

The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion

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Self-defense is the most prominent rationale for the U.S. invasion of Panama. President Bush informed the Congress on December 21, 1989 that the "deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations charter and was necessary to protect American lives in imminent danger."¹

The strength of the President's claim depends upon the facts. Upon close inspection, the factual record of events preceding the invasion discloses two keen surprises. The problem of violence faced by American armed services personnel and civilians in Panama was long-standing and more serious than was generally reported in the press. Thus, the task of crafting an appropriate American response was not easy. Yet, it is not clear that the United States fully exercised a number of available measures short of armed invasion to protect Americans from the problems of low-level violence. This passivity undermines any legal justification for the invasion based upon self-defense.

I. ARGUMENTS FOR SELF-DEFENSE

There are six key parts in the argument for self-defense. The reader should be aware that this is a reconstructed argument; the United States did not have occasion after the overthrow of the Noriega regime to fully muster the factual arguments for self-defense.

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1. Letter from President Bush to House Speaker Thomas Foley (Dec. 21, 1989), *reprinted in* H.R. DOC. No. 127, 101st Cong., 2d Sess. (1990) [hereinafter **PRESIDENT'S LETTER**].

A. *No Safe Haven for Americans*

The Canal Zone was returned to Panamanian jurisdiction in 1979 when the Panama Canal Treaty came into force.² As a result, the United States lost any convenient “safe haven” to which Americans in Panama could retreat. Many members of the Panamanian Defense Forces (PDF)³ and officials of the Noriega government took up residence in the former Canal Zone. There were still some special areas set aside for Panama Canal Commission employees and American military personnel and their dependents, but many Americans—including thousands of American corporate employees—lived in dispersed housing arrangements in neighborhoods throughout Panama City and the Republic. The intermingling of the American and Panamanian communities meant that United States citizens were exposed to the actions of the Noriega government. The United States could not easily limit this exposure. American military base areas are relatively small, making it difficult to house all American military dependents and employees of the Panama Canal Commission, and virtually impossible to house on any continuing basis the thousands of other American civilians working or retired in Panama. Even on some mili-

2. Panama Canal Treaty, United States-Panama, 193 Stat. 4521, 33 U.S.T. 39, T.I.A.S. No. 10030 (signed Sept. 7, 1977; entered into force Oct. 1, 1979). The Panama Canal Treaty recognizes Panamanian sovereignty over the former Canal Zone, but allows the Panama Canal Commission, a U.S. government corporation, to continue operating the Canal itself until the year 2000, subject to requirements of paying at least \$10 million annually to Panama in toll revenues, increasing Panamanian employment in operating the Canal, and having a Panamanian Administrator for the Canal Commission as of January 1, 1990. See Panama Canal Treaty, *supra*, arts. 1(3), 3(3)(c), 13(4). Until the year 2000 the United States has “primary responsibility to protect and defend the Canal.” United States rights “to station, train and move military forces within the Republic of Panama” and its “use of areas and installations and the legal status of [U.S.] armed forces” are governed by an implementing agreement. See Panama Canal Treaty, *supra*, art. 4(2); Agreement Between the United States and Panama on Implementation of Article IV of the Panama Canal Treaty [hereinafter Article IV Implementing Agreement], 33 U.S.T. 307, T.I.A.S. No. 10032 (signed Sept. 7, 1977; entered into force Oct. 1, 1979). The Panama Canal Treaty terminates on Dec. 31, 1999 with turnover of the Canal to Panamanian jurisdiction.

In the year 2000 and after, the new legal regime of a Permanent Neutrality Treaty will govern the Canal. The Canal is to be a neutral international waterway operated by Panama, and as of that date only Panama may “maintain military forces, defense sites and military installations within its national territory.” The United States retains the right to “defend the Canal against any aggression or threat against the peaceful transit of vessels through the Canal.” Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, United States-Panama, arts. 1, 4, & 5, 33 U.S.T. 1, T.I.A.S. No. 10029 (signed Sept. 7, 1977; entered into force Oct. 1, 1979).

3. The Panamanian Defense Forces (PDF) combined the functions of the police and military. All its divisions were commanded by Noriega. See FUERZAS DE DEFENSA [ARMED FORCES OF PANAMA] (1987 handbook published by PDF and Sipimex Ltda., Santiago, Chile).

tary bases there is no complete physical insulation between American and Panamanian forces.⁴

The 1977 Canal Treaty abolished any "extraterritoriality" for Americans in Panama. Before the 1977 Treaty, Americans in the Canal Zone were under the police jurisdiction of American authorities. This ended with the return of the Canal Zone to Panama. In the Panama Canal Treaty, the United States recognized the Republic of Panama as "territorial sovereign" of all land in Panama, including the former Canal Zone, and did not restrict by treaty the ordinary criminal and civil jurisdiction of the Panamanian government over foreign citizens living in Panama.⁵ American corporate employees, off-duty American soldiers, American military dependents, and Canal Commission employees could be stopped by the PDF for civil or criminal infractions, including traffic violations.⁶ Hence, there was no easy way to shield Americans from the actions of the Panamanian authorities.

B. Abuse of Off-Duty American Soldiers and Civilians

From 1987 until the invasion—although it received limited publicity in the United States—Noriega encouraged incidents involving abuse of American soldiers as a way to rally support for his leadership. Harassment of off-duty American soldiers by local Panamanian

4. For example, the United States Southern Command and the Panamanian Defense Forces Fifth Battalion housed troops at Fort Amador, the major military facility adjacent to downtown Panama City; only a parade green separated the barracks of the PDF from the family housing of U.S. military dependents. At Fort Gulick, near Colón, family housing for U.S. military dependents remained on the facility after the base was turned over to the PDF.

5. Panama Canal Treaty, *supra* note 2, arts. 1 & 3.

6. Police elements of the PDF included the Fuerza de Policia, the "DENI" (Departamento Nacional de Investigaciones), and "DNTT" (Dirección Nacional de Transito Terrestre). See FUERZAS DE DEFENSA, *supra* note 3.

The implementing agreements under the 1977 Treaties gave Panama the right to exercise primary criminal jurisdiction over ordinary crimes committed by American soldiers, Canal Commission employees, and their dependents—though, for these classes of defendants, Panama promised in the agreements to give "sympathetic consideration" to requests for ceding jurisdiction. Arrests could be carried out by Panamanian police. American authorities were to be notified "as promptly as possible" of any such arrest and, for other than serious crimes, defendants were to be "handed over" on request to American authorities for pretrial custody. The United States had a "primary right" to exercise criminal jurisdiction over offenses committed within defense sites, committed in the course of official duties, committed against United States property or security, or committed against United States service members or civilian employees. See Article IV Implementing Agreement, *supra* note 2, art. 6 (criminal jurisdiction over service members and dependents); Agreement Between the United States and Panama on Implementation of Article III of the Panama Canal Treaty [hereinafter Article III Implementing Agreement], 33 U.S.T. 141, T.I.A.S. No. 10031, art. 19 (criminal jurisdiction over U.S. citizen employees of Canal Commission and dependents) (signed Sept. 7, 1977; entered into force Oct. 1, 1979).

officers had always been an occasional event against the background of Panamanian nationalism. These incidents of harassment increased in number and seriousness after the United States imposed economic sanctions. The United States Southern Command, the military command in charge of all American armed service personnel in Panama, received continuing reports of the mistreatment of American soldiers taken into custody by the PDF for minor infractions or for no reason at all.⁷

Among the reported incidents most unnerving to the American community in Panama over the two year period preceding the invasion were: the alleged beating of a U.S. soldier and the rape and beating of his wife by a male dressed in military fatigues;⁸ the firing of a gun towards the head of a Navy petty officer during a police traffic stop, when the Navy officer resisted the attempted theft of his watch and ring;⁹ and the detention of local school buses carrying 100 American school children by PDF soldiers—including an attempt to tow away a bus while the children were still aboard—following the bus operators' failure to obtain tax clearance certificates.¹⁰ Other disturbing reports included the 24-hour detention of a U.S. serviceman and his father by four PDF officers who beat the father, pointed guns at the heads of the father and son, and robbed them of \$300;¹¹ the

7. These incidents were widely discussed in the American community in Panama, but received only limited press coverage in the United States. Most American newspapers did not have a reporter resident in Panama. Toward the end, there was heated debate whether the Department of Defense was seeking to minimize the incidents in order to prevent further deterioration of United States-Panama relations, or whether officials of the Department of State were magnifying incidents in advocacy of the use of force. *See Terror in Panama: Violence Against Americans on Rise; U.S. Response Hit*, Army Times, Mar. 20, 1989, at A3 (reporting criticism by former Assistant Secretary of State Elliott Abrams of Defense Department response to incidents). Some of the incidents were described in Congressional hearings in April 1989. *See* "Fact Sheet (23 Feb 89), Summary of most serious PDF-US Forces Personnel Harassment Incidents . . . from 6 Feb 88 to 23 Feb 89," Supplement to the Testimony of Lt. Gen. Donald W. Jones, Dep. Ass't Sec. of Defense for Military Manpower and Personnel Policy, in *Hearings on National Defense Authorization Act for Fiscal Year 1990—H.R. 2461, Before the Readiness Subcomm. of the House Committee on Armed Services*, 101st Cong., 1st Sess. 1502-11 (Apr. 12, 1989 session "To Review Military Quality of Life") [hereinafter DOD Summary].

8. DOD Summary, *supra* note 7 (incident of June 16, 1988). *See also* Sciolino, *Anti-U.S. Attacks Spread in Panama*, N.Y. Times, Aug. 21, 1988, at A11, col. 1; Sciolino, *U.S. Says Panama is Harassing G.I.'s*, N.Y. Times, Sept. 29, 1988, at A16, col. 1.

9. DOD Summary, *supra* note 7 (incident of Nov. 13, 1988).

10. *PDF Illegally Detains School Buses*, Tropic Times (newspaper of the U.S. Southern Command, Panama) [hereinafter Tropic Times], Mar. 6, 1989, at 1, col. 1. The bus operators' failure to obtain tax clearance certificates was offered as an excuse for the attempt to tow away a bus while the children were still aboard. Tropic Times, Mar. 23, 1989, at 1, col. 3 (description of incident by Rep. William Lehman of Florida, at hearing of House Committee on Appropriations).

11. DOD Summary, *supra* note 7 (incident of Aug. 1, 1988).

sexual abuse of an Air Force enlisted woman by two PDF officers;¹² and the severe beating of a United States Navy civilian employee who was reporting to a police station of the Panamanian National Investigation Department (DENI) in Colón.¹³ Though some incidents involved intoxicated police officers and the extortion of sums of money, other incidents showed a clear desire to taunt and intimidate.¹⁴ Civilians as well as military personnel encountered rough treatment. In March 1988, two American employees of the Panama Canal Commission reported they had been severely beaten and threatened with shooting by the PDF.¹⁵ The use of excessive force in making arrests and in conducting interrogations was apparently common.¹⁶

The United States raised matters of police mistreatment with the PDF representatives on the Joint Committee established under the 1977 Panama Canal Treaty.¹⁷ But from 1987 forward, the Joint Committee ceased to function effectively, and the PDF generally did not respond to complaints or take disciplinary action against the

12. DOD Summary, *supra* note 7 (incident of Aug. 3, 1988).

13. A U.S. military police liaison accompanying the civilian employee was pushed aside. The civilian employee was dragged into the station, handcuffed, beaten with a rubber hose, and kicked in the head and body by a PDF lieutenant and DENI personnel, suffering a broken eardrum and extensive bruises. See DOD Summary, *supra* note 7 (incident of Feb. 5, 1989); see also *PDF Officers Beat Up U.S. Navy Workers*, *Tropic Times*, Feb. 10, 1989, at 1, col. 1.

14. Take, for example, the following:

On 3 Sep 88, [soldier's name deleted] and his family were detained in the vicinity of Rio Sereno Volcan by six armed civilian-clothed individuals. They were transported to a PDF station where a PDF Lt. Chavez accused them of spying and threatened their life by stating: "Maybe your country sent you hoping we'd kill you and your family, or beat you up so they'll have a reason to invade; or for the *New York Times* to print 'US soldier and family killed by Panama Defense Forces.' Even if we didn't do anything to you, you may still go out and have a beer and on your way back, driving at night, you miss a curve, fall off a cliff and die along with your family."

DOD Summary, *supra* note 7 (incident of Sept. 3, 1988).

15. Incidents of Harassment Against the Panama Canal Commission and Its Employees (describing incident of March 23, 1988), Attachment to Testimony of John Maher, Branch Agent, Panama Canal Pilots Branch, International Organization of the Masters, Mates and Pilots Union, AFL-CIO, in *Harassment of Panama Canal Employees: Hearing Before the Subcomm. on Panama Canal/Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. at 86 (May 18, 1989). See also Rohter, *Americans Living in Ex-Canal Zone Complain of Harassment by Panama*, *N.Y. Times*, Mar. 27, 1988, at A18, col. 1.

16. DOD Summary, *supra* note 7.

17. Interview with Gen. Fred F. Woerner, U.S. Army (Ret.), in Boston, Massachusetts (June 1 & 26, 1990) [hereinafter *Woerner Interview*] (General Woerner was Commander-in-Chief of the U.S. Southern Command in Panama until October 1, 1989). See Article IV Implementing Agreement, *supra* note 2, art. 3; see also Agreement Between the United States and Panama on Joint Committee, Oct. 1, 1979, 33 U.S.T. 558, T.I.A.S. 10045 (effected by Exchange of Notes).

officers involved.¹⁸ After Noriega ousted Panamanian President Eric Arturo Delvalle in February 1988, the United States declined to recognize Noriega or his newly-selected president as legitimate representatives of the government of Panama. United States Embassy officials and the Commander-in-Chief of the United States Southern Command were under guidance to avoid contacts with the Noriega government.¹⁹ Hence, there were few acceptable channels for effective remonstrance.

C. *Automatic Weapons Fire and Intrusions at Military Bases*

The provocations of the Noriega regime also included action against on-duty U.S. military personnel and military facilities. From early 1988 until 1989, repeated intrusions occurred at the Arraijan Tank Farm, the major strategic aviation fuel facility of the United States Southern Command. Arraijan provides fuel storage for military aircraft flying from Howard Air Force Base, a key facility for the United States' air presence in Central America. In repeated incidents, automatic weapons fire was directed at United States sentry personnel and toward buried storage tanks containing millions of gallons of jet fuel.²⁰ The weapons fire came from the heavy canopy jungle surrounding the Tank Farm. Early on, American sentries were rein-

18. Joint Briefing, U.S. Southern Command, Quarry Heights, Panama City (July 25 & 27, 1990) [hereinafter Quarry Heights Briefing]; Woerner Interview, *supra* note 17; telephone interview with Dr. Gabriel Marcella, U.S. Army War College, Carlisle, Pennsylvania (Sept. 11, 1990). One exception involved the disciplining of a PDF lieutenant for the February 5, 1989 beating of a United States Navy civilian employee in the DENI police station.

19. Joint Briefing, U.S. Army War College, Carlisle, Pennsylvania (June 10, 1991); telephone interview with John Bushnell, former Chargé d'Affaires, United States Embassy, Panama (Nov. 13, 1991).

20. Quarry Heights Briefing, *supra* note 18; Woerner Interview, *supra* note 17. See Gordon, *U.S. Marine Is Killed in Panama*, N.Y. Times, Apr. 13, 1988, at A3, col. 3; Pitt, *Marines Fire on Panama 'Intruders'*, N.Y. Times, Apr. 14, 1988, at A3, col. 1; *Gunfire and a War of Nerves; The United States in Panama: A Troubled Presence*, N.Y. Times, Apr. 17, 1988, at D3, col. 1; *American Soldiers in Panama Exchange Fire with Intruders*, N.Y. Times, July 21, 1988, at A7, col. 6; Malone, *The Panama Debacle-Uncle Sam Wimps Out*, Wash. Post, Apr. 23, 1989, at C1 (over 50 attacks at fuel depot).

See also *Firefight Erupts at Navy Tank Farm*, Tropic Times, Apr. 13, 1988, at 1, col. 1 (Marine killed in Apr. 11, 1988 intrusion involving 6-8 persons); *RP Blames Nervous Marines for Firing*, Tropic Times, Apr. 15, 1988, at 1, col. 1 (two-hour "firefight" on Apr. 12, 1988 involving 100 U.S. Marines and 40-50 intruders); Tweedale, *Tank Farm Intruders "Highly Professional"*, Tropic Times, Apr. 18, 1988, at 1, col. 1 (Apr. 12, 1988 intruders used night vision equipment; "sporadic exchanges" of gunfire); Tweedale, *Firefight Casualties Unconfirmed*, Tropic Times, Apr. 25, 1988, at 1, col. 2 (Pentagon unable to confirm or deny that Cuban commandos were killed or wounded); *Marines Fire at Intruders*, Tropic Times, Jan. 20, 1989, at 1, col. 3 (two tracer rounds received from tree line in Jan. 15, 1989 intrusion at Tank Farm); *Marines Fire at Intruders on Panama Base*, United Press Int'l, Jan. 19, 1989 (shots fired by intruder at Tank Farm on Jan. 15, 1989).

forced and returned fire. The weapons fire was apparently designed to harass; no fuel tanks or American personnel were hit by incoming fire.

The provocation caused an American fatality. On April 11, 1988, United States Marine Corporal Ricardo M. Villahermosa was killed in the crossfire of American forces responding to an armed intrusion at the Tank Farm.²¹ The Tank Farm intruders did not wear PDF uniforms, yet their connection to the Noriega regime was suggested by reports that they used night vision equipment and that intruders were wounded and removed to Cuba for medical treatment.²² The former United States Commander in Panama concluded that Noriega was seeking to taunt American troops, and perhaps to blow up one of the half-million gallon fuel tanks as a spectacle to prove the vulnerability of American forces.²³

There were also armed intrusions, with shots fired, at the Navy Ammunition Depot,²⁴ and at a facility of the National Security Agency.²⁵ In addition, relations between the Panamanian and American forces were dangerously tense at joint military facilities. At Fort Amador, for example, the PDF dug trenches in front of their barracks, facing American military family housing, and trained a machine gun on the helicopter of the American Commander-in-Chief when it took off or landed.²⁶

D. Panama's Declaration of a State of War

On December 15, 1989, the Panamanian National Assembly passed a declaration of a "state of war."²⁷ Noriega gave a bellicose

21. Gordon, *U.S. Marine is Killed in Panama*, N.Y. Times, Apr. 13, 1988, at A3, col. 3.

22. See, e.g., Malone, *The Panama Debacle-Uncle Sam Wimps Out*, Wash. Post, Apr. 23, 1989, at C1 (some intelligence analysts conclude Cuban commandos led Apr. 13, 1988 raid, with three Cubans wounded, two evacuated to Cuban vessel transiting the Canal).

23. Woerner Interview, *supra* note 17.

24. *Guards See More Intruders in U.S. Areas*, Tropic Times, Apr. 22, 1988, at 1, col. 1 (intruders at ammunition storage depot fire at U.S. sentry); *Marines Fire at Intruders*, Tropic Times, Jan. 20, 1989, at 1, col. 3 (intruder "believed to be armed" seen at ammunition depot).

25. Quarry Heights Briefing, *supra* note 18.

26. *Id.*

27. The Spanish text of the December 15 National Assembly resolution (*Resolución No. 10*), as published in *Gaceta Oficial*, No. 21,436, stated in part:

Que la República de Panamá, país pacífico, tradicionalmente dedicado al trabajo laborioso para lograr un desarrollo armónico de su población, ha estado durante los dos últimos años bajo un cruel y constante hostigamiento por parte del Gobierno de los Estados Unidos de América, cuyo Presidente ha hecho uso de los poderes de guerra que jamás su nación ejerció contra ninguno de sus más encarnizados enemigos en las guerras que ha sostenido en distintos continentes, para tratar de someter la voluntad de los panameños.

* * * *

RESUELVE:

speech seeking the declaration and additional powers as head of government.²⁸ The declaration of a state of war certainly deserves weight as evidence of a foreign adversary's possible intention to use armed force. Even if one assumes the declaration was primarily aimed at enhancing Noriega's governmental powers—by creating a domestic “state of war” more akin to a state of emergency—the difference might be missed by members of the PDF and by members of Noriega's civilian militia, the “Dignity Battalions,” thus creating real danger to U.S. personnel. Administration officials have indicated that, despite initial White House public statements dismissing the state of war declaration as a “hollow step” unworthy of immediate Presidential attention,²⁹ the declaration of a state of war became a matter of concern in the White House.

1. Se declara a la República de Panamá en estado de guerra, mientras dure la agresión desatada contra el pueblo panameño por el gobierno de los Estados Unidos de América.

A translation circulated within the United States government read as follows:

That for the past 2 years the Republic of Panama, a peaceful country traditionally dedicated to hard work to achieve the harmonious development of its population, has been under the cruel and constant harassment of the U.S. Government whose President has used the power of war to try and subject the will of the Panamanian people, a power his nation never exercised against its worst enemies during the wars it has fought on the various continents.

* * * *

It is resolved:

1. To declare the Republic of Panama in a state of war for the duration of the aggression unleashed against the Panamanian people by the U.S. Government.

U.S. Dept. of Commerce, Foreign Broadcast Information Service LAT-89-241 (Dec. 18, 1989) at 19, 20.

28. The phrases in Noriega's speech to the Panamanian National Assembly generally regarded as most threatening are within the following passage:

The only thing that the U.S. empire will not be able to steal from us is our geographical position as bridge of the world and heart of the universe across which all world flags must transit. We would not use the canal as an ideological or personal tool to favor conflicting interests. We do not justify the excessive U.S. military fighting strength under the sophism of defending the canal from being destroyed. We, the Panamanians, are the sole and ultimate canal custodians. They should not fool themselves and confuse the world because even before [former Southern Command commander] General Galvin was here, the last few professional regional commanders had confirmed that the United States cannot defend the canal even if a soldier were posted along every single meter of the interoceanic waterway[.]

We, the Panamanians, *will sit along the banks of the canal to watch the dead bodies of our enemies pass by*, but we would never destroy the canal.

Speech of General Noriega before the Assembly, Panama City Radio and Television Services (in Spanish), 1846 Greenwich Mean Time, Dec. 15, 1989, translation by U.S. Dept. of Commerce, Foreign Broadcast Information Service LAT-89-241 (Dec. 18, 1989) at 21, 24 (emphasis added).

29. *Panama Assembly Names Noriega Government Chief*, L.A. Times, Dec. 16, 1989, at A4, col. 1 (“White House officials regarded the announcement from Panama as so insignificant that they did not immediately inform President Bush after he left the Oval Office early, suffer-

E. The Lieutenant Paz Shooting

On December 16, 1989, Marine Lieutenant Robert Paz was fatally shot as he rode in a car through a roadblock in front of PDF Headquarters. This was taken by the United States to be an escalation of the violence, and was the immediate trigger of the invasion.³⁰ On Saturday evening at about nine o'clock, the car with four off-duty American military officers drove up to a roadblock next to La Comandancia, the PDF Military Headquarters, in the low-income El Chorrillo section of Panama City. PDF personnel at the roadblock pointed weapons at the officers and tried roughly to remove them from the car. The American Marine captain at the wheel sped the engine and raced the car away from the roadblock. The PDF roadblock guards fired, and a bullet killed Marine Lieutenant Robert Paz, a passenger in the back seat.³¹ The driver of the car, Captain Mark Haddad, was grazed by a shot. Shortly before, an American Navy Lieutenant and his wife had been stopped at the same roadblock and, after witnessing the Paz shooting, they were taken to a PDF police station, where the Navy Lieutenant was severely beaten and his wife threatened with sexual abuse during a PDF interrogation.³² Upon their return to the Southern Command, the three surviving members of the Paz car and the Navy Lieutenant and his wife were debriefed overnight by American authorities. The events were immediately reported to the Chairman of the Joint Chiefs of Staff. The decision to invade Panama was apparently made on Sunday, December 17. A recommendation from General Maxwell Thurman, the Commander-in-Chief of the United States Southern Command, went forward to the Joint Chiefs of Staff on Sunday morning, and an "order to execute" was approved by the President on Sunday afternoon.³³

No American had before been killed by uniformed PDF forces. The shooting came the day after Panama's state of war declaration on December 15, 1989; the order of events could be taken as evidence that Noriega's bellicose rhetoric had loosened any sense of restraint

ing from a raspy voice."); *Opposition Leader in Panama Rejects a Peace Offer from Noriega*, N.Y. Times, Dec. 17, 1989, at A5, col. 1 (Marlin Fitzwater said the Assembly action was "another hollow step in [Noriega's] attempt to force his rule on the Panamanian people.").

30. See PRESIDENT'S LETTER, *supra* note 1.

31. U.S. Southern Command, News Release Nos. 89-12-6, 89-12-8; *PDF Kills SOUTHCOM Officer*, Tropic Times, Dec. 18, 1989, at 1, col. 1. The American car proceeded to Gorgas Hospital, where Lieutenant Paz was pronounced dead. *Id.*

32. U.S. Southern Command, News Release No. 89-12-7; *PDF Kills SOUTHCOM Officer*, Tropic Times, Dec. 18, 1989, col. 1.

33. Quarry Heights Briefing, *supra* note 18; see also Defense Department Briefing by Secretary of Defense Richard Cheney and Chairman of the Joint Chiefs of Staff, Gen. Colin Powell, Fed. News Serv., Dec. 20, 1989.

on the part of the PDF in their treatment of Americans. Noriega did not issue an apology after the Paz shooting. Instead, Panamanian officials alleged that the Americans had been the aggressors in the incident, firing at the PDF Headquarters and local bystanders as they drove by several roadblocks.³⁴ By failing to admit and condemn the shots fired by the PDF at the American car, Noriega ratified the killing of Lieutenant Paz. If decisive action was not taken after the Paz killing, one may argue, such incidents would proliferate.

F. The Necessity for Massive Force, or None at All

The most difficult step in the argument for self-defense is to show why an armed invasion was necessary to counter the problem of PDF abuse. The key must be the lack of a safe haven; the American military and civilian population would remain vulnerable to retaliation if any lesser use of defensive force were attempted. Though most violence against Americans was uncontrolled hooliganism by the PDF, rather than the execution of orders from Noriega, the constant, diffuse quality of the violence might still argue for the broad use of force: one needed to intimidate the PDF and Dignity Battalions generally in order to stop anti-American abuse.

G. In Sum

These hard facts—no ready haven for Americans in Panama, a pattern of harassment and violence against American personnel and facilities, made more alarming by Noriega's declaration of war and the Paz shooting—and the calculation that any intermediate use of force could expose Americans to retaliation are the heart of the justification for the American invasion in self-defense.³⁵

34. See *Comunicado, Fuerzas de Defensa, Republica de Panama* (Dec. 17, 1989), printed in *Critica, El Diario del Pueblo* (Panama City), Dec. 18, 1989, at 1, col. 3 ("Siendo aproximadamente las 9:00 de la noche del sábado, un vehículo con matrícula norteamericana irrumpió a gran velocidad los retenes ubicados en la Avenida A y Calles 21, 23, 25 y el límite, haciendo disparos contra el Cuartel Central y la población civil de El Chorrillo, dejando como saldo de heridos de bala a la neñita de un año, Elín Bethancourt, al señor Ruperto Ales Gaile y al soldado Alex Correa, de nuestra institución.") (Translation: At approximately nine o'clock on Saturday night, a vehicle with a North American license plate broke through at great velocity the roadblocks at Avenue A and streets 21, 23, 25, shooting at the Central Headquarters and the civil population of El Chorrillo, leaving wounded a one-year old girl Elín Bethancourt, Mr. Ruperto Ales Gaile and soldier Alex Correa, of our institution.).

35. As in any incident, there may be undisclosed intelligence information to supplement the proponent's case. However, the precedential meaning of an incident is necessarily drawn, in the public discourse of international law, from the facts that are publicly available.

II. ARGUMENTS AGAINST SELF-DEFENSE

A skeptic could admit these facts and still pose hard questions. The use of force is limited in the late twentieth century by the standards of the United Nations Charter and by the customary law rules of necessity and proportionality. These standards raise difficulties for the theory of self-defense in justifying the Panama invasion.

A. *No Classical Armed Attack*

The rule of self-defense recognized by the United Nations Charter allows the use of force against an "armed attack."³⁶ But the history of provocation and abuse of American personnel in Panama does not fit any classical idea of an armed attack. The dual function of the PDF as a police agency and a military force cannot disguise that the problem faced by American servicemen and civilians was largely one of police brutality. The incidents of harassing weapons fire at the Arraijan Tank Farm certainly qualify as illegal violence, but they involved guerrilla personnel whose identity was never publicly asserted by the United States, and the incidents had largely abated long before the invasion.³⁷

Does the December 15 declaration by the Panamanian National Assembly substitute for an armed attack? At least one senior member of the State Department Office of the Legal Adviser took the view that a declaration of a state of war was not an adequate predicate for the use of force, unless there was reason to believe that violence would ensue.³⁸ The text of article 51 of the U.N. Charter³⁹ recognizes a right of self-defense in the case of armed attack, but extends no similar recognition to a formal declaration of a state of war or a state of emergency. Anticipatory defense against a future attack may sensibly be allowed when an adversary's threat of force is "instant, overwhelming, and leav[es] no choice of means"⁴⁰ But in Panama,

36. U.N. CHARTER art. 51 ("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.").

37. Woerner Interview, *supra* note 17.

38. Briefing, Legal Adviser's Office, United States Department of State, Washington, D.C. (July 17, 1990).

39. *See supra* note 36.

40. This is the classical formulation by Secretary of State Daniel Webster. *See* Letter from Secretary of State Webster to Lord Ashburton (Aug. 6, 1842) (the "Caroline" case), in 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 669 (K. Shewmaker ed. 1983), *also in* 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906). In a world of nuclear danger, we may wish to permit anticipatory self-defense against overwhelming threats to national safety, even where the threat is not immediate. But the threat in Panama did not approach any such level of danger to national safety and survival.

the threat was not of any instant or overwhelming force, rather of exacerbated harassment.⁴¹ The import of the December 15 declaration must be judged against the events of the summer and fall of 1989. Noriega and his officials had used similar martial rhetoric on many prior occasions,⁴² especially following the United States' vigorous military exercises in Panama over the summer of 1989.⁴³ The December 15 declaration was made while Noriega was seeking additional domestic powers, including the designation of Head of State previously enjoyed by General Omar Torrijos.⁴⁴ The weight now given to the declaration differs from the United States' initial skeptical

41. In the author's interviews with numerous officials of the United States government, no one has suggested that Noriega had any plan to initiate an overall attack on American facilities, personnel, or civilians. The paper record of incidents seems to corroborate that Panamanian police used excessive force on many occasions in dealing with American personnel. Americans living in Panama readily confirm that these incidents demoralized the American community. But early on, the U.S. Southern Command gave a low key account of the incidents:

"[T]his harassment pattern is not considered a campaign orchestrated by the Gen. Manuel A. Noriega regime, . . . but rather a continuation of a trend which began in February," a US SOUTHCOM official reported. . . . The officials pointed out that incidents, such as numerous unwarranted detentions, use of excessive force, beatings and sexual harassment, are more likely actions of PDF personnel who are taking advantage of Noriega's anti-U.S. posture, encouraged by the regime-directed disinformation campaign aiming to besmirch U.S. forces and policy in Panama. . . . US SOUTHCOM officials say that . . . most harassments have not been life-threatening, [but] they do pose quality of life limitations on U.S. military personnel in Panama.

Tropic Times, Aug. 26, 1988, at 1, col. 1.

42. See, e.g., *Noriega Breaks Silence, Hits U.S. "Imperialism,"* Tropic Times, May 19, 1989, at 7, col. 1 (Noriega stated "our country has been the object of aggression for the last 18 months. The point of confrontation is precisely between Panama and the [U.S.] military presence in our area.").

43. The U.S. operations, called "Purple Storms" and "Sand Fleas," were announced as an exercise of treaty rights under the 1977 Treaty. Panama argued the United States did not have a right to conduct exercises of such broad scope, and castigated the exercises as a mock invasion. See Letter of Noriega Regime's Permanent Representative to the United Nations Leonardo Kam to President of the Security Council (Aug. 8, 1989), U.N. Doc. S/20773 ("United States troops in Panamanian territory have continued the dangerous escalation of their acts of intimidation, provocation and aggression against Panama, in violation of its sovereignty and territorial integrity and of the Panama Canal Treaties."), *quoted in Panama Asks for Second U.N. Meeting*, Tropic Times, Aug. 9, 1989, at 1, col. 1; Remarks of Panamanian Foreign Minister Jorge Ritter, 44 U.N. SCOR (2874th mtg.), U.N. Doc. S/PV.2874, at 18, 23 (1989) (U.S. forces claim right to "move without restrictions of any kind throughout Panamanian territory" as if "an army of occupation . . . Panama has almost become a theater of war."), *quoted in R.P. "Almost a Theater of War" Ritter Accuses*, Tropic Times, Aug. 14, 1989, at 8, col. 1 (with slight textual variations). See also *Panama Seeks UN Help Against U.S.*, Tropic Times, Aug. 30, 1989, at 5, col. 3 (Foreign Minister Jorge Ritter "said Panama had already been invaded by U.S. forces, who had taken over villages, hospitals and law courts during the exercises.").

44. See Panama National Assembly, *Resolución No. 10* (Dec. 15, 1989), *Gaceta Oficial*, No. 21,436; also in U.S. Dept. of Commerce, Foreign Broadcast Information Service LAT-89-241 (Dec. 18, 1989) at 19.

response: U.S. forces in Panama were not put on alert after the Panamanian National Assembly's declaration, nor were personnel movements limited.⁴⁵ No special advisory was issued by the American Embassy or Southern Command to American civilians living in Panama concerning the National Assembly's state of war declaration. The White House publicly dismissed the event as a "hollow step."⁴⁶ The prior commander of American forces concludes that the state of war declaration was a "description of a condition that had existed. It did not imply a change of attitude."⁴⁷

We should be reluctant to craft a rule impeding the United States from responding to persistent mistreatment of its nationals abroad. Governments exist to protect their citizens. At the same time, however, in judging whether it is permissible to invade another country, one should not lose sight of the difference between low-level harassment and large-scale armed attacks that threaten territorial rights or numerous lives.

B. The Duty to Employ Less Drastic Means

The use of force requires a showing of necessity and proportionality.⁴⁸ These standards govern the right to resort to war, not only tactics in war. As a result of the invasion of Panama, though the battle plan was carefully conducted, several hundred Panamanian civilians were killed,⁴⁹ three thousand Panamanian civilians were

45. According to a Southern Command spokesman, before and after the declaration of the state of war, American troops in Panama "were at 'Charlie' [an intermediate personnel movement limitation], because rhetoric was not uncommon. It was not the kind of thing you would shut down for." Under condition "Charlie," soldiers could go out to restaurants in downtown Panama City, though they were required to avoid bars and discos. Personnel movement limitations had been at "Charlie" during most of the three months prior to the state of war declaration. Quarry Heights Briefing, *supra* note 18. See also *Opposition Leader in Panama Rejects a Peace Offer from Noriega*, N.Y. Times, Dec. 17, 1989, at A5, col. 1 ("Marlin Fitzwater, the White House spokesman, also said American troops in Panama . . . had not changed their alert status because of the declaration.").

46. *Opposition Leader in Panama Rejects a Peace Offer from Noriega*, N.Y. Times, Dec. 17, 1989, at A5, col. 1 (White House spokesman Marlin Fitzwater called the declaration "another hollow step in an attempt to force his [Noriega's] rule on the Panamanian people.").

47. Woerner interview, *supra* note 17.

48. These requirements serve "the over-riding policy . . . of minimizing coercion and violence across state lines." McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600-01 (1963). See D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 93-94 (1958); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 259, 261, 279 & n.2 (1963); Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 190-91, 216-21 (1988).

49. The initial estimate by U.S. authorities was 202 Panamanian civilians dead. A medical mission to Panama conducted by Dr. Jane Schaller, Chair of Tufts Medical School Department of Pediatrics, Dr. Paul Wise of Harvard Medical School, and Dr. Gregg Bloche of Georgetown University, on behalf of Physicians for Human Rights, concluded that the initial

wounded, and approximately 18,000 Panamanians lost their homes.⁵⁰ Before mounting an invasion to avoid future incidents of police brutality and harassment, it behooves any government to show that other available means to guard its citizens from danger have been employed. On this count, the United States remains vulnerable.⁵¹ Possible protective measures not taken by the United States included: (1) moving all armed services personnel and dependents onto base areas at an early date; (2) restricting movements of United States military personnel outside base areas except for the performance of official duties; (3) allowing personnel to carry sidearms when travelling outside American bases; (4) providing armed patrols of Canal Commission housing areas; and (5) withdrawing vulnerable American civilians from Panama during the crisis. In addition, the United States could have taken steps after the shooting of Lieutenant Paz to clarify responsibility and to make clear to Noriega that any additional violence would prompt retaliation.

1. Providing Physical Protection On and Outside Base Areas

Although the Canal Zone no longer exists as a separate enclave, the United States has numerous military bases along the Canal. Many of the bases are designated as "defense sites," and the United States is entitled under the Treaty to maintain exclusive access to these areas.⁵² American troops could have been housed—safely and

mortality estimate omitted at least 100 additional civilian deaths. See Statement of Physicians for Human Rights (Somerville, Mass., Mar. 15, 1990). Roberto Eisenman, publisher of *La Prensa*, who was exiled by Noriega, estimates approximately 500 civilian deaths. Interview with Roberto Eisenman in Panama City (July 26, 1990). In July 1990, officials of the United States Southern Command stated there was no complete list of Panamanian civilian casualties, and that no list was being prepared. Quarry Heights Briefing, *supra* note 18. See also Hockstader, *In Panama, Civilian Deaths Remain an Issue*, Wash. Post, Oct. 6, 1990, at A23, col. 1.

No payment has been made to the families of civilian casualties on an *ex gratia* or other basis.

50. This estimate was made by the head of the Panamanian relief effort, Teresita de Arias. See Statement of Physicians for Human Rights, *supra* note 49, at 11. Other estimates of the number of homeless ranged from 2,500 to 20,000. See Hoffman, *Bush Unveils \$1 Billion Panama Aid Package; President Calls Aid Loan Plan Close to "Instant Relief" For Homeless*, Wash. Post, Jan. 26, 1990, at A8, col. 4; *A Year Later, Many in Panama Remain Homeless*, N.Y. Times, Dec. 20, 1990, at A3, col. 1; Eisner, *United States v. Noriega*, Newsday, Jan. 6, 1990, at 12.

51. Even observers who support the invasion have suggested other means of protecting U.S. armed services personnel and U.S. civilians may have been available. Columnist George Will noted, "American lives and assets might have been protectable by measures short of intervention." Will, *Good Neighbor Policy*, Wash. Post, Dec. 21, 1989, at A29, col. 1.

52. Under the Panama Canal Treaty, the United States is entitled to exclusive use of "defense sites" for treaty purposes until the year 2000. These defense sites include Howard Air Force Base, Rodman U.S. Naval Station, Fort Clayton-Corozal Army Reservation, Albrook Air Force Station, Fort William Davis Military Reservation and Fort Sherman. In

securely from PDF harassment—on the defense sites. This measure would have imposed hardship conditions, but would have protected American personnel from PDF police encounters. Prefabricated housing could have been constructed on exclusive-access American defense sites to accommodate essential personnel.

American military personnel could also have been afforded protection when travelling outside the base areas. Commanders, with appropriate clearance from Washington, could have authorized United States personnel to carry sidearms at all times outside military compounds and issued locator radios to allow immediate back-up.⁵³ Although the agreements implementing the 1977 Panama Canal Treaty restrict the carrying of arms while off-duty,⁵⁴ United States personnel might do so with justification in light of Noriega's policy of harassing American soldiers which was wholly inconsistent with the Panama Canal Treaty.⁵⁵ A signatory to a treaty is permitted to engage in reasonable measures to protect against the other signatory's defalcation.⁵⁶ Carrying sidearms outside the military bases would have been an intermediate measure of self-defense that challenged the treaty regime far less drastically than a full-scale invasion. Alternatively, American soldiers could have been restricted to base except for official duties. When travelling on duty, American servicemen were entitled to carry weapons under the Treaty⁵⁷ and could be detailed in

addition, the United States occupies "military areas of coordination" which are set aside for "coordinated use" by the armed forces of both governments. "Military areas of coordination" include Quarry Heights, Fort Amador, and Fort Gulick, as well as housing areas in Curundu Heights, Herrick Heights, and Coco Solo South. See Article IV Implementing Agreement, *supra* note 2, arts. 1 & 4, annex A. In military areas of coordination, the senior United States Commander has treaty "responsibility for interior security, including control of access to these Areas," with military police patrols to be jointly conducted. *Id.*, annex B.

53. Where an American was detained, "[w]e should have responded with several MP's going down immediately rather than 12 hours later with an unarmed Spec. 4," noted one official. Joint Briefing, U.S. Army War College, *supra* note 19.

54. Article IV Implementing Agreement, *supra* note 2, art. 21, allows United States service personnel to carry "official arms . . . [w]hen required by their official duties," under standards established by the Joint Committee. The possession and carrying of private firearms was to be governed by Panamanian law and U.S. Forces regulations. Yet, if service personnel are targeted for harassment *because* of their status, one might legitimately choose to take a broader notion of the requirements of official duties.

55. See Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27, art. 26, reprinted in 63 AM. J. INT'L. L. 875, and 8 I.L.M. 679 (1969), (concluded at Vienna, May 23, 1969, entered into force Jan. 27, 1980; U.S. not a party, but treaty generally restates customary law) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

56. *Id.* art. 60(1) ("A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for . . . suspending its operation in whole or in part.").

57. See Article IV Implementing Agreement, *supra* note 2.

groups. The U.S. Southern Command could have safeguarded Canal Commission employees and essential contractors by housing them on military bases, providing military escorts for essential outside activities, and controlling access to Canal Commission housing areas.

2. Withdrawing Vulnerable American Civilians

The major reason proffered by American commanders for not using intermediate counter-measures to deter Noriega and the PDF was the vulnerability of the American civilian population.⁵⁸ Yet inconvenient steps to reduce the exposure of American civilians were not pursued even at the latest stage in the confrontation with Noriega.

The American business community was never asked by the President to withdraw personnel from Panama or to reduce their numbers.⁵⁹ While American Presidents shoulder a responsibility to protect the safety of American business people abroad, there is a difference between using force to provide protection during the evacuation of American civilians, and using force to guarantee their safe residence abroad into the indefinite future. Whether we like it or not, international law does not entitle one country to displace another country's existing government in order to provide a secure, long-term environment for nationals who have chosen to live or do business abroad. Armed force may be used to protect American corporate personnel and other civilians during their evacuation,⁶⁰ but it is another matter to use armed force to guarantee a *Pax Mercatoria*.⁶¹

58. Woerner Interview, *supra* note 17; Quarry Heights Briefing, *supra* note 18.

59. A President could have sought the voluntary cooperation of the American corporate community, or, in the alternative, issued an Executive Order under the International Emergency Economic Powers Act limiting the expenditure of American funds in Panama. See International Emergency Economic Powers Act, 50 U.S.C. § 1701-06 (1988).

60. In April 1988, the U.S. Embassy briefed the American business community on procedures for evacuation of up to 35,000 civilians from Panama in the event of an emergency. The evacuation was designed to proceed through U.S. military bases. See Tweedle, *Noriega Blames Scared Marines For Mystery Firefight*, United Press Int'l, Apr. 14, 1988 (evacuation plan for civilians). See also Larmer, *In Canal Zone, American Concerns Grow*, Christian Sci. Monitor, Mar. 29, 1988, at 1, col. 2 (evacuation plan for Canal Commission employees and dependents); Rohter, *Charm Fades for Americans Living in Canal Zone*, N.Y. Times, Mar. 13, 1988, at A16, col. 3.

61. Even if a treaty allows civilians to remain in a foreign country for purposes of trade or convenience, we are unlikely to say that all treaty rights can be vindicated at the cost of using force. Canal Commission employees, and Canal and armed services contractors, were entitled to live in Panama to assist in Canal operations and military activities, and we may want to distinguish this as a national security interest. See Article III Implementing Agreement, *supra* note 6, arts. 11 & 12; Article IV Implementing Agreement, *supra* note 2, art. 12. These civilians were relatively few in number and could have been sheltered on defense sites and controlled-access housing areas.

As for military dependents, plans to remove military families were pursued belatedly and incompletely. The Department of Defense withdrew some military dependent families in May 1988.⁶² "Operation Blade Jewel" began in May 1989 to transfer remaining military families to housing on military bases and adjacent Canal Commission housing areas, or to return them to the United States.⁶³ But logistical arrangements were never made to allow these families to live self-sufficiently on the base areas, and the delay in evacuating dependents prolonged their vulnerability and allowed incidents to accumulate. In an all-volunteer army, it is difficult to separate service personnel from their families for long tours, or to require family residence in makeshift housing.⁶⁴ But under international law, inconvenience must be incurred before one can resort to lethal force.⁶⁵

The critic of the invasion may still be asked: Why was there any duty to regroup in more secure areas? If the Panama Canal Treaty guaranteed American dependents the right to live anywhere in Panama, was there any duty to reside on defense sites rather than stand our ground in the vulnerable areas? There are two responses. First, the Panama Canal Treaty is notably vague. It recognizes categories of "defense sites" for exclusive American military use and "areas of coordination" for joint use,⁶⁶ but does not set forth any unrestricted right of residency throughout the Republic of Panama for military personnel and their dependents. Second, even if the Treaty is taken to create an implied right of unrestricted residency, this part of the Treaty was not essential to American national security interests; we should shrink from any proposed doctrine that allows any and all treaty rights to be vindicated by force, for we may see a proliferation of excuses for war in the hands of other countries. The alternative of

62. See *Service Members, Civilians End Move From RP*, Tropic Times, July 7, 1989, at 1, col. 1 (describing May 1988 program to curtail travel to Panama of dependents accompanying military "sponsors," and voluntary early return to U.S. of dependents already living in Panama); Sciolino, *U.S. Says Panama is Harassing G.I.'s*, N.Y. Times, Sept. 29, 1988, at A16, col. 1 (1400 of 2450 families of military personnel and Department of Defense civilians sent back to United States or to safer locations in Panama).

63. See *Service Members, Civilians End Move From RP*, Tropic Times, July 7, 1989, at 1, col. 1 (in two month period, 6300 military personnel, Department of Defense civilians, and dependents relocated from Panama City to housing on U.S. military bases, to Panama Canal Commission housing areas, or to U.S.).

64. A standard unaccompanied tour of duty is 12-15 months long, under DOD policy. The Southern Command wished to have personnel "versed in the area," requiring longer tours. Quarry Heights Briefing, *supra* note 18.

65. See, e.g., Y. DINSTEIN, *supra* note 48, at 216 ("Necessity comes to the fore when war is begun following an isolated armed attack.").

66. See Panama Canal Treaty, *supra* note 2, arts. 1 & 4, annex A.

providing protected residence on base areas was the course most clearly consistent with the U.N. Charter in the Panama crisis.

3. Fully Investigating the Paz Shooting and Communicating U.S. Concern to Noriega

The shooting of Lieutenant Paz on December 16, 1989 was the first death of a U.S. citizen publicly attributed to the PDF.⁶⁷ White House spokesman Marlin Fitzwater called it an act of "murder."⁶⁸ But one may ask why the United States was unable to allow any interval for investigation of the incident before making a decision to invade Panama, and why the United States did not take steps to clarify responsibility for the incident with Noriega. To be sure, the Lieutenant Paz shooting was made more likely by the heightened tension between the United States and Panama. The shooting arguably stemmed from provocation by the Panamanians. PDF members at the roadblock in front of PDF military headquarters pointed their weapons at the American officers and tried to pull the officers from the car, without taking the intermediate step of checking their identification cards or inquiring why they were present in front of La Comandancia.

But American officials acknowledge that Panama had the right to establish traffic roadblocks in Panama City.⁶⁹ Fleeing from a roadblock may have triggered a reflexive, violent response from roadblock guards. The United States soldiers in the car drove through the checkpoint directly in front of a sensitive Panamanian military facility where Noriega's own office was located, in an atmosphere still tense from the October coup attempt. The Panama City Modelo jail also was nearby, where a U.S. citizen accused of involvement in an intelligence operation was widely known to be incarcerated; the proximity of the jail may have added to the Panamanians' excessive response. It is also conceivable that the shots fired at the fleeing car may have been intended only to disable the vehicle.⁷⁰

In relying upon the incident as predicate for the invasion, the United States also faces the question of whether the acts of low-level

67. One American serviceman was killed in defensive crossfire at the Arraijan Tank Farm in 1988, but the United States Government did not publicly claim the intruders were associated with the PDF.

68. White House Briefing by Marlin Fitzwater (Fed. News Serv., Dec. 18, 1989). See also U.S. Southern Command, News Release No. 89-12-7, at p. 3.

69. Quarry Heights Briefing, *supra* note 18.

70. Under the Endara government, shots fired by a Panamanian officer at a fleeing car have again caused the death of a U.S. serviceman. *Panama Police Kill U.S. Soldier*, United Press Int'l, Nov. 5, 1991; *Tensions Rise Between Police, U.S. Soldiers*, United Press Int'l, Nov. 8, 1991; *U.S. Envoy Says "Excessive Force" Used in Soldier's Death*, Reuters, Nov. 6, 1991.

officers should have been attributed to the Panamanian government, and whether any other remedy was available. A former American commander has noted that Noriega sought to taunt our forces in Panama, but that Noriega was also wary that any killing could precipitate American use of force.⁷¹ Once President Delvalle was ousted, the United States declined direct diplomatic contact with Noriega, to avoid lending support to his regime. Treaty matters were handled through the structure of the Treaty Affairs Joint Committee of PDF and American officers. Protest of the shooting of Lieutenant Paz was made at 11:45 p.m. on December 16 to the Panamanian members of the Joint Committee.⁷² According to Southern Command officials, even in a situation so serious, no attempt was ever made to reach Noriega for discussion.

Former U.S. Department of State Legal Adviser Abraham Sofaer has argued that the differing account of the Paz shooting released by the Panamanian government on Sunday, December 17, was a sufficient indication of Noriega's obduracy.⁷³ The skeptic may ask why we could not have contacted Noriega and demanded that he investigate the shooting, immediately suspend the responsible officers, and issue immediate orders to PDF and Dignity Battalion members to respect American lives and safety. One could even have brought the matter to the U.N. Security Council, to which Charter signatories are textually required to refer disputes that threaten the peace, short of an Article 51 "armed attack."⁷⁴

Similarly, the United States' public response after the shooting may not have communicated how gravely the matter was regarded. Southern Command officials called the shooting "an isolated incident."⁷⁵ This was done, some U.S. officials report, to lull Noriega so

71. Woerner Interview, *supra* note 17. The brutal mistreatment of an American Navy Lieutenant and his wife after the Paz shooting may have reflected in part the Panamanian officers' realization that a line had been crossed with the shooting, and their fear of what the witnesses had seen. It is not clear whether the PDF interrogators knew of Lieutenant Paz's fatal wound at the time of the interrogation.

72. Fact Sheet on Recap of Recent PDF-US Forces Treaty Violations/Incidents, 11 January 1990, in DEPT. OF DEFENSE, Summary of Pre-Operation Just Cause Incidents (released Nov. 1, 1990), at 4.

73. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 285 (1991). The Panamanian government's news release on Sunday, December 17, 1989, claimed that shots had been fired at La Comandancia by the U.S. servicemen.

74. U.N. CHARTER arts. 33, 37.

75. See United Press Int'l, Dec. 17, 1989 ("Col. Ron Sconyers, a spokesman for the U.S. Southern Command in Panama, agreed on Cable News Network that 'most of the indications point that this is an isolated incident, but certainly a very tragic and needless one.'"); see also *id.* ("In the aftermath of the Saturday night shooting, an administration official cautioned: 'I

that he would be vulnerable to a surprise attack 72 hours later.⁷⁶ But the skeptic may ask how far a preference for tactical surprise can qualify the duty of U.N. Charter signatories to seek nonviolent resolution of disputes.

III. CONCLUSION

This essay is intended as an invitation to debate. The United States' leadership role in the world includes profound influence as a lawmaker—in the formation of the customary law of force and the working law of the Charter. The law that will be drawn from our action in Panama depends upon what happened in fact. Truncated official explanations after the event may not fully reflect the circumstances that *internally* were seen as warranting the use of force; explaining the landscape of the decision may modify the precedential meaning of the action. Law is also formed by the *opinio juris* of statesmen, scholars, and, in a democracy, citizens. We must assess our decisions in foreign policy in the harsh light of the facts, including alternative courses of action that were not pursued, to assure United States actions are consistent with the law we ask others to live by.

think this was an isolated incident. To draw conclusions from the rhetoric of the last few days would be misleading at this time.' ”), *reprinted in* Tropic Times, Dec. 18, 1989, at 8, col. 2.

The Southern Command press release spoke of the Comandancia shooting as proof of an atmosphere of recklessness, but did not claim it was desired or planned by the regime. The shooting showed “a total breakdown of discipline and control within the regime” and “the critical loss of control by regime leadership.” U.S. Southern Command, News Release No. 89-12-7, at 3. *See also* Statement of Secretary of Defense Richard Cheney, *quoted in* Tropic Times, Dec. 18, 1989, at 1, col. 4 (“The lack of discipline and control in the Panamanian Defense Forces is further evidence that Panama is a country without a government.”); Tropic Times, Dec. 18, 1989, at 1, col. 4 (“Southern Command and U.S. Embassy officials expressed grave concern over the unwarranted use of deadly force by the PDF.”).

76. Quarry Heights Briefing, *supra* note 18.