THE INVASION OF PANAMA: AN ANALYSIS OF OPERATION JUST CAUSE UNDER INTERNATIONAL LAW

Darren Margolis*

The United States invaded Panama on December 20, 1989. Titled "Operation Just Cause," the invasion had several objectives as defined by President George Bush: (1) to restore democracy, (2) to safeguard American lives, (3) to protect the Panama Canal, (4) and to apprehend General Manuel Noriega. The first section of this paper will evaluate the legality of objectives 1, 2, and 3 under international law. The second section will focus on objective 4 for the purpose of determining whether the United States has jurisdiction over Noriega.

The stated objectives for the invasion must be analyzed independently of any political concerns. Some commentators on the invasion have mistakenly suggested that, assuming the true reasons for the invasion are political, the legal analysis becomes unnecessary and the invasion must therefore be illegal.[1] This point of view fails to take into account the fact that the motives of states in their relations with each other are often political; most aspects of foreign policy are *entirely* political.[2] Performing a balancing test between the legal and the political motives will therefore tell us nothing about the legality of an act under international law. Just as a proper motive will not render an illegal act legal, neither will an improper motive render a legal act illegal.

When the United States government, under Ronald Reagan, discovered that Noriega had become a double agent for Cuba and the Soviet Union, relations quickly deteriorated between the US and Panama, culminating in Noriega's indictment on drug charges in a Florida court.[3] By the time Bush came into office Noriega had become a major issue in US foreign policy, particularly after Bush's proclaimed war on drugs. Bush therefore continued the Reagan policy of economic sanctions to pressure Noriega to step down, which Noriega steadfastly refused to do. The objectives of Operation Just Cause have their roots in the steps Noriega took to defy the US in solidifying his rule over Panama.

RESTORING DEMOCRACY

Prospects may have looked bright for a peaceful transition of power in Panama in May of 1989. Noriega, who had in March of 1988 ousted President Eric Arturo Delvalle, supported Carlos Duque in what Noriega promised to be a fair election. The United States continued to recognize Delvalle, not Noriega, as the legitimate head of government, and early polling named opposition candidate Guillermo Endara as the clear favorite over Duque. To ensure free and fair elections, an international delegation came to Panama to observe the process. What followed, however, signified a clear departure from any known standard of fairness.

Noriega's forces raided vote-counting centers, delayed the start of the tally, and ultimately replaced the official tally sheets with counterfeits. Members of the international delegation of observers quickly condemned Noriega's actions. Former US president Jimmy Carter, a hero to many Panamanians for signing the Panama Canal Treaty, proclaimed that "the government is taking the elections by fraud" and that the result was "the robbing of the people of Panama of their legitimate rights."[4] Although the print media carried a report of Endara

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* Darren Margolis is a graduate of Towson State University and is currently attending the University of Baltimore School of Law.

1 The view that the politics make the invasion illegal can be found in many newspaper and magazine articles which deplored the invasion. The people who hold this view are laymen who have no knowledge of international law. In the scholarly journals I read for this paper, not one author took that position.

2 Telephone Interview with Dr. Peter Merani, Professor of Political Science at Towson State University. For more on this point, see Hans J. Morgenthau & Kenneth W. Thompson, *Politics Among Nations* (6th ed. 1985).

3 *United States v. Noriega*, No. 88-0079 CR (S.D. Fla. filed Feb. 4, 1988).

4 William Branigin, "Carter Says Noriega Is Stealing Election," Wash. Post, May 9, 1989, at A1. See also William Doerner, "Lead Pipe Politics", Time, May 22, 1989, at 40: The Roman Catholic Church referred to the election tampering as an "effort to frustrate the popular will of the people," and Venezuelan President Carlos Andres Perez called it simply "a coup d'etat."

barely escaping harm at the hands of Noriega forces during a victory rally, outrage over the election fraud became even more intense when television news footage showed Noriega's elite "Dignity Battalions" brutally beating opposition vice-presidential candidate Guillermo Ford, his face and clothes bloodied. In his press conference announcing the invasion and its objectives, President Bush specifically referred to the footage of Vice-President Ford to illustrate the need to restore democracy.[5]

A fundamental principle of international law is sovereignty of states. Article 2(1) of the Charter of the United Nations states that "The Organization is based on the principle of the sovereign equality of all its Members."[6] In addition, several articles of the Organization of American States (OAS) manifest a concern for upholding the principle of sovereignty.[7] The principle of sovereignty recognizes the supreme political authority of a state to regulate itself free from outside influence. Criteria for recognizing a state and government as sovereign include whether it has effective control over a defined territory and population, an organized governmental administration, and the capacity to act effectively to conduct foreign relations and to fulfill international obligations.[8]

Based on the foregoing criteria, Guillermo Endara could not be deemed the head of government of Panama at the time of the invasion.[9] He had no control over any territory in Panama, no administrative control over various branches of the Panamanian government (notably, the military), and he certainly could not conduct foreign relations. Indeed, no country other than the US had recognized the Endara government at the time of the invasion. Although Endara had the rightful claim to the title of sovereign (***de jure***), Noriega had actual possession (***de facto***). According to Professor Quincy Wright, "In international law the ***de facto*** situation is presumed to overrule the ***de jure*** situation -- ***ex facto jus oritur***."[10]

In furtherance of the principle of sovereignty, Article 2(4) of the Charter of the United Nations requires 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, or in any other manner inconsistent with the Purposes of the United Nations."[11] (emphasis added)

On its face, Article 2(4) would seem to preclude **any** use of force, to restore democracy or accomplish any other goal. Scholars, differ however, as to whether intervention to restore democracy violates the UN Charter.

In support of Operation Just Cause, Professor Anthony D'Amato argues that intervening to install the freely elected government and thereby implementing the will of the people did not violate Article 2(4) because it did not violate either the territorial integrity or political independence of a state.[12] Professor D'Amato believes that the protection for territorial integrity and political independence in Article 2(4) exists to prohibit actions like colonialism and annexation.[13] The US did not seek to annex or colonize Panama, and the government put in power was chosen by the people. Therefore, no violation of Article 2(4) took place.

Professor D'Amato's view finds support in the writings of Professor Michael Reisman.

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5 Marian N. Leich, "Use of Force", 84 Am. J. Int'l L. 545, 546 (1990).

6 U.N. Charter art. 2, para. 1.

7 O.A.S. Charter arts. 1, 9, 10, 11.

8 Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097.

9 President Bush implied that the intervention was lawful because it was done at the invitation of the Endara government. See Leich, *supra*, at 547 ("We consulted with the duly elected Panamanian government [Endara]...and they...welcomed our assistance.") Under the foregoing analysis, the invitation had no validity because Endara did not meet the requirements of a government. It should also be noted that Endara later denied that he was ever consulted. See Paul Lewis, "Endara Struggles for Order", St. Louis Dispatch, Dec. 23, 1989, at 15 (" 'We were not really consulted,' Endara admitted. He said he had been 'very diplomatically' told of President George Bush's plans only two or three hours before the invasion. 'I would have been happier without an intervention.' ")

10 Alan Berman, "In Mitigation of Illegality", 79 Ky. L.J. 735, 783 (quoting Quincy Wright, Editorial comment: "United States Invasion in Lebanon", 53 Am. J. Int'l L. 112, 120 (1959)).

11 U.N. Charter art. 2, par. 4.

12 Anthony D'Amato, "The Invasion of Panama was a Lawful Response to Tyranny", 84 Am. J. Int'l. 516, 520 (1990).

13 Id.

Reisman's first premise is that the UN Charter offers no "ethical imperative" against use of force.[14] This becomes clear from the Charter's authorization for the UN to use force and for states to use force in self-defense under Article 51. Thus, while the Charter does mandate non-aggression, it does not mandate pacifism.

Second, Professor Reisman urges that Article 2(4) be considered in the context of the whole Charter. Professor Reisman contends that the ultimate end of the UN Charter is "the enhancement of the ongoing right of peoples to determine their own political destinies. Therefore, each application of Article 2(4) must enhance opportunities for ongoing self-determination."[15] To underscore the point, Professor Reisman offers a hypothetical situation: if the military stages a coup against a government and takes power, international law allows for the military government to invite in outside forces to help put down subsequent rebellion, but does not allow an outside force to come in and reinstall the ousted popular government.[16] For the UN to apply Article 2(4) so mechanically thwarts the purpose of the UN Charter, according to Professor Reisman, because the result "may be to superimpose on an unwilling polity an elite, an ideology...alien to its wishes."[17]

On the other side of the issue is Professor Oscar Schachter. As far as interpretation of the terms territorial integrity and political independence, Professor Schachter asserts that invading to topple a repressive government violates the political independence of a state; invading also violates the territorial integrity because an invasion necessarily precludes the right of a state to control access to its own territory.[18] To argue otherwise "demands an Orwellian construction" of those terms.[19] Neither does Professor Schachter agree that self-determination of peoples is the ultimate end of the UN Charter. Paraphrasing from Article 1 of the UN Charter, Professor Schachter concludes that the goals most important to the UN Charter are the "maintenance of peace and prevention of aggression."[20] He also expresses concern about what he perceives to be the subjectivity inherent in Professor Reisman's theory: superpowers left as the arbiters of what is democracy and self-determination could abuse their power and invade using those concepts as a pretext.[21]

The UN Charter as well as other conventions of international law provide no clear answer to the debate. Article 2(4) prohibits use of force against territorial integrity, political independence "or in any other manner inconsistent with the Purposes of the United Nations."[22] Although Professor Schachter seems correct in asserting that maintenance of the peace and prevention of aggression are the ultimate ends of the UN under Article 1, Article 1(2) states as the purpose of the UN "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[23] So even if self-determination of peoples is not the ultimate end of the UN, the ultimate end, as seen by Professor Schachter, of maintaining the peace becomes contingent on respect for self-determination. Therefore, intervention in support of self-determination would not be inconsistent with the purposes of the United Nations. Article 55 restates the proposition that respect for self-determination is necessary to achieve peace, and Article 56 requires all members "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."[24] Again, under Article 56, intervention in support of self-determination seems consistent with the purposes of the United Nations. Article 2(1), however,

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[14] Michael Reisman, "Coercion and Self-Determination: Construing Article 2(4)", 78 Am. J. Int'l L.W. 642 (1984).
[15] *Id.* at 643.
[16] *Id.* at 644.
[17] *Id.* at 645.
[18] Oscar Schachter, "The Legality of Pro-Democratic Invasion", 78 Am. J. Int'l L. 645 (1984).
[19] *Id.*
[20] *Id.* See U.N. Charter art. 1, para. 1 ("maintain international peace" and "suppression of acts of aggression" are the exact phrases employed.)
[21] *Id.*
[22] U.N. Charter art. 2, para. 4.
[23] U.N. Charter art. 1, para. 2.
[24] U.N. Charter art. 55; U.N. Charter art. 56.

makes it clear that the UN "is based on the principle of sovereign equality of all its Members."[25] This provision would then make intervention for self-determination inconsistent with the purposes of the UN.

These ambiguities also appear in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, adopted by the UN General Assembly.[26] The Declaration, in an effort to elaborate on the Charter, seems to put more emphasis on the importance of self-determination than the Charter does. The Declaration expressly prohibits force "for any reason whatever," yet like the UN it also imposes a duty on all states "to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter."[27] The Declaration then indicates that "such peoples are entitled to seek and to receive support in accordance with the purposes...[of the UN]."[28] Further, the Declaration implies that action against states in support of self-determination of peoples is prohibited only when there is no real threat to self-determination. Or as the Declaration phrases it, only when these states are "conducting themselves in compliance with the principle of equal rights and self-determination of peoples...and thus possessed of a government representing the whole people belonging to the territory" is force prohibited.[29]

Relying too heavily on the Declaration becomes problematic for two reasons. First, the Declaration explicitly states in various ways that it does not exist to enlarge or diminish the scope of the Charter.[30] Therefore, anything that one can "read in" to the Declaration but not into the Charter can have only minimal effect as authority. Second, a UN General Assembly resolution, which the Declaration represents, does not constitute binding international law. General Assembly resolutions provide only evidence for discovering the law; they become law through custom. If states begin to rely on them in their actions the resolutions will become customary international law. Customary international law evolves through state practice to which states conform out of a sense of legal obligation.[31] And from customary international law comes the concept of ***jus cogens***, a peremptory norm of international law. A peremptory norm of general international law, according to the Vienna Convention on the Law of Treaties, "is a norm accepted by the international community of States as a whole as a norm from which no derogation is permitted," modifiable only by a subsequent norm of the same character.[32]

Under customary law, self-determination of peoples has not yet become accepted grounds for intervention. Recently, the US received condemnation for its invasion of Grenada based on, ***inter alia***, principles of self-determination. The United States has itself condemned other countries claiming the privilege, as when Vietnam invaded Cambodia to depose the genocidal Khmer Rouge. Protection of self-determination as a grounds for use of force suggested by both the Charter and the Declaration has not, then, become customary international law; it certainly has not evolved to the level of ***jus cogens***. The doctrines of state sovereignty, however, remain of paramount importance, "firmly established in the tradition, customs, treaties and doctrine of international law."[33]

The International Court of Justice has made it more difficult to use intervention to protect self-determination. In *Nicaragua v. United States*,[34] the Court considered several justifica-

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25 U.N. Charter art. 2, para. 1.

26 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 Restatement (Third) of Foreign Relations 102(2) (1987).

32 Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331.

33 Michael E. Harrington, "Operation Provide Comfort: A Perspective in International Law", 8 Conn. J. Int'l L. 635, 636.

34 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

tions for actions by the United States against the Sandinista government of Nicaragua. The United States believed that the Sandinista government represented a "totalitarian Communist dictatorship."[35] Given that democratic practices such as elections are outlawed as "bourgeois" under most Communist dictatorships in such places as Cuba and, until recently, Ethiopia, the establishment of such a regime certainly violates the right of the people to self-determination. However, the Court holds that "adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of state sovereignty, on which the whole of international law rests," and the freedom of a state to choose its own political system.[36] The Court then refuses to "contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[37] Regarding the related US justification of enforcing respect for human rights, the Court finds that "the use of force could not be the appropriate method to monitor or ensure such respect."[38] But most telling of all, the Court concludes that "no such general right of intervention, in support of an opposition within another State, exists in contemporary international law."[39]

Professors D'Amato and Reisman make a compelling case based on ***normative*** and ethical propositions. But based on the foregoing analysis, Professor Schachter's point of view has much more basis in currently accepted principles of international law. Since intervention to restore democracy has not yet received universal acceptance, the United States cannot rely on it as a norm of international law. Therefore, the objective of Operation Just Cause to restore democracy in Panama was not lawful.

SAFEGUARD AMERICAN LIVES

Deteriorating relations between the governments of Panama and the US provided a catalyst for the mistreatment of US soldiers and civilians at the hands of the Panamanian Defense Force (PDF). General Frederick F. Woerner, Jr., head of the US Southern Command (SOUTHCOM) in Panama maintained a list of these incidents. This list documented over seventy incidents of violence against US nationals in 1989 alone.[40] These included: PDF members firing at the home of a US army lieutenant as he peered out his window; a US navy officer beaten by PDF members and forced to beg for his life at gunpoint; and a PDF member shooting at a jeep containing children of civilian employees of the US Department of Defense (DOD).[41]

The Department of Defense apparently maintained a list as well, because it reported the following incidents: the PDF detained a US serviceman and his father for 24 hours, beat the father, and robbed them both at gunpoint; a PDF member forcibly took custody of a US Navy civilian employee from a US Military Policeman, dragged him into the police station, and beat him so severely that he suffered a broken eardrum and extensive bruises.[42] The PDF extended its campaign of terror to jointly operated US-Panamanian bases. At Fort Amador "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."[43]

SOUTHCOM also reported a list of attacks against US property. A 1990 briefing by

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[35] *Id.* at 124.
[36] *Id.* at 124.
[37] *Id.* at 124.
[38] *Id.* at 125.
[39] *Id.* at 109.
[40] Abraham D. Sofaer, "The Legality of the United States Action in Panama", 29 Colum. J. Transnat'l L. 281, 284 n. 12 (1991).
[41] *Id.*
[42] Ruth Wedgwood, "The Use of Armed Forces in International Affairs: Self-Defense and the Panama Invasion", 29 Colum. J. Transnat'l L. 609, 613 n. 13 (1991).
[43] *Id.* at 615.

SOUTHCOM stated that "[t]here were also armed intrusions, with shots fired, at the Navy Ammunitions Depot, and at a facility of the National Security Agency."[44] The Washington Post reported that "Cuban commandoes may have joined Gen. Noriega's forces in military attacks against American bases in Panama, including an April 1988 raid on a fuel tank farm" near Howard Air Force Base, just one of over 50 attacks at the depot which SOUTHCOM recorded.[45]

Neither SOUTHCOM nor the DOD believed that these incidents represented the handiwork of rogue officers. General Woerner indicated his belief 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.[46] Likewise, the DOD found that the PDF commonly used excessive force in arrests and in interrogations.[47] It should be noted however, that high-ranking members of the Bush administration did not conclude that the foregoing incidents alone showed a pattern traceable to Noriega. Lieutenant General Thomas W. Kelly, then director of operations for the Joint Chiefs of Staff, could not read the intelligence reports as providing "positive proof" that the PDF actually committed some of the alleged altercations, or that these incidents showed that Noriega and the PDF were intentionally confronting US forces.[48]

Any remaining suppositions that Noriega intended no conflict with the US seemed to disappear on December 15, 1989. Citing the economic sanctions currently employed by he US against the Noriega regime, the Panamanian National Assembly declared "that the Republic of Panama is in a state of war while there is aggression against the people of the United States of America," and in apparent defiance of US nonrecognition of the Noriega government, the Assembly bestowed upon Noriega the title of "maximum leader of the struggle for national liberation."[49] Noriega proclaimed an "offensive of creativity," promising that "we...will sit along the banks of the Canal to watch the dead bodies of our enemies pass by."[50]

Admittedly, the declaration alone did little to create a sense of urgency in the US government toward the situation in Panama. General Woerner, although by that time no longer in command of SOUTHCOM, called the declaration "a description of a condition that had existed. It did not imply a change of attitude."[51] Similarly, White House Spokesman Marlin Fitzwater dismissed the declaration as "another hollow step in [Noriega's] attempt to force his rule on the Panamanian people."[52] And at least one commentator has noted that "U.S. forces in Panama were not put on alert after the...declaration, nor were personnel movements limited. No special advisory was issued by the American embassy or Southern Command to American civilians living in Panama concerning the...declaration."[53]

The US attitude changed significantly within 24 hours, when the PDF acted upon Noriega's declaration of war. Members of the PDF shot and killed US Marine Lt. Robert Paz after the car in which he was a passenger sped away from a roadblock at which PDF members tried to forcibly remove the occupants, all of whom were soldiers, at gunpoint.[54] The killing of Lt. Paz marked a serious turning point: the first time a member of the PDF killed a US serviceman. Lt. Adam Curtis and his wife Bonnie, also stopped at the roadblock, had witnessed the attack. They were taken to Noriega's Comandancia for a four hour interroga-

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44 *Id.* at 615.
45 William S. Malone, "The Panama Debacle -- Uncle Sam Wimps Out", Wash. Post, Apr. 23, 1989 at C1.
46 Wedgwood, *supra*, at 614.
47 Wedgwood, *supra*, at 613.
48 Bob Woodward, *The Commanders* 100 (1991).
49 Sofaer, *supra*, at 284-285.
50 Sofaer, *supra*, at 285.
51 Wedgwood, *supra*, at 621.
52 Louis Henkin, "The Invasion of Panama Under International Law: A Gross Violation", 29 Colum. J. Transnat'l L. 293, 301 n.33.
53 Wedgwood, *supra*, at 621.
54 Woodward, *supra*, at 157.

tion, during which PDF members beat Lt. Curtis and threatened to kill him and sexually threatened his wife.[55] General Maxwell Thurman, the new head of SOUTHCOM, saw the killing as the beginning of further acts by the PDF under the declaration of war; significantly, General Colin Powell, head of the Joint Chiefs of Staff, and Secretary of Defense Dick Cheney agreed that the killing of Lt. Paz and the mistreatment of the Curtises portended danger for Americans still in Panama, and that the US now had an obligation to act for their protection.[56]

Previous efforts to link violent action by the PDF to Noriega had proven unsuccessful, but it soon became clear that Noriega intended to encourage confrontation. Rather than issue an apology for the murder of Lt. Paz, Noriega claimed that the US soldiers in the car had shot at the Comandancia, wounding a solider and a one year-old girl.[57] Regarding the Curtises, Noriega asserted that they were treated "courteously."[58] But according to Lt. Kelly, US intelligence had recorded Noriega on the telephone fabricating these stories to shift blame to the Americans.[59]

The evidence showed that Noriega, by issuing his declaration of war and subsequently failing to condemn the murder of Lt. Paz and mistreatment of the Curtises, bore full responsibility for these attacks as the head of state. The evidence also suggested, given Noriega's exacerbation of tensions, the strong likelihood of subsequent attacks. After originally dismissing as virtually meaningless the declaration of war by Noriega, Fitzwater recanted in light of the two incidents, saying it "may have been a license for harassment and threats and . . . murder" by the PDF fostered by a "climate of aggression that is very disturbing."[60] Secretary of State Baker cited an unconfirmed intelligence report that Noriega forces planned a commando raid on an American neighborhood in Panama.[61] Based on all the evidence, President Bush acted, citing "the inherent right of self-defense, as recognized in Article 51 of the UN Charter" to defend "US military personnel, US nationals and US installations."[62] The result: 24,000 troops deployed, aerial bombardment of PDF headquarters and other key targets, over 500 Panamanian civilians and soldiers killed, over 3,000 Panamanians wounded, 18,000 Panamanians lost homes, 23 American soldiers killed.[63]

Article 51 of the U.N. Charter reads, in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[64] Despite the UN Charter's mandate that the right of self-defense applies only to armed attacks, customary international law recognizes a right of anticipatory self-defense, from which flows the right to protect nationals abroad. The United Kingdom, France, Belgium, Israel and the United States have all taken this view.[65] Former US Secretary of State Daniel Webster, in 1842, provided a statement of this principal, which, although it was issued prior to the UN Charter, is still authoritative. Webster specified that there must exist a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."[66] A post-UN Charter and perhaps more authoritative opinion came from Sir Humphrey Waldock. Waldock proposed a three part test: There must exist (1) an imminent threat of injury to nationals; (2) a failure or inability on the part of the

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55 Woodward, *supra*, at 158.
56 Woodward, *supra*, at 161.
57 Woodward, *supra*, at 159.
58 Sofaer, *supra*, at 285.
59 Woodward, *supra*, at 159.
60 Ann Devroy, "U.S. Says Noriega Has Begun a Pattern of Harassment", Wash. Post, Dec. 19, 1989 at A16.
61 "Fighting in Panama: The State Dept.", New York Times, Dec. 21, 1989 at A19.
62 Leich, *supra*, at 548. President Bush also invoked the similar right of self-defense codified in Article 21 of the OAS.
63 John Quigley, "The Legality of the United States Invasion of Panama", 15 Yale J. Int'l L. 276, 295; Henkin, *supra*, at 308; Wedgwood, *supra*, at 622; Woodward, *supra*, at 195 ("CBS...ran a report that as many as 4,000 Panamanian civilians had died in the conflict" but "[i]nvestigations by other organizations in Panama and the United States indicated SOUTHCOM wasn't far off the mark. The SOUTHCOM numbers were generally accepted.")
64 U.N. Charter art. 51.
65 Tom J. Farer, "Panama: Beyond the Charter Paradigm", 84 Am. J. Int'l L. 503, 505 (1990).
66 Berman, *supra*, at 745.

territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury.[67] In defending Israel's raid on Entebbe to rescue its nationals in 1976, the US relied on Waldock's test while Israel relied on Webster's.[68]

Contrary to the opinions of some scholars,[69] the International Court of Justice did not eliminate this customary right in *Nicaragua v. United States*.[70] Although the Court does hold that "[i]n the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack,"[71] the Court confines that holding by making it applicable only to a situation of "an armed attack which has already occurred."[72] The Court "expresses no view," however, on "the issue of the lawfulness of a response to the imminent threat of armed attack."[73] This is consistent with the Court's holding that customary international law and the UN Charter can co-exist. Referring to Article 51, the Court explains that "[i]t cannot...be held that Article 51 is a provision which 'subsumes and 'supervenes' customary international law."[74] Therefore, an analysis under the Webster/Waldock tests will properly determine the legality of the intervention in Panama. These tests have become incorporated into a two prong test: necessity and proportionality. Both prongs must be proven affirmatively.

The situation in Panama created a right of self-defense under the necessity test. The murder of Lt. Paz and the mistreatment of the Curtises, following so soon after a declaration of war and followed by Noriega's cover up, portended a very real threat to the 35,000 Americans in Panama. The Panama Canal Treaty gave Noriega and his PDF exclusive jurisdiction over the former Canal Zone, here Americans and their dependents mainly resided.[75] Additionally, many American civilians and soldiers lived intermingled with the PDF outside the Zone, making them especially vulnerable. Based on the foregoing facts, the host government certainly failed to protect the nationals (Waldock test) and the situation presented an imminent threat (Waldock and Webster tests) allowing no time to deliberate (Webster test). Any more time deliberating, beyond that used to make the decision to act, could have resulted in another death--an unacceptable proposition to a government charged with protecting the lives of its citizens.

Whether the situation met the proportionality test is less clear. Proportionality derives from the Webster requirement that the threat be overwhelming such that no other means could have sufficed, and the Waldock requirement that the measures be confined solely to the single objective of protecting the nationals. In light of those criteria, the Panama mission to protect nationals has dissimilarities to other rescue operations the US has accepted as legal.

Regarding the Webster criterion of having no other alternatives, that criterion was easily established in previous missions. The Israeli raid on Entebbe presented a situation of civilians trapped in a building surrounded by terrorists. The terrorists had support from the Ugandan government and its army, so the civilians had no means of defense or escape at all. When President Carter attempted a rescue operation in Iran, the American hostages clearly had no route of escape. And the rescue of endangered Americans in Grenada became necessary when, in the opinion of the State Department, the revolutionary army could not guarantee their safety and when diplomatic measures taken to secure their release met with resistance, their hostage status was undeniable.[76]

President Bush declared that he ordered the invasion "only after reaching the conclusion

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67 Berman, *supra*, at 745.
68 Berman, *supra*, at 745.
69 See, e.g., Jennifer Miller, "International Intervention -- The United States Invasion of Panama", 31 Harv. Int'l L.J. 633, 645 (1990); Henkin, *supra*, at 308 n. 66.
70 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).
71 *Id.* at 103.
72 *Id.* at 103.
73 *Id.* at 103.
74 *Id.* at 94-95.
75 Panama Canal Neutrality Treaty, Sept. 7, 1977, U.S.-Pan., art. XI, 33 U.S.T. 39 [*hereinafter* Neutrality Treaty].
76 John N. Moore, "Grenada and the International Double Standard", 78 Am. J. Int'l L. 145, 150 (1984).

that every other avenue was closed and the lives of American citizens were in grave danger."[77] Some critics of the invasion have suggested, however, that other alternatives did exist. The most obvious remedy available, in stark contrast to the aforementioned scenarios, was the evacuation of all US nationals back to the United States. The US had the unhampered ability to remove its nationals from danger since Noriega never prevented them from leaving. The problem with that argument, however, is that the US had both a right and obligation under the Panama Canal Treaties to stay in Panama.[78] The Panama Canal Treaties give the US responsibility for protecting the Panama Canal,[79] so even after all personnel were evacuated, some would need to return to staff the Canal. Although that interim period removes the imminent threat, Americans returning would face the same danger as before the evacuation.

Some might argue that the US could seek relief from the UN or OAS during that short interim period. But that begs the question: what could they have done anyway? The US successfully brought suit against Iran in 1980 in the ICJ, but the ruling had no enforcement mechanism. And the likelihood of the UN Security Council authorizing a peacekeeping force to protect American nationals staffing the Panama Canal seems ludicrous, all the more so considering the likelihood of a veto on that action by the USSR or China. And similar political reasons make it doubtful that the OAS would want to send forces to engage in possible combat with a fellow Latin American country.

Another suggested alternative involved the evacuation of all US personnel to the former Canal Zone, since, unlike Entebbe, Iran, or Grenada, the US had a large contingent of well-supplied forces there capable of defending themselves and the civilians in residence. Besides the fact that the PDF had total jurisdiction and also shared space on some US bases, that option was impractical because there simply was not enough room inside the Zone for all Americans. One scholar has suggested that the US could have taken such precautionary measures as restricting movements of Americans when outside US bases, allowing US personnel to carry sidearms off-base, and setting up armed patrols of the Zone housing areas.[80] The US never argued that these measures would not have done the job, but on the other hand, this strategy ignores the possible plight of civilian Canal employees not living in the Zone. It also fails to consider that since Panama has jurisdiction over all its territory, US personnel would be subject to whatever restrictive laws Panama has regarding the right to bear arms.

Under the Webster criterion, then, this situation presents a novel legal problem. Factually, it is not on point with previously accepted examples of the customary right to protect nationals. However, since the situation does not actually fall outside the Webster criteria, a good argument can now be made that customary international law will accept this factual situation as well. But even assuming that Operation Just Cause met the Webster test, it must still meet the last element of the Waldock test.

Just Cause did not meet the final criterion of the Waldock test. The Pentagon tactical plan used for Just Cause, originally called BLUE SPOON, had as its objective the "wiping out" of the PDF.[81] Arguing for the invasion, General Powell told President Bush that destroying the PDF was necessary to bring down the Noriega regime sooner--he did not argue that it was necessary to protect American lives.[82] Incorporation of the illegal objective made it impossible to tell if the amount of force used was truly necessary for the sole purpose of protecting nationals. Under the Waldock criterion that the measures taken have only protection of nationals as their goal, BLUE SPOON's purpose of destroying the Noriega regime brought disproportionate force.

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77 Leich, *supra*, at 547.
78 Neutrality Treaty, *supra*, art. I, 33 U.S.T. at 48-49.
79 Neutrality Treaty, *supra*, art. I, 33 U.S.T. at 48-49.
80 Wedgwood, *supra*, at 624.
81 Woodward, *supra*, at 81, 163.
82 Woodward, *supra*, at 168.

PROTECT THE PANAMA CANAL

Noriega used the occasion of the National Assembly's declaration of war to threaten the US right to protect the Canal. Noriega claimed that the US had no right to continue defending the Canal because, according to him, it couldn't do the job effectively.[83] He then called for the end of all rights of the US in Panama, declaring "only one territory and one flag."[84]

Under Article IV(2) of the Panama Canal Treaty of 1977, the United States has "primary responsibility to protect and defend the Canal."[85] Article IX of the treaty prohibits Panama from taking "any...action which purports to...interfere with the exercise on the part of the United States of America of any right granted under this treaty."[86] ***Prima facie***, the declaration of war followed by the hostilities against US personnel violated the Panama Canal Treaty. Those hostile actions, taken against US personnel charged with securing the canal, could be interpreted as a threat to the security of the Canal itself.

Article IV(1) of the treaty provides that "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."[87] A proclamation by President Carter, incorporated into the treaty, clarified that each country has the right to act against any threat directed against the Canal.[88]

Some scholars have argued that the Panama Canal Treaty mandates US-Panamanian cooperation, and therefore cannot apply to threats to the Canal coming from Panama itself.[89] This is too restrictive a reading, and defies common sense. First, the directive that "each party" act to protect the Canal, complemented by the directive that the United States has the "primary responsibility" to protect the Canal makes cooperation more of a suggestion than a mandate. Naturally, cooperation is preferred by the treaty, but the treaty makes clear that each party can act according to its respective constitutional process, independently of the other.

It also seems rather obvious that the US did not envision a scenario where Panama becomes the aggressor to the Canal. If the US feared that possibility, it hardly seems likely that it would have signed a treaty to eventually give it back to Panama.[90] And, of course, no country--particularly a Latin American country--is going to sign a treaty with an explicit provision giving the US even a qualified right to use force against it.

President Carter did, however, proclaim that the right of the US to protect the Canal does not mean, nor shall it be interpreted as, a 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.[91] Additionally, the president's proclamation acknowledged that the Panama Canal Treaty rights and obligations of both parties were subject to existing treaty law, especially Article 2(4) of the UN Charter.[92]

The United States had the legal right to act alone to defend the Canal. But, consistent with international law, this right did not extend to intervening in the internal affairs of Panama. Contrary to appearances, these competing considerations are not irreconcilable--the Panama Canal Implementation Treaty offers the solution. The Implementation Treaty, a companion

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83 Sofaer, *supra*, at 288.
84 Sofaer, *supra*, at 288.
85 Neutrality Treaty, *supra*, art. IV, 33 U.S.T. at 56.
86 Neutrality Treaty, *supra*, art. IX, 33 U.S.T. at 70.
87 Neutrality Treaty, *supra*, art. IV(1), 33 U.S.T. at 56.
88 Neutrality Treaty, *supra*, Proclamation by the President of the United States, 33 U.S.T. at 3.
89 Henkin, *supra*, at 302.
90 David W. Alberts, "The United States Invasion of Panama: Unilateral Military Intervention to Effectuate a Change in Government - A Continuum of Lawfulness, 1991 Transnat'l L. & Contemp. Probs. 263, 266 ("Although not an explicit provision in the treaties, Congress conditioned its ratification of the treaties on a successful transition to a democratic civilian government in Panama.").
91 Neutrality Treaty, *supra*, Proclamation by the President of the United States, 33 U.S.T. at 4.
92 Neutrality Treaty, *supra*, Proclamation by the President of the United States, 33 U.S.T. at 33.

to the main treaty, provides exposition on how to implement Article IV. The treaty gives US forces full use of designated "defense sites" which it may use to protect the Canal.[93] These defense sites, listed in Annex A of the Implementation Treaty, include not only US bases, but numerous other facilities.[94] Therefore, consistent with Article IV, the US could have fortified all the defense sites with reinforcements and even forced out from those defense sites any PDF members threatening the Canal. The invasion to topple Noriega and destroy the PDF violated the terms of the treaty and principles of international law.

THE UNITED STATES HAS JURISDICTION OVER NORIEGA

For the United States to successfully prosecute Noriega, it must meet all three elements of jurisdiction: jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to adjudicate.[95] Principles determining the applicability of jurisdiction, in the absence of treaty, derive from customary international law. Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[96] In the United States, customary international law on questions of jurisdiction is found in federal court cases.

Under the "territorial principle" of customary international law, a state has jurisdiction to prescribe law for conduct that occurs outside its territory that has, or is intended to have, substantial effect within it.[97] The US indicted Noriega for conspiracy in drug trafficking. Clearly, drugs entering this country have had a substantial effect on our citizens through an increase in drug-related crimes and a decrease in productivity of workers who are addicted. The government has also been substantially effected, with the increased burden on the economy to enforce drug laws and to provide health care for those suffering the effects of addiction. Detailing the scourge on our society represented by the pervasiveness of drugs could provide enough material for another paper, but the examples cited above suffice to obtain jurisdiction under the territorial principle.

Jurisdiction to prescribe, however, is not co-extensive with jurisdiction to enforce.[98] A state claiming jurisdiction under the territorial principle may only exercise it if to do so would be reasonable.[99] The reasonableness test, however, has nothing to do with the manner in which the state exercises its jurisdiction; it is only concerned with whether the exercise of jurisdiction itself would be reasonable.[100] The Supreme Court has ruled that exercising jurisdiction over drug traffickers is reasonable.[101]

Limitations do exist, however, on the manner in which a state may exercise jurisdiction under the territorial principle. Flowing from the principle of sovereignty, international law prohibits law enforcement officers of one state from exercising jurisdiction in another state without that other state's consent.[102] An abduction, such as that perpetrated by the US against Noriega, violates the sovereignty of a state and is therefore prohibited by international law. Customary international law recognizes abductions as illegal.

Nevertheless, an illegal abduction by one state's law enforcement officers will not

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[93] Panama Canal Treaty: Implementation of Article IV, Sept. 7, 1977, U.S.-Pan., art. I, 33 U.S.T. 307 [*hereinafter* Implementation Treaty].

[94] Implementation Treaty, *supra,* Annex A, 33 U.S.T. at 389.

[95] Restatement (Third) of Foreign Relations 401 (1987).

[96] Restatement (Third) of Foreign Relations 102(2) (1987).

[97] Restatement (Third) of Foreign Relations 402(1)(c) (1987).

[98] Miller, *supra,* at 642.

[99] Restatement (Third) of Foreign Relations 402 cmt. d (1987).

[100] Restatement (Third) of Foreign Relations 403(2)(a-h) (1987). Professor Miller has inaccurately interpreted the Restatement's reasonableness provision in her argument: *See* Miller, *supra,* at 642 ("It is submitted that a full-scale military assault...cannot be considered a reasonable means of bringing one drug smuggler to justice.")

[101] *Rivard v. United States,* 375 F.2d 882 (5th Cir. 1867), *cert. denied,* 389 U.S. 884 (1967) (conspiracy to smuggle heroin into the US). However, even without that case, exercise of jurisdiction is appropriate because the United States and Panama are both signatories to a multilateral treaty which compels punishment for participants in international drug-related conspiracies. *See* Single Convention on Narcotic Drugs, Mar. 30, 1967, art. 36, 18 U.S.T. 1408, 1425.

[102] Restatement (Third) of Foreign Relations 432 cmt. b (1987).

necessarily deprive that state of jurisdiction to adjudicate. Nearly all states have long recognized the doctrine of "male captus, bene detentus"--absent a protest from the offended state, an illegal capture does not preclude jurisdiction.[103] This doctrine has its roots in English common law from the early nineteenth century and has achieved explicit recognition in modern courts from France and Israel.[104] Under the male captus doctrine, if the state from which the person was abducted does not demand his return, the abducting state may prosecute.[105] In accordance with the principles of sovereignty, the doctrine allows only the state to protest on the ground of violation of its sovereignty; the individual has no standing to protest as a means of defeating prosecution.[106]

Since 1886, the United States has followed the male captus doctrine in what has become known as the *Ker-Frisbie* doctrine because of the two cases which formulated it. In *Ker*,[107] the Supreme Court held that the defendant, captured in Peru by Illinois officials, had no standing to object to the method of his arrest, a kidnapping. The Supreme Court relied on the *Ker* decision in the *Frisbie*[108] case, holding that the defendant, captured in Illinois by Michigan authorities, could not use that as a basis for objecting to the trial. Although that did not involve an international legal issue, the Court affirmed its decision in Ker, holding that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"[109] The federal courts have applied the *Ker-Frisbie* doctrine many times over the ensuing years, and the Supreme Court has most recently applied it in a 1992 case.[110]

The government of Panama has not yet demanded the return of Noriega for prosecution. In all likelihood, the government of Panama will not ask for the return of Noriega. Since the government of Panama has not objected, the United States has jurisdiction to adjudicate. Noriega cannot, under the *Ker-Frisbie* doctrine, use the violation of Panama's sovereignty to escape jurisdiction.

Despite the *Ker-Frisbie* doctrine's focus on rights of states, rather than individuals, a federal court in 1974 created a special exception to protect the rights of the individual in certain circumstances. According to the Second Circuit in United States v. Toscanino[111] the court will forfeit jurisdiction to adjudicate "where it has been acquired as a result of the government's "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[112] That case involved a defendant who claimed to have been tortured by the authorities for days. However, the Second Circuit clarified the exception in a later case. In United States ex rel. Lujan v. Gengler[113] the court held that Toscanino should only apply to "government conduct of a most shocking and outrageous character."[114] The Fifth Circuit, in *United States v. Codero*[115] provided an even more restrictive definition of conduct that would "shock the conscience of the court."[116] One scholar has found that in subsequent decisions, courts have

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[103] Restatement (Third) of Foreign Relations 432 reporter's note 2 (1987).

[104] *Id.* English cases going back to the early nineteenth century have followed that rule. *See*, e.g., *Ex parte Scott*, 9 B. & C. 446, 109 Eng. Rep. 166 (K.B. 1829); *Ex parte Elliott*, [1949] 1 All E.R. 373 (K.B.). More recently the Supreme Court of France so held in *Re Argoud*, [1964] Bull. Crim. 420, [1965] Annuaire Francais 935, 45 Int'l L. Rep. 90 (Cass. Crim. 4 June, 1964). The Israeli case is *Attorney General v. Eichmann*, 36 Int'l L. Rep. 18, 70-71 (Dist. Ct. Israel, 1961), affirmed 36 Int'l L. Rep. 277 (Sup. Ct. Israel 1962).

[105] Restatement (Third) of Foreign Relations 432 cmt. c (1987).

[106] Restatement (Third) of Foreign Relations 432 reporter's note.

[107] *Ker v. Illinois*, 119 U.S. 436 (1886).

[108] *Frisbie v. Collins*, 342 U.S. 519 (1952).

[109] *Frisbie*, 342 U.S. at 522.

[110] *United States v. Alvarez-Machain*, 112 S. Ct. 857 (1992).

[111] *United States v. Toscanino*, 500 F.2d 267 (1974).

[112] Toscanino, 500 F.2d at 275.

[113] *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (1975).

[114] *Lugan*, 510 F.2d at 65.

[115] *United States v. Codero*, 668 F.2d 32 (1st Cir. 1981).

[116] *Codero*, 668 F.2d at 36.

either accepted the restrictions of Lujan or *Codero* or rejected *Toscanino* entirely.[117]

Noriega will probably have little success relying on the conduct exception. The continuing restrictions on *Toscanino* makes its continued vitality questionable. But even assuming *Toscanino* were accepted in either the *Lujan* or *Codero* language, Noriega suffered no injury which could possibly apply. The loud music which the army directed at the Papal Nuncio's residence where Noriega took refuge did not injure Noriega. If any party has standing to complain about the music, it is the Nuncio or the Catholic Church. Even if by some stretch of argument, Noriega can claim an injury, it hardly seems that this injury could be compared to the torture giving rise to the exception in the previous cases. Forcing someone to listen to loud music might rise to the level of offensive, but it can hardly be called shocking or outrageous. A federal court has already rejected any attempt by Noriega to conform either the loud music or the invasion itself to the *Toscanino* exception.[118]

CONCLUSION

At the start of this paper I made it clear that the legal analysis needed to be considered separately from any political motives. However, I must conclude that ethically, Operation Just Cause was correct. This is because it seems strange to condemn an intervention which installed the legitimate government and which received the support of 92% of the people of Panama.[119] Those who condemned the invasion had to face the harsh rebuke of Panamanians who took a decidedly different view.[120] Customary international law is always changing. In order to modify customary international law, states must sometimes violate it. The United States did not recognize the Vietnamese intervention into Cambodia to topple the genocidal Khmer Rouge, so the US must bear some responsibility for its intervention in Panama not yet falling under customary international law.

I do not agree with Professor Schachter that allowing individual states to become the arbiters of self-determination will necessarily create a slippery slope. The Soviet Union invaded several countries claiming a right of self-determination for the people. More recently, Saddam Hussein attempted to justify his invasion of Kuwait on the grounds of self-determination. However, in none of these instances could arguments for self-determination hold up under scrutiny. In any situation, it is certainly instructive to look at the ideologies of the intervening countries: a dictatorship will not intervene in the name of democracy.

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[117] For courts that restrict the holding of *Toscanino*, See, e.g., *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *David v. Attorney General*, 699 F.2d 411 (7th Cir. 1983); *Letterman v. Rushen*, 704 F.2d 442 (9th Cir. 1983); *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981); *Davis v. Muellar*, 643 F.2d 521 (8th Cir. 1981); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980); *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980). For those that reject *Toscanino* completely, *See*, e.g., *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986); *United States v. Darby*, 744 F.2d 1508 (11th Cir. 1984); *United States v. Wilson*, 732 F.2d 404 (5th Cir. 1984); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Winter*, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974).

[118] *United States v. Noriega*, 746 F. Supp. 1506 (1990). The Court also quickly disposed of two more of Noriega's defenses: sovereign immunity and act of state. For the former, the Court noted that the United States had never recognized Noriega as the legitimate sovereign of Panama (p. 1521); for the latter, the Court held that Noriega's conspiracy was his own private action, and not an official act of state (p. 1523).

[119] Silvio Hernandez, "Panama: Electoral Tribunal Proclaims Endara President", December 27, 1989, Inter Press Service, *available in* LEXIS, News Library, Inpres file. (With 62.5% of the votes cast, Endara had clear majority); Michael R. Kagay, "Panamanians Strongly Back U.S. Move", New York Times, Jan. 6, 1990, at A1.

[120] "Panama Thanks U.S. For Liberating Country and Criticises OAS", Reuters, Jan. 10, 1990, available in LEXIS, News Library, Reuter file ("We do not consider ourselves liberated by the United States...[this] is what the people of Panama feel."); But an even better statement came from Ronen T. Ceasar, a Panamanian citizen studying at Boston University at the time of the invasion. Since the invasion coincided with the midsemester break, he had an opportunity to go back home and see the results of Operation Just Cause for himself. When classes resumed, a member of the University community named Karl Gerds wrote an op-ed piece for the school paper condemning the intervention as yankee imperialism. Mr. Gerds then had to face Mr. Ceasar's withering reply in a letter to the editor: Ronan T. Ceasar, "Into the Woods", Daily Free Press, Jan. 18, 1990, at 11 ("[W]e Panamanians see it as a liberation...[i]f Just Cause was considered an invasion, the people would not celebrate the ousting of Noriega by dancing with American soldiers. It is always easy to talk about what is in the woods, but once you enter them you realize the truth.").

But the best solution would be for the UN or the OAS themselves to take action for self-determination. That would diminish the problem of arbitrariness as envisioned by Professor Schachter and it provides a common goal for all UN and OAS members. The OAS successfully intervened on the side of democracy in the Dominican Republic in 1965. Realistically, intervention in all cases to protect self-determination may not be practical, but the rule for UN action has never been all or nothing. In situations where U.N. intervention would be both possible and practical, the U.N., with its commitment to the right of self-determination, has the ethical imperative to take action. In Noriega's Panama, there was no practical reason why the will of the people should not have prevailed.