
OUTSIDE COUNSEL

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How the Invasion of Panama Affects International Law and the Bahamas

THE UNITED States invasion of Panama on Dec. 20, 1989, received strong support from the American public. Because of General Manuel Noriega's alleged association with drug trafficking, he had replaced Moammar Gadhafi and the late Ayatollah Ruhollah Khomeini as the new international outlaw in the eyes of the U.S. Government.

However, as General Noriega's trial begins in the United States, it is appropriate to determine whether the invasion was justified under international law and examine its implications for sovereign Caribbean countries such as the Bahamas.

Unlike domestic legal systems, the international legal system is decentralized and effective power is centered in nation states which are sovereign and equal, though some states obviously wield more power than others. No centralized institutions have sufficient authority and resources to make, apply and enforce international law and to adjudicate disputes. In popular perception, perhaps the most powerful office is the presidency of the United States or the general-secretaryship of the Soviet Communist Party.

The development of international law, as reflected in the United Nations Charter, treaties and customary international law, is a continuing process of authoritative decisions for clarifying and securing the common interest of community members. International law serves not only as a limit on effective power but also as a creative instrument in promoting both order and other civilized values in a world of sovereign States.

The legal prescriptions which determine when a State can resort to military means to resolve international disputes were fundamentally changed by the United Nations' Charter. The United Nations Charter, Article 2(4) states "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."

Thus, the Charter abolishes the 19th century legalistic invocation of the term "war" or measures short of war and establishes the principle of peaceful settlement of conflicts among States.

However, international law recog-

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nizes three exceptions to the general prohibition against the use of military force to settle international disputes among States:

Self Defense

1. *Self Defense* — Under customary international law, codified in the United Nations Charter, Article 51, States have the inherent right of individual and collective self defense 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. The phrase "an armed attack" does not mean that self defense must always wait for an actual armed attack.

The U.N. Charter is not a suicide pact and the target State cannot be expected to be a sitting duck awaiting its own destruction in this nuclear age even if a process of attack has not begun. Therefore, there is growing support in international law for "anticipatory" self defense, which may be defined as the unilateral use of force when, in a State's subjective determination, the State is faced with an imminent attack. An example of anticipatory self defense is the United States quarantine against Cuba in October 1962 in response to Cuba's importation of offensive nuclear weapons from the Soviet Union.

Aggression was defined by the U.N. General Assembly in December 1974 as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Self defense, therefore, involves employing the military instrument against an alleged attacker to protect territorial integrity and political independence.

Human Rights

2. *Humanitarian Intervention* — The doctrine of humanitarian intervention is invoked when States resort to military force to protect human rights in other States. Such protection has traditionally been extended, first to nationals abroad in order to secure compliance with the minimum standards for the treatment of aliens under customary international law and, second, to non-nationals in order to deter and end atrocious deprivations of human rights by a State against its own nationals or the nationals of third States.

This doctrine is based on the theory that where egregious violations of human rights occur within a State whose government will not or cannot stop them, the general community, or in exigent circumstances a single State, may enter the territory of the defaulting State to secure an end to the outrage and compliance with a minimum international standard of human rights.

The U.N. Charter, Articles 1(3), 55 and 56, suggests that the protection of human rights is a coequal goal with the maintenance of peace and security.

This general rights prescription was strengthened by the Universal Declaration of Human Rights, the two international covenants on human rights and the optional protocol to the Covenant on Civil and Political Rights. Together these instruments constitute a global bill of human rights.

Humanitarian intervention is often used to rescue religious minorities, recent examples are the Indian activities in Bangladesh in 1971 and the Entebbe operation undertaken by Israel in July 1976 to rescue hostages held in the Entebbe airport in Uganda.

It should be noted that the remedy of humanitarian intervention is a weapon more available to the powerful and is highly susceptible to abuse and misuse against weak third world countries.

Self Help

3. *Self Help* — The practice of self help — often characterized as retaliations, retaliations, reprisals intervention, minor coercion or measures short of war — though controversial, is viewed by industrialized countries as an essential element in maintaining minimum world order in a decentralized international legal order where remedy procedures are realistically unavailable.

Although the International Court of Justice in the *Corfu Channel* case stated that force has no place in contemporary international law, the court held that it was lawful for Britain to assert rights by force in sending its warships through the straits, with guns mounted and ready for action if necessary, in response to the prior unlawful act of Albania. Like humanitarian intervention, this remedy is a weapon of the powerful and can be misused and abused against weak third world countries.

The exercise of any of these three exceptions must be subject to review by the international community for strict compliance with the legal requirements of necessity and proportionality. The classic formulation of the element of necessity for permissible self defense was given by Secretary of State Daniel Webster in the *Caroline* incident in 1837 as the "instant, overwhelming, leaving no choice of means and no moment for deliberation."

The test of lawfulness is that the target State is permitted to use military force when it reasonably decides, as third party observers may appraise reasonableness, that the threat to its territorial integrity or political independence is so imminent that it must respond immediately by military force to protect itself. The responding force must be proportionate in relation to the provocation.

The U.S. invasion of Panama clearly violated the United Nations Charter's provision that "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."

The United States posited that its justifications were (1) to protect American lives, (2) restore democracy to Panama, (3) preserve the integrity of the Panama Canal and (4) bring General Noriega, who had been indicted in Florida, to justice.

Under scrutiny, these justifications are not convincing. It has been said that the prevailing view in Washington is that the invasion of Panama was a massive military action staged largely on the basis of Mr. Bush's visceral feelings about the Panamanian leader, General Noriega, who was known to him from their mutual association with the Central Intelligence Agency, rather than any valid reasons under international law. (*The New York Times*, Dec. 24, 1989)

There is no credible evidence that American lives were in danger prior to the actual invasion. The unfortu-

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nate killing of the U.S. Marine lieutenant by Panamanian soldiers on Dec. 16 and the threats made against other American nationals, in the context of the inflammatory rhetoric between General Noriega and President Bush, did not constitute a threat to the United States territorial integrity or political independence. In fact, over 26 American lives, and about 2,000 Panamanian lives were lost and billions of dollars in property damage suffered in "Operation Just Cause."

Although the stated goal of saving American lives was a rationale for the invasion, the operational decision by the U.S. military to minimize U.S. casualties by using massive firepower inflicted casualties indiscriminately in poor areas in Panama, as "hundreds of wood shanties in poor neighborhoods" were destroyed in an attempt to destroy General Noriega's headquarters.

There is no credible evidence that the Panama Canal was in danger of being closed by the Panamanian Government. In fact, the Panama Canal was closed for the first time in 75 years by the U.S. forces during the invasion.

While the situation in Panama constituted a serious irritant to U.S. policy makers, there is no compelling evidence that this situation constituted the basis for self defense or humanitarian intervention by the United States. There was no provocation of an "instant, overwhelming, leaving no choice of means and no moment for deliberation" type in the Panamanian situation. The facts in Panama did not constitute a reasonable basis for self defense or anticipatory self defense by the United States, because Panama never threatened the territorial integrity or political independence of the United States.

The evidence is even less compelling that the invasion was a humanitarian intervention. Compared to South Africa and other countries in Latin America such as Chile and Haiti with whom the United States maintains diplomatic relations, the situation in Panama did not constitute an egregious case of human rights abuse.

While the promotion of democracy is surely to be encouraged, such promotion is not a justifiable basis for military invasion of a State under international law. This rationale is even less persuasive when viewed in the context of past U.S. interventions in Panama to prevent democracy and that for over 20 years General Noriega was a paid intelligence source for the CIA. Although the Pol Pot regime in Cambodia was universally despised for its human rights abuse, when Vietnam's troops drove Pol Pot from power, the United States condemned the intervention as a violation of international law and refused to recognize the new government.

The U.S. invasion of Panama cannot be justified under the exceptions of self defense, humanitarian intervention or permissible self help because no legal necessity existed and in any event the U.S. response with 26,000 troops was not proportionate in force and intensity to any threat that General Noriega constituted.

The fourth justification given by the United States for the invasion of Panama was to bring to justice General Noriega, who had been indicted in February 1988 by a federal grand jury in Miami and a grand jury in Tampa, Florida. While there is no basis under international law to invade another country whose leaders have been indicted in the United States for drug trafficking, given the United States predominant influence in this Hemisphere, this reasoning establishes a dangerous precedent for the Bahamas which could be the target of similar intervention in the future.

The indictment nearly two years ago of General Noriega by a Federal grand jury in Miami and Tampa for being a part of a drug smuggling and money laundering conspiracy started the chain of events that culminated in the invasion of Panama and the arrest of General Noriega.

During the 1980s the Government of the Bahamas came under persistent attack by U.S. officials for alleged complicity with international drug trafficking and money laundering. The threatened criminal indictment of the Bahamian Prime Minister in 1988 in Florida (*The New York Times*, April 29, 1988) and the indictment of some of his colleagues could be used as a pretext for U.S. interventions in the Bahamas.

Given the potential peril to the sovereignty of the Bahamas, the Bahamian diplomatic response to the U.S. invasion of Panama is confusing and naive. On Dec. 22, 1989, the Bahamas Information Services issued a release stating that the Bahamas "understands the unprecedented circumstances which precipitated the intervention . . ." The statement fails to address the illegality of the invasion under international law, the implications for Caribbean sovereignty and the increased use of military force in this region while the Soviet Union is reducing its military presence in Eastern Europe.

Given a second opportunity to address the issue, the Bahamas Government again stumbled when it was among 24 nations which failed to appear on Dec. 29, 1989, to vote on the U.N. General Assembly resolution condemning the U.S. invasion as a "flagrant violation" of international law. The Bahamian response to the invasion of Panama contrasts with the Bahamian Government's forthright condemnation of the U.S. invasion of Grenada on Oct. 26, 1983, as a violation of international law and a threat to Caribbean sovereignty. What accounts for this different response in such similar circumstances?

The Bahamas Government's failure to properly assess the invasion of Panama may be due to its defensiveness to U.S. charges of drug complicity. However, this failure to effectively inform the Bahamian public of the potential peril to Bahamian sovereignty and fashion an appropriate diplomatic response which reflect Bahamian national interest may come to haunt the Bahamas in the future. To see the events in Panama as merely an opportunity for increased ship registration for the Bahamas is simplistic and short sighted.

There is an urgent need in the Bahamas for bipartisan public debate about the U.S. invasion of Panama and the implications for the Bahamas.

Conclusion

The United States invasion of Panama reflects the failure of the U.S. Panama policy, a policy that helped to create rather than avert the conditions that led to the resort to military force. This failure represents a return to gunboat diplomacy, with its attendant negative connotations, and undermines efforts to promote multilateral cooperation within the hemisphere. In the era of *glasnost*, the United States, as an hegemonic power, has a special responsibility to strengthen, respect and observe international law.

The war against narcotic cartels is important to preserve democratic societies and our civilization. However, the price should not be Caribbean sovereignty. As the U.S. military shifts its emphasis from Europe with the reduction of East-West tensions to greater involvement in the drug war in this hemisphere, it should observe international law and avoid the temptation to resume gunboat diplomacy.

The capture of General Noriega, while an important psychological boost to the fight against drugs, will have a marginal effect on the flow of drugs into the United States. Colombia, not Panama, is the source of most of the cocaine exported to the United States and drug demand originates in the United States, not Panama.

Therefore, United States leaders should take the more courageous route of convincing the American public that the fight against drugs is a long-term struggle, requiring drug education and treatment to lower demand in the United States. However noble the goals of the U.S. invasion of Panama, the means employed were illegal and did considerable violence to the United Nations Charter, the Organization of American States Charter and the Panama Canal Treaty.

Bahamian sovereignty could be the next casualty, unless the Bahamian society clearly assesses the implications of the Panama invasion.

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