rights under the canal treaties."¹⁴⁰ He said that "the United States has both the right and, for that matter, the duty to protect and defend the Canal under Article 4 of the Panama Canal Treaty."¹⁴¹ Article 4 of the Panama Canal Treaty of 1977 states:

The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.¹⁴²

A Department of Justice spokesperson also cited the other 1977 Canal treaty, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal,¹⁴³ as a legal basis for the U.S. intervention.¹⁴⁴ The Neutrality Treaty was concluded to ensure that the Canal remains open to ships of all states.¹⁴⁵ Article 4 of the Neutrality Treaty provides that

classic war. . . . When you take those rules and translate them to Panama, they don't work very well." *Id.*

139. *A Transcript of Bush's Address on the Decision to Use Force in Panama*, *supra* note 44.

140. *Excerpts From Statement by Baker on U.S. Policy*, *supra* note 53.

141. *Id.*

142. 1977 Panama Canal Treaty, *supra* note 11, art. 4(1). Ambassador Pickering also cited article 4 of the Panama Canal Treaty as a legal basis for the United States action. See PANAMA: A JUST CAUSE, *supra* note 39, at 2.

143. Neutrality Treaty, *supra* note 16.

144. *Administration Says International Agreements Support Its Action*, N.Y. Times, Dec. 21, 1989, at A22, col. 3 (statement of David Runkel).

145. Neutrality Treaty, *supra* note 16, art. 2.

"[t]he United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty."¹⁴⁶

The United States based its claim of a need to use force to ensure Canal operations on the alleged harassment of Canal personnel.¹⁴⁷ It said that the harassment violated Panama's obligation under the Canal treaties to ensure the unimpeded operation of the Canal for the ships of all states.¹⁴⁸ In May 1989 the United States accused Panamanian authorities of harassing a number of U.S. military personnel, evacuated some military dependents from Panama,¹⁴⁹ and claimed that the harassment violated the Canal treaties.¹⁵⁰ The United States also cited as a further treaty violation the arrest by Panamanian military authorities of fifteen employees of a United States firm that provided security for the United States Embassy.¹⁵¹

The United States charged the Panamanian government with a "campaign of harassment" against U.S. military personnel,¹⁵² and in August 1989 the United States went before the United Nations Security Council and cited 900 incidents of harassment since February 1986 by which Panama had violated the Canal treaties.¹⁵³ Also, in August, U.S. military authorities detained nine P.D.F. soldiers and twenty Panamanian civilians who they said were responsible for interfering with the large-scale military maneuvers the United States conducted in Panama.¹⁵⁴ An Administration official said of the harassment: "We intend to enforce our rights under the Panama Canal treaties."¹⁵⁵ Intended by the United States "to reassert United States rights under the Panama Canal treaties and to discourage harassment of American servicemen,"¹⁵⁶ the maneuvers met with criticism from the Organization of American States, which

146. *Id.* art. 4.

147. See *supra* text accompanying notes 55-58.

148. *Administration Says International Agreements Support Its Action*, *supra* note 144 (Secretary of State Baker says harassment is evidence that U.S. rights under Canal treaties were threatened by Noriega).

149. *First Families Arrive in U.S.*, N.Y. Times, May 18, 1989, at A8, col. 3.

150. *Panama Guards at U.S. Embassy Seized*, N.Y. Times, May 20, 1989, at A3, col. 4; *Administration Says International Agreements Support Its Action*, *supra* note 144.

151. *Panama Guards at U.S. Embassy Seized*, *supra* note 150.

152. *Military Arrests Exacerbate U.S.-Panamanian Relations*, N.Y. Times, Aug. 10, 1989, at A8, col. 3.

153. *Panama, United States again before Council*, *supra* note 27 (statement of Herbert S. Okun); see also *Panama Guards at U.S. Embassy Seized*, *supra* note 150 (Department of Defense charged that Panama "violated the canal treaties . . . more than 1,200 times in the last 15 months by harassing United States military personnel and dependents").

154. *Military Arrests Exacerbate U.S.-Panamanian Relations*, *supra* note 152.

155. *Id.*

156. *U.S. Is Faulted on Military Maneuvers in Panama*, *supra* note 25.

labelled them “inopportune” and said that they interfered with its efforts to convince General Noriega to resign.¹⁵⁷

The invasion of Panama thus was the culmination of tensions surrounding the United States approaching obligation to turn the Canal over to Panama. Contrary to the Bush Administration’s argument, however, Panama’s alleged violations of its obligations under the Canal treaties did not give the United States the right to use force against Panama.

V. Assessment of the Claim of Protection of the Panama Canal

The Administration’s claim of a right to use force against Panama on the basis of the Panama Canal treaties encounters both factual and legal problems. Panama had not breached its duty to permit the free transit of ships through the Canal; and even if it had, the Canal treaties do not give the United States a right to intervene militarily against Panama.

First, despite Secretary Baker’s allegations of a “continuing pattern of harassment that we’ve seen going on down there against Americans in the exercise of our treaty rights,”¹⁵⁸ the Canal had continued to operate. The harassment incidents did not amount to a material breach of Panama’s treaty obligation to permit the unimpeded transit of ships.¹⁵⁹ Panama had not indicated an intent to interfere with the Canal’s operation, and there was little reason to believe that the Canal would not continue to function.¹⁶⁰ The conduct of the invasion shows that the United States, despite its rhetoric, was fully aware of this situation; even after the invasion began, United States forces showed no concern that the P.D.F. might try to sabotage the Canal and took no precautions to protect it.¹⁶¹

In fact, the Department of State had acknowledged on November 2, 1989 that Panama had not interfered with Canal operations. In Congressional testimony, Michael G. Kozak, Deputy Assistant Secretary of State for Inter-American Affairs, admitted that “[d]espite [the Noriega] regime[s] efforts to change U.S. nonrecognition policy by harassing U.S.

157. *Id.*

158. *Excerpts From Statement by Baker on U.S. Policy*, *supra* note 53.

159. See Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention has not been ratified by the United States, but the United States has cited article 60 as reflective of customary law. See A. ROVINE, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1973 307, 482-83 (1974).

160. *George Bush, contra reloj*, *El País* (Madrid), Dec. 25, 1989, at 2, col. 1 (stating that “there is no evidence that might prove that Noriega or his forces had any intention of attacking the installations of the waterway”) (translation); *Challenge for Panamanians: A Canal in Transition*, *N.Y. Times*, Jan. 29, 1990, at A3, col. 1 (despite harassment in 1988-89, “ship traffic on the canal was hardly disrupted”).

161. *US Forces Strike Panama in Bid to Oust Strongman*, *Christian Sci. Monitor*, Dec. 21, 1989, at 1, col. 4.

and Panamanian employees of the U.S. forces and the Panama Canal Commission, Noriega has seemingly sought to avoid a direct threat to the canal or a direct challenge to the proper exercise of U.S. rights."¹⁶² Although Kozak said that U.S. rights under the 1977 Canal treaties had not been violated, he did see a possible future threat to Canal operations; in his words, "it becomes clearer each day that Noriega's continuation in power is a threat not only to the interests and freedom of his own people, but also to the canal."¹⁶³ Thus, if the United States did see a threat to the Canal, it was a future, not an immediate, threat.

Furthermore, even if Panama had violated its obligation to permit the free operation of the Canal, such a violation would not clearly give the United States a right to take military action against Panama under any treaty. Although the Neutrality Treaty commits the United States and Panama to maintain "the regime of neutrality,"¹⁶⁴ it is silent on any U.S. military right to defend the Canal.

Concerned with defining the rights of the United States under the Neutrality Treaty, President Carter concluded a "statement of understanding" with Panama's General Omar Torrijos as an interpretation of the Neutrality Treaty.¹⁶⁵ Providing that the United States and Panama shall "defend the Canal against any threat to the regime of neutrality and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal," the statement gives the United States an unequivocal right to use force.¹⁶⁶ The statement, however, also clearly prevents the United States from using force against the government of Panama. It continues:

This does not mean, nor shall it be interpreted as the right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.¹⁶⁷

This language tracks that of Article 2(4) of the United Nations Charter,¹⁶⁸ indicating that the United States was not obtaining a right to use force against Panama itself, except as such force might be authorized

162. BUREAU OF PUB. AFF., U.S. DEP'T OF STATE, CURRENT POLICY NO. 1226, PANAMA CANAL: THE STRATEGIC DIMENSION 3 (1989) (statement of M. Kozak).

163. *Id.*

164. Neutrality Treaty, *supra* note 16, art. 4.

165. *U.S.-Panama Statement of Understanding*, 77 DEP'T ST. BULL. 631 (Nov. 1977).

166. *Id.*

167. *Id.*

168. "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." U.N. CHARTER art. 2(4).

under the United Nations Charter.¹⁶⁹ The Charter, however, gives the United States the right to use force against Panama only in self-defense.¹⁷⁰ Therefore, the Neutrality Treaty does not grant the United States a separate right to intervene against the government of Panama under the guise of defending the Canal.¹⁷¹

Nor does the 1977 Panama Canal Treaty give the United States a right to intervene against the government of Panama, no matter how serious the threats to the Canal. By the Canal Treaty, Panama, "as territorial sovereign, grant[ed] to the United States of America . . . the right[] . . . to protect and defend the Canal"¹⁷² until December 31, 1999.¹⁷³ It gave the United States "primary responsibility to protect and defend the Canal" until that date, including a right to maintain troops in Panama for that purpose.¹⁷⁴

The Canal Treaty gives the United States no extraterritorial rights in Panama; it recognizes the Canal and the land surrounding it as the territory of Panama.¹⁷⁵ The treaty commits the United States to dismantle its Canal Zone Government¹⁷⁶ and to allow Panama to "reassume plenary jurisdiction over the former Canal Zone."¹⁷⁷ Most important, the parties agreed to resolve any dispute arising under the treaty by diplomatic means and, failing that, "to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate."¹⁷⁸

The Canal Treaty thus does not give the United States a right to use military force except for the purpose of defending the Canal. Its effect was in that respect similar to that of the Neutrality Treaty as interpreted in the "statement of understanding."¹⁷⁹ Panama, as the territorial sovereign, did not agree to a use of force against itself. While the Canal Treaty

169. Maier, *United States Defense Rights in the Panama Canal Treaties: The Need for Clarification of a Studied Ambiguity*, 24 VA. J. INT'L L. 287, 303 (1984).

170. U.N. CHARTER art. 51.

171. R. PERRUCHOU, *LE RÉGIME DE NEUTRALITÉ DU CANAL DE PANAMA* 237-38 (1983).

172. 1977 Panama Canal Treaty, *supra* note 11, art. 1(2).

173. *Id.* art. 2(2).

174. *Id.* art. 4(2). The specifics of U.S. military presence were handled in a separate treaty entitled Agreement in Implementation of Article IV of the Panama Canal Treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. 307, T.I.A.S. No. 10032, *reprinted in* 16 I.L.M. 1068 (1977).

175. 1977 Panama Canal Treaty, *supra* note 11, art. 1.

176. *Id.* art. 3(10).

177. *Id.* art. 11.

178. *Id.* art. 14.

179. See *supra* note 165 and accompanying text. Legal Adviser Sofaer has said, to the contrary, that the Panama Canal Treaty gave the United States the right to use military force to protect the Canal from "internal threats." Remarks of Abraham Sofaer, *supra* note 59.

has no explicit provisions on the point, the foregoing discussion of the Canal Treaty's other terms makes it clear that, in the Treaty, Panama granted the United States the right to use force only against entities other than Panama. The Treaty does not permit the United States to use force against Panama.

Both the Canal and Neutrality treaties, moreover, must be read together with the Charter of the Organization of American States.¹⁸⁰ Article 20 of that document, quoted above,¹⁸¹ bars military intervention in the territory of another state. In the context of U.S.-Panama relations and the two Canal treaties, this means, according to one commentator, that "the United States is absolutely prohibited from entering Panama to defend the Canal without Panamanian consent."¹⁸² Thus, the two Canal treaties themselves provide no basis for the United States to insert troops into Panama without the consent of Panama; absent such consent, the clear language of Article 20 of the O.A.S. Charter precludes a presumption that the treaties give the United States any such right.¹⁸³

The Canal and Neutrality treaties must also be read consistently with the United Nations Charter, which prohibits force against the "territorial integrity or political independence" of another state.¹⁸⁴ The United States argued that its use of force, aimed at protecting the Canal, was not directed against Panama's territorial integrity, since the United States had no intent to take territory from Panama or alter its borders. As regards the prohibition on the use of force against Panama's "political independence," the United States might claim that the effect of its action was to make Panama more politically independent than formerly, rather than interfering with Panama's political independence. The International Court of Justice in the *Corfu Channel* case, however, read Article 2(4) as prohibiting any forcible intrusion, even when the aim would not change the boundaries or political order in the other state.¹⁸⁵ The Court ruled that Britain's claimed right to conduct a mine-sweeping operation in Albanian waters in order to ensure the safety of international shipping

180. Maier, *supra* note 169, at 309; see Vienna Convention, *supra* note 159, art. 31(3)(c) (indicating that a treaty is to be construed in light of "any relevant rules of international law applicable in the relations between the parties").

181. See text accompanying note 70.

182. Maier, *supra* note 169, at 309.

183. *Id.*

184. U.N. CHARTER art. 2(4).

185. Schachter, *Right of States*, *supra* note 117, at 1626 (construing *Corfu Channel* opinion as meaning that force is impermissible even when "derogation of territorial sovereignty was limited in time and limited to the aim of securing legal rights").

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was inconsistent with Article 2(4). Thus, Article 2(4) prohibits forcible intrusion into the territory of another state, regardless of the aim.¹⁸⁶

In conclusion, neither the facts nor the law substantiate the Administration's argument that Panama's alleged obstruction of Canal operations gave the United States a right to use force to replace the Panamanian government. While Panama and the United States had not cooperated well during General Noriega's tenure, Panama did not violate its obligations to ensure the smooth functioning of the Canal. But even had it done so, the United States had no legal basis under the two Canal treaties or under international law to send troops to act against the government of Panama.

VI. Promotion of Democracy in Panama

The Bush Administration identified four "objectives" of the action. In addition to the two legal justifications asserted— self-defense and the protection of the Canal— the Administration mentioned two other goals motivating its decision to act in Panama: the promotion of democracy in Panama, and the capture of General Noriega for trial on drug trafficking charges.

President Bush said that one goal of the invasion was "to defend democracy in Panama;"¹⁸⁷ Secretary Baker stated that the United States acted in consultation with "the legitimate, democratically elected government of Panama, which welcomed our actions."¹⁸⁸ The government to which he referred was that of Guillermo Endara, the apparent victor of the May 1989 presidential election.¹⁸⁹ Neither President Bush nor Secretary Baker, however, said that Endara requested military intervention or that the United States intervened in response to such a request. Thus, as a *legal* basis for attacking Panama, the United States did not rely on a request from Guillermo Endara.

186. See generally Corfu Channel, *supra* note 122, at 4.

187. A Transcript of Bush's Address on the Decision to Use Force in Panama, *supra* note 44.

188. Excerpts From Statement by Baker on U.S. Policy, *supra* note 53. Ambassador Pickering, in addressing the U.N. Security Council, said: "It is worth noting that the U.S. Government consulted with the democratically elected leadership prior to last evening's actions, and that they approved of our steps." PANAMA: A JUST CAUSE, *supra* note 39, at 1. Legal Adviser Sofaer said that the United States government, as it contemplated invasion, "decided it should seek President-elect Endara's cooperation in any military action eventually undertaken." Remarks of Abraham Sofaer, *supra* note 59. However, Eduardo Vallarino, who represented the new Endara administration at the United Nations, told the United Nations that Endara had not requested or authorized the U.S. military action, but that the U.S. decision "was a unilateral decision by the U.S." He said, "we were not part of it." *World Criticism of U.S. Intervention Mounts*, Wash. Post, Dec. 22, 1989, at A29, col. 2.

189. See sources cited *supra* note 24.

The United States was well advised not to justify its invasion on a request from Endara, because reliance on such a request would not have provided a valid legal basis. International law no longer recognizes the right of a government to request outside military intervention in a civil confrontation. Rather, the prevailing principle obliges other states to refrain from intervening on the side of any party.¹⁹⁰ The International Court of Justice in *Nicaragua v. U.S.* said that this prohibition is found in customary international law.¹⁹¹

If the United States were to justify the invasion on the basis of a request from Endara, its rationale would have to be that the population of Panama had, in the May election, expressed its will to have him as its leader. Nevertheless, it does not therefore follow that the population would desire outside military intervention in order to put him into office. Further, if intervention were permissible to install a duly elected government that had been prevented from taking office, the duration of the period of validity of such intervention would still be unclear. If intervention occurred well after the election, there might be less reason to assume that the will of the populace still favored that group.

Some commentators have argued that international law should recognize a right of one state to intervene in another for the purpose of stopping human rights violations there.¹⁹² That theory pursues the admirable goal of helping populations overthrow oppressive leadership. The drafters of the United Nations Charter, however, rejected such an approach by limiting the legitimate use of force to self-defense.¹⁹³ The theory of humanitarian intervention challenges the traditional doctrine that each state should permit every other state to devise its own domestic political processes, for such a theory would permit one state to determine that a particular political leadership was inappropriate for another.

Proponents of the theory of humanitarian intervention have advanced it primarily in connection with mass killings, or other serious abuse, by a government of its people.¹⁹⁴ If the United States were to apply the theory to its invasion of Panama, it would be taking the theory a step further, to justify the overthrow not of a government that is seriously abusing its

190. I. BROWNLIE, *INTERNATIONAL LAW*, *supra* note 84, at 327.

191. *Nicaragua: Merits*, *supra* note 101, at 106-10.

192. See F. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 5 (1988).

193. U.N. CHARTER arts. 2(4), 51.

194. See, e.g., Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 *YALE J. INT'L L.* 221, 233-40 (1989).

citizens, but rather of one that is denying them meaningful participation in government.

Even if humanitarian intervention were allowed under the United Nations Charter, the application of the humanitarian intervention theory presupposes a unilateral determination by the intervening state that the conditions in the other state warrant intervention. For intervention under the theory to be valid, the intervening state would need to (a) accurately estimate the level of democracy in the target state; (b) not allow other considerations, in particular considerations of its own advantage, to influence its decision to intervene; and (c) facilitate the accession to power of a government that promotes democracy.

It is questionable whether states can ever satisfy these requirements. First, the assessment of democracy in another state is a difficult one. Nobody has yet defined a universally accepted standard of democracy. Even by the roughest standards, many states do not approach democracy. In some states, the populations have long tolerated monarchies, with no parliamentary institutions. In others, parliamentary process and national elections have played only a minor role. Therefore, to allow states to justify intervention to install democracy would be to allow them plausibly to justify intervention in many other states; humanitarian grounds might then become a pretext for other, non-humanitarian motives.

Second, powerful states could abuse the theory of humanitarian intervention.¹⁹⁵ Intervention on any ground is an option available only to more powerful states; to permit intervention on humanitarian grounds is to institutionalize and sanction this inequality.

Moreover, in practice one does not find examples of an intervention undertaken to improve the human rights of the population of the other state. Inevitably, intervening states act out of considerations of their own needs. They may believe themselves to be under attack,¹⁹⁶ or they may

195. Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 649 (1984) [hereinafter Schachter, *Legality*]; Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 216, 226 (J. Moore ed. 1974).

196. This was the situation when Tanzania invaded Uganda in 1979. Tanzania acted because of Uganda's attacks into Tanzania, not to stop human rights violations. As the Tanzanian government said: "The war between Tanzania and Idi Amin's regime was caused by the Ugandan Army's aggression against Tanzania and Idi Amin's claim to have annexed part of Tanzanian territory. There was no other cause." *Tanzania and the War Against Amin's Uganda*, in FOREIGN POLICY OF TANZANIA, 1961-1981: A READER 305 (K. Mathews & S. Mushi eds. 1981). Yet one proponent of humanitarian intervention uses this action as an example of force lawfully used to stop deprivations of human rights. See F. TESÓN, *supra* note 192, at 174.

be overthrowing a government for various political reasons.¹⁹⁷ The expectation that one state will act in an altruistic fashion to improve the lot of the population of another is unrealistic. In the instant case, though the United States may have claimed humanitarian goals in its invasion of Panama, it may also have had other, self-interested motives.¹⁹⁸

Third, the method an intervening state uses to replace the government it is overthrowing is also problematic. After invading Panama, the United States arranged a swearing-in for Endara. As indicated above,¹⁹⁹ it is difficult for an intervening state to know what kind of government is desired by the population of the other state. Furthermore, the very participation of the intervening state in establishing a government casts doubt on the claim that the government is really being established according to the will of the population.

The anti-intervention provisions of the charters of the United Nations,²⁰⁰ and particularly of the Organization of American States,²⁰¹ would seem to preclude humanitarian intervention. In any event, whatever its reasons for intervening in Panama, the United States did not actually assert a humanitarian legal justification.²⁰²

VII. Combatting Drug Trafficking

President Bush gave one further reason for the Panama action — “to combat drug trafficking.”²⁰³ Secretary Baker elaborated, stating that one “objective” was “to seize and arrest an indicted drug trafficker,” a reference to General Noriega and his 1988 indictment in the United States on drug trafficking charges.²⁰⁴ In August 1989, the Department of State told the Organization of American States that General Noriega had turned Panama into a “haven for drug traffickers.”²⁰⁵ The capture of General Noriega was certainly a goal of the invasion; however, neither

197. This was the situation with the United States invasion of Grenada in 1983, in which the United States acted for reasons related to world politics, not to prevent human rights violations. Quigley, *supra* note 89, at 351-52. *But see* F. TESÓN, *supra* note 192, at 197 (citing invasion as example of humanitarian intervention); *see also* Dadrian, *supra* note 194, at 246-49 (discussing political dimension of humanitarian intervention in Ottoman Turkey).

198. *See infra* text accompanying notes 234-52.

199. *See supra* text accompanying note 192.

200. U.N. CHARTER art. 2(4).

201. O.A.S. Charter, *supra* note 63, arts. 18, 20.

202. Legal Adviser Sofaer said that the objective of installing persons who had been elected to administer Panama was relevant to the legality of the United States action, although he did not say that it provided an independent legal justification. Remarks of Abraham Sofaer, *supra* note 59.

203. *A Transcript of Bush's Address on the Decision to Use Force in Panama*, *supra* note 44.

204. *Excerpts From Statement by Baker on U.S. Policy*, *supra* note 53.

205. *U.S. Renews Attack on Noriega, Offering Evidence of Ties to Drugs*, N.Y. Times, Sept. 1, 1989, at A1, col. 1 (address by Deputy Secretary of State Eagleburger).

President Bush nor Secretary Baker put it forward as a legal justification for the action. This paper nevertheless will analyze the possible legal basis of such a claim.

International efforts to suppress drug trafficking have received increasing attention in recent years. Although there is no universal jurisdiction over drug trafficking as there is over piracy or genocide,²⁰⁶ Panama and the United States are both parties to the major multilateral convention on suppression of drug trafficking. That agreement, the Single Convention on Narcotic Drugs,²⁰⁷ requires prosecution of serious drug offenses,²⁰⁸ and although General Noriega's alleged acts were committed outside the United States, the United States would have jurisdiction over them if they had an effect inside the United States.²⁰⁹ While the United States might thus have jurisdiction to prescribe²¹⁰ rules to curtail the facilitation of cocaine smuggling into its territory, it would not necessarily have jurisdiction to enforce²¹¹ those rules. Generally, a state may not engage in law enforcement activity in another state without its consent.²¹²

Because drug trafficking is considered a matter of international concern, states confer extensively with each other to coordinate efforts to suppress the traffic in illegal drugs, both within the United Nations and on a regional basis. They also collaborate on an operational basis in sharing information and apprehending offenders. Yet neither the Single Convention on Narcotic Drugs²¹³ nor any other norms found in treaty or customary law permit a state, in its anti-drug efforts, to violate the sovereignty of another state.

206. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) [hereinafter RESTATEMENT (THIRD)].

207. Single Convention on Narcotic Drugs, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 [hereinafter Single Convention]; see also Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3 [hereinafter Protocol Amending the Single Convention].

208. Protocol Amending the Single Convention, *supra* note 207, art. 14.

209. *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSLA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 204 (1983); *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, art. 4(1)(b)(iii), U.N. Doc. E/CONF.82/15 (1988), reprinted in 28 I.L.M. 493 (1989) (authorizing party state to establish jurisdiction over drug trafficking offense committed outside its territory with intended effects within its territory).

210. RESTATEMENT (THIRD), *supra* note 206, § 402.

211. *Id.* § 431.

212. *Id.* § 433; see also *Drug Plan Puts Stress on Reducing Demand*, N.Y. Times, Feb. 23, 1990, at A5, col. 1 (reporting U.N. General Assembly's Global Program of Action on drug trafficking and Political Declaration calling on nations, in their anti-drug efforts, to respect sovereignty of other states and principle of non-interference in internal affairs of other states).

213. See *supra* note 207.

The Department of Justice, however, has recently taken a position that seems to justify the use of force to seize a person sought on drug charges in the territory of another state, even without the consent of its government. On November 3, 1989, the Office of Legal Counsel of the Justice Department issued an opinion memorandum stating that the use of United States military personnel to apprehend drug traffickers overseas would not violate United States law. Titled "The Extraterritorial Effect of the Posse Comitatus Act," the memorandum declared that the Posse Comitatus Act,²¹⁴ which prohibits the United States military from undertaking law enforcement, does not apply outside the United States.²¹⁵ Earlier in the year, on June 21, the Office of Legal Counsel had issued another opinion memorandum that stated that the Federal Bureau of Investigation and other United States law enforcement agencies were authorized to seize criminal suspects in a foreign state without the consent of that state.²¹⁶ Some Administration officials viewed the two opinion memoranda, taken together, as authorizing use of the military to seize suspects abroad, even without the approval of the state in question;²¹⁷ on that understanding, some members of Congress criticized the two memoranda.²¹⁸

This interpretation of the two memoranda conflicts with the right of a state to sovereignty over its territory. The *Restatement (Third) of the Foreign Relations Law of the United States* allows "[l]aw enforcement officers of the United States [to] exercise their functions in the territory of another state only with . . . the consent of the other state."²¹⁹ Without such consent, the arrest and abduction of foreign nationals abroad infringes on the territorial rights of the host state and thus violates Article 2(4) of the United Nations Charter.²²⁰ Moreover, such actions poten-

214. 18 U.S.C. § 1385 (1988).

215. *U.S. Military Given Foreign Arrest Powers*, Wash. Post, Dec. 16, 1989, at A1, col. 6. The text of the memorandum has not been made public.

216. *Id.*

217. *US Policy of Grinding Down Noriega Stalls*, *supra* note 73 (U.S. officials claim right to seize drug suspects from territory of foreign states). This view received some support from the Supreme Court's decision in *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990). In that case, the Court held that the Fourth Amendment's requirement of a warrant for a search for evidence does not apply to the search by U.S. police officials of the residence abroad of a foreign national. The warrant requirement, however, involves particular difficulties regarding application abroad, since it is not clear that a U.S. magistrate has the authority to issue a warrant for the search of premises in a foreign state. Concurring, Justice Kennedy noted that a foreign national is protected by the Due Process Clause of the Fifth Amendment when tried in a U.S. court. *Id.* at 1068.

218. *U.S. Military Given Foreign Arrest Powers*, *supra* note 215.

219. RESTATEMENT (THIRD), *supra* note 206, § 433.

220. *United States v. Toscanino*, 500 F.2d 267, 276-78 (2d Cir. 1974); Paust, *supra* note 94, at 726.

tially violate one or more of the following human rights of the suspect: the right to personal integrity, the right to be detained only under legal authority, the right to a prompt review of the lawfulness of a detention, and the right to remain in a state until expelled by proper authority.²²¹

Before the Justice Department issued the two opinion memoranda,²²² United States precedent did not favor jurisdiction over persons forcibly arrested overseas without the consent of the territorial state and brought into the United States for trial. In *United States v. Toscanino*,²²³ the United States Court of Appeals for the Second Circuit considered the lawfulness of the abduction of the accused by foreign agents in Uruguay, who allegedly acted on behalf of United States law enforcement officers. It stated that such an abduction would violate the United States treaty commitments, in both the United Nations Charter and the Charter of the Organization of American States, to respect the territorial sovereignty of Uruguay. The court first held that due process required "a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused rights."²²⁴ The court then went on to say that no United States court has jurisdiction to prosecute a person seized in violation of the sovereignty of another state.²²⁵

Although the usual rule regards as irrelevant the method by which an accused was brought into the jurisdiction,²²⁶ the court in *Toscanino* declared that this rule "does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty."²²⁷ In support, the court cited the *Eichmann Case*,²²⁸ in which Israel seized a suspect in Argentina without Argentina's consent.²²⁹ The

221. Quigley, *Government Vigilantes at Large: The Danger to Human Rights From Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 199-205 (1988).

222. See *supra* text accompanying notes 214-18.

223. 500 F.2d 267 (2d Cir. 1974).

224. *Toscanino*, 500 F.2d at 275. The suspect was allegedly tortured by foreign police agents, with the knowledge of the United States Attorney. This ground has been stressed by commentators and by the Second Circuit itself in subsequent characterizations of the holding of *Toscanino*. See *United States v. Lira*, 515 F.2d 68, 70 (2d Cir. 1975); Note, *The Extraterritorial Application of the Constitution — Unalienable Rights?*, 72 VA. L. REV. 649, 668-69 (1986).

225. *Toscanino*, 500 F.2d at 277-79.

226. *Frisbee v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). But see Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 238 (1934) (criticizing *Ker* holding).

227. 500 F.2d at 278.

228. Attorney-General of Israel v. Eichmann, 36 INT'L L. REP. 18 (Isr. Dist. Ct. Jerusalem 1961), *aff'd*, 36 INT'L L. REP. 277 (Isr. Sup. Ct. 1962).

229. 500 F.2d at 277-78.

United Nations Security Council found this action to violate Argentina's sovereignty.²³⁰

The prohibition against prosecution applies, in the *Toscanino* analysis, only if the asylum state objects to the abduction;²³¹ a subsequent case of prosecution following forcible abduction restricted the prohibition to precisely such cases. In *United States ex rel. Lujan v. Gengler*,²³² the Second Circuit found the failure of the host states (Argentina and Bolivia) to object to the abduction "fatal to his [defendant's] reliance upon the charters."²³³ The circumstances of the Panama case cloud this issue somewhat, as the Noriega government considered the invasion to violate Panamanian sovereignty, but the Endara government did not.

Even if international law recognized a right to seize a suspect in another state without that state's consent, this right would not establish a further right to invade the host state and overthrow its government in order to seize the suspect. The infringement on the host state's sovereignty in this situation is even greater than in the seizure of a suspect without an effort to defeat the armed forces of the state or to overthrow its government. Thus, although the United States did not assert the aim of capturing General Noriega as a legal justification for its invasion of Panama, it would have provided only a tenuous legal basis for the invasion.

VIII. Other Possible Motives for the Invasion

The invasion of Panama took place in a complex political climate that made it difficult to determine with certainty the United States primary motivation. Although none of the four objectives cited by the Bush Administration justifies the United States action, they may have been relevant as motives in the decision to invade Panama. While legally deficient and perhaps specious, they certainly evoke principles that are difficult to oppose: defense of citizens, protection of a major international asset, promotion of democracy, combatting drug trafficking. Nevertheless, the circumstances surrounding the invasion suggest that the United States had other, less admirable goals which remained unstated.

One possible motive is retention of United States control over the Panama Canal. The Panama Canal Treaty called for the complete transfer

230. S.C. Res. 138, 15 U.N. SCOR (868th mtg.) at 4, U.N. Doc. S/4349 (1960).

231. See *Toscanino*, 500 F.2d at 282 (Anderson, J., concurring) ("By and large treaties are to be enforced by governments, rather than by their individual citizens . . .").

232. 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).

233. *Id.* at 67. The charters referred to are those of the Organization of American States and the United Nations.

of the Canal and the removal of all United States troops from Panama by December 31, 1999, but that treaty was controversial in the United States. When it was signed, many in Congress opposed it,²³⁴ and skepticism as to the advisability of a pullout from Panama persisted.²³⁵ So long as a strongly nationalist government, such as Noriega's government, was in power in Panama, there was little chance of amending the Treaty. If the Panamanian government were on close terms with the United States, however, and particularly if its officials owed their positions to the United States, there was a possibility of renegotiating the Panama Canal Treaty to provide some role in Canal operations for the United States into the twenty-first century and the continued deployment of military forces in Panama.²³⁶ Throughout the episode, the United States denied any intention of renegeing on the two Canal treaties,²³⁷ but it never closed the door to the possibility of renegotiation.

The United States was concerned about Panama's appointment of a Canal Administrator due to take office on January 1, 1990.²³⁸ It had said it would not accept any administrator named by Panama; its avowed refusal to accept any Panamanian appointment violated its obligation under the Panama Canal Treaty to appoint as administrator a Panamanian national proposed by Panama.²³⁹ The importance of the position lay in the administrator's responsibility for operating the Canal, under United States auspices, until December 31, 1999, when the United States would cede all rights to Panama. The United States hoped for a smooth transition to Panamanian control that would leave the Canal in good operating order at the time of its withdrawal.

The United States refusal to accept any candidate for administrator proposed by Panama also had important political ramifications, which may well have outweighed any practical significance. President Bush made his statement about the next administrator at the same time that he rejected the legitimacy of a new president who had taken office with General Noriega's backing.²⁴⁰ President Bush said that the United States

234. See, e.g., *Senate Additions to the Panama Canal Treaties*, 78 DEP'T ST. BULL. 52-54 (May 1978) (series of conditions, reservations, and understandings placed by Senate on U.S. ratification of Panama Canal Treaty and Neutrality Treaty).

235. *Combat in Panama*, L.A. Times, Dec. 21, 1989, at A9, col. 1 (notes controversial nature of Panama Canal Treaty).

236. See *Quayle Trip: Resentment Dramatized*, N.Y. Times, Jan. 31, 1990, at A16, col. 4 (noting possibility of renegotiation of Canal treaties).

237. See *Combat in Panama*, *supra* note 235 (Bush reaffirms commitment to implement Panama Canal Treaty and to turn over Canal in year 2000).

238. See 1977 Panama Canal Treaty, *supra* note 11, art. 3(3)(c).

239. See *supra* text accompanying notes 29-31.

240. See *Aide to Noriega Is Sworn In; U.S. Won't Recognize Him*, *supra* note 29.

would accept no "diplomatic correspondence" from the government of Panama, including correspondence about the appointment of the Canal administrator.²⁴¹ Thus, the United States refusal to accept an administrator appointed by the Noriega-led government was an additional means of pressure designed to bring down that government.²⁴²

A second point of contention in United States-Panama relations involved cocaine trafficking. President Bush had declared a "war on drugs" as a major policy priority.²⁴³ The "war on drugs" had registered little success, as efforts to prevent cultivation in countries of origin and to prevent smuggling into the United States had not achieved significant results.²⁴⁴ Because Panama had become a transit point in shipments from Colombia (a source of much of the cocaine) to the United States,²⁴⁵ a decisive move against that transshipment might give life to the "war on drugs."

The Bush Administration also had reason to be concerned about General Noriega's knowledge and possible revelations of a United States role in the drug trafficking. As a covert means of providing revenue to the *contra* rebels in Nicaragua, the Central Intelligence Agency had arranged the shipment of cocaine and marijuana to the United States on the return legs of aerial supply flights to the *contras*.²⁴⁶ The Agency did not acknowledge this drug trafficking, but General Noriega may have known of it, because he was involved both in drug operations and in aiding the *contras*.²⁴⁷

The drug trafficking situation was relevant to the invasion in one other respect. The United States was interested in taking a more active role,

241. *Id.*

242. Pearson, *Panama*, BUS. WEEK, Dec. 25, 1989, at 70 (discussing refusal to accept nominee for Administrator as part of U.S. pressure to remove Noriega-led government).

243. *Bush Endorses Outline of Plan for Drug Battle*, N.Y. Times, Aug. 16, 1989, at A1, col. 5.

244. Wrobleski, *Presidential Certification of Narcotics Source Countries*, 88 DEP'T ST. BULL. 47 (June 1988).

245. *Id.* at 50.

246. L. COCKBURN, OUT OF CONTROL 152-88 (1987); *Contra Arms Crews Said to Smuggle Drugs*, N.Y. Times, Jan. 20, 1987, at A1, col. 4 (D.E.A. agents say pilots taking arms to *contras* brought drugs back on return flights; pilots claim they had White House protection).

247. *Money Courier Tells of Services for CIA*, Christian Sci. Monitor, July 16, 1987, at 3, col. 2 (Cuban accountant Ramón Milian Rodríguez, convicted of cocaine possession and drug-money laundering, testifies to Senate Foreign Relations Committee's Subcommittee on Terrorism, Narcotics, and International Operations that he delivered to Gen. Noriega money from both C.I.A. and Colombian drug cartel); *Smuggler Ties Contras to U.S. Drug Network*, N.Y. Times, July 16, 1987, at A13, col. 5 (George Morales, convicted of drug smuggling, testifies to Senate Foreign Relations Committee's Subcommittee on Terrorism, Narcotics, and International Operations that he directed pilots who flew arms to *contras* from southern Florida and brought cocaine and marijuana back on return trips; operation alleged to have protection of C.I.A.).

including a military role, in suppressing the drug deliveries coming out of Colombia. It had already sent some military personnel to Colombia for that purpose. Shortly after invading Panama, it sent ships to cruise off the coast of Colombia. The establishment of nearby Panama as a friendly state facilitated this activity. The use of troops in Panama may have been part of the effort to increase the role of the military in anti-drug operations.²⁴⁸

A third factor that may have influenced the United States decision to invade Panama was the longstanding military hostilities in Central America. The Bush Administration, like its predecessor, assumed an adversarial position towards the government of Nicaragua, financing the *contra* military opposition and maintaining economic sanctions that severely hamstrung Nicaragua's economy. The Administration may have thought that an invasion of a nearby state would provide an object lesson to Nicaragua. With elections in Nicaragua scheduled for February 1990, the Administration may have hoped that an invasion of Panama would show the people of Nicaragua the risks run by a Central American state in opposing the United States, thus convincing them to vote for a candidate who would establish close relations with the United States. The ultimate success of the anti-Sandinista coalition in the February 1990 elections may have been due in part to concern by Nicaraguan voters that retaining a government that was on hostile terms with the United States would mean continued military and economic pressure from the United States.²⁴⁹

A fourth factor that may have played a role in the invasion was the international balance of forces. "Robbed of a plausible threat in the shape of the Evil Empire,²⁵⁰ the United States Defence Department needs new enemies to take on," wrote the London *Economist*. "Who better than beastly drug runners like General Noriega?"²⁵¹ With the perceived threat to the United States from the Eastern Bloc diminishing, military planners in the United States were under pressure to justify the existing level of armaments and armed forces, which had risen dramatically during the 1980s. The suspicion that the Panama invasion may have been staged, in part, to prove the need for military expenditures was enhanced by the fact that all the military services found a role in the

248. *U.S. to Unveil Drug Plan; Big Army Role Seen*, N.Y. Times, Mar. 9, 1990, at A5, col. 1.

249. *Nicaraguan Opposition Routs Sandinistas; U.S. Pledges Aid, Tied to Orderly Turnover*, N.Y. Times, Feb. 27, 1990, at A1, col. 6.

250. A reference to the term President Ronald Reagan used to characterize the U.S.S.R.

251. *A man, a plan, a canal, Panama*, *supra* note 18, at 17.

invasion, and by the use in the invasion of sophisticated equipment like the stealth fighter.²⁵²

IX. Conclusion

Neither of the two bases the United States asserted to justify its invasion of Panama is adequate. Each falls short of providing a justification under applicable principles of international law. The self-defense claim fails because the United States did not demonstrate that Panama had attacked the United States or was about to do so. The claim based on the Panama Canal treaties of 1977 fails because the treaties do not give the United States a right to intervene against Panama, and even if they did, Panama had not threatened the Canal's operation.

The justifications asserted by United States found scant support in the international community, which widely criticized the invasion of Panama as a violation of international law.²⁵³ By a vote of twenty to one — the sole negative vote being that of the United States²⁵⁴ — the Organization of American States adopted a resolution which said that members “deeply regret” the invasion,²⁵⁵ called for the withdrawal of U.S. forces, and supported “the right of the Panamanian people to self-determination without outside interference.”²⁵⁶ The O.A.S. condemned the invasion despite its previous criticism of General Noriega and its efforts to convince him to give up power.²⁵⁷

In the United Nations Security Council, a majority voted for a draft resolution declaring that the intervention violated international law, though vetoes by the United States, the United Kingdom, and France

252. *Id.* at 18 (stating that use of stealth aircraft “reinforced the impression that the Pentagon is treating Panama as a playground in which to practise its new arts”); *Panama Alerted to Attack, General Says*, N.Y. Times, Feb. 27, 1990, at A7, col. 1 (report by Lt. Gen. Carl Stiner, U.S. Army, says that six stealth fighters were used, rather than only two as originally reported); *Stealth Fighter's Mission Reported Marred by Error*, N.Y. Times, Apr. 4, 1990, at A1, col. 2 (critics of Pentagon charge that it used stealth aircraft in Panama to “buttress the case for buying” them, in face of Congressional opposition because of high cost).

253. *World Criticism of U.S. Intervention Mounts*, *supra* note 188; *U.S. Cites Self-Defense; Legal Scholars Skeptical*, *supra* note 1; *Generalizada condena a la intervención estadounidense*, La Prensa (Buenos Aires), Dec. 22, 1989, at 3, col. 1.

254. *O.A.S. Votes to Censure U.S. for Intervention*, Wash. Post, Dec. 23, 1989, at A7, col. 5; *Criticism of U.S. Action Is Supported in 20-1 Vote*, N.Y. Times, Dec. 23, 1989, at A15, col. 5. Costa Rica, El Salvador, Honduras, Guatemala, Antigua, and Barbados abstained.

255. “Deplore” in the Spanish-language text. *La OEA deplora la invasión y exige un cese del fuego*, La Prensa (Buenos Aires), Dec. 23, 1989, at 4, col. 1.

256. *Criticism of U.S. Action Is Supported in 20-1 Vote*, *supra* note 254.

257. *O.A.S. Draws Latin Fire for Stand on Panama*, *supra* note 25; *Latin Envoys Report No Progress in Their Effort to Dislodge Noriega*, *supra* note 25; *Diplomats Urge Noriega to Resign by Sept. 1*, *supra* note 25; *Diplomacy: Haunting Noriega Issue Stirs Great Hope and Low Expectation as O.A.S. Meets Again*, *supra* note 25; *U.S. Is Faulted on Military Maneuvers in Panama*, *supra* note 25.

killed the resolution.²⁵⁸ The United Nations General Assembly adopted a resolution, 75-20, to "strongly deplore" the intervention and to demand the immediate withdrawal of United States forces from Panama.²⁵⁹ Clearly, the majority of states considered the action to be unlawful.

It is fortunate, in the interest of maintaining standards that protect states from attack, that the states represented in the Organization of American States and the United Nations reacted so strongly to the invasion and rejected the United States claims of justification. In particular, the United States claim of self-defense reflects the continuation of a dangerous doctrine expanding that concept. Since the mid-1980s, the United States has advocated a position that (1) holds that an attack on civilians is an attack on their state; (2) does not require imminence to an attack anticipated from the target state; (3) does not require the intervening state to prove that an attack would occur; and (4) ignores the requirement of proportionality in the use of responsive force. Acceptance of the United States application of this expansive doctrine to its claim of self-defense in Panama would permit states to use the claim of self-defense as a justification for unlawful use of force.

Finally, the invasion of Panama was even more unfortunate because it occurred in a period in which superpower tension has eased, reducing military conflict in the developing world. For the past several decades the United States had claimed that East-West confrontation provided a political justification for its military interventions in Central America. But military interventionism by the United States in Central America antedated the East-West contention, and the Panama invasion demonstrated that it has outlived it.

258. *Two Delegates Vying to Be the Voice of the New Government*, N.Y. Times, Dec. 29, 1989, at A12, col. 3.

259. *U.N. Assembly Blasts Invasion of Panama*, Wash. Post, Dec. 30, 1989, at A17, col. 1. Some European delegates who voted in the negative explained that their vote did not indicate support for the legality of the invasion, but said that they had wanted the resolution to mention misdeeds by Gen. Noriega. *Id.*