On the Matter of Multiple Legal Justifications for Military Action

Dino Kritsiotis[*]

The phenomenon of multiple legal justifications for a given military action – the threat or use of force or armed intervention taken by one State against another State – is not an unknown or an uncommon occurrence within public international law, and it is one that may be said to have acute bearing in contexts where the "consent" of the host State through its government has been pleaded or raised. By way of striking example is the American intervention in Panama in December 1989, which, apparently, had occurred on the basis of "[General] Noriega's illegitimacy, and President [Guillermo] Endara's approval and cooperation".[1] This was but one of the "several compelling and legitimate reasons" that quickly came to be associated with the intervention,[2] no doubt deduced from the "goals" that President *George H. W. Bush* had identified in the televised address he delivered soon after the commencement of Operation Just Cause – namely,

> "[t]o safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties, and to bring General Manuel Noriega to justice".[3]

In presenting these goals to his national audience, President *Bush* claimed that General *Noriega's* "reckless threats and attacks upon Americans in Panama" – including an apparent declaration of war issued upon the United States – "created an eminent danger to the 35,000 American citizens in Panama," and that, as President, he had "no higher obligation than to safeguard the lives of American citizens".[4] This really does suggest that a hierarchy of imperatives existed within the mind of the President before he elected his

[*] Professor, University of Nottingham.

[1] Or so it was put by *A. D. Sofaer*, the then Legal Adviser to the State Department, in his remarks to the American Society of International Law in March 1990, ASIL Proceedings 84 (1990), 182, 184.

[2] *A. D. Sofaer* (note 1), 183.

[3] Statement by President *Bush* (20.12.1989), Office of the Press Secretary, the White House. The full transcript of this televised address is reproduced in: Fighting in Panama: The President; A Transcript of Bush's Address on the Decision to Use Force in Panama, N.Y. Times, 21.12.1989, A19.

[4] Statement by President *Bush* (note 3).

ultimate course of action,[5] reaffirmed by President *Bush's* admission that he had "directed our armed forces to protect the lives of American citizens in Panama, and to bring to General *Noriega* to justice in the United States".[6] Notice the gentle, effortless seguing of considerations that is being undertaken with these very words, together with the subsequent reference made in the same speech to being "fully committed to implement the Panama Canal Treaties and turn over the Canal to Panama in the year 2000".[7] And, among this medley of considerations, we find mentioned – and mentioned repeatedly – the "formal welcoming of the United States" when its armed forces entered Panama in December 1989.[8]

Three observations would seem to be in order from these events:

The first point to emphasise in this synopsis is the danger in assuming that every official pronouncement made is also setting out the justifications – and, specifically, the legal justifications – for military action.[9] It is notable that when President *Bush* itemised the considerations for military action, he did so by saying that "[f]or nearly two years, the United States, nations of Latin America and the Caribbean have worked together to resolve the crisis in Panama".[10] This is the context – the very specific context – in which he came to frame the four "goals" of the action. It is perhaps telling that President *Bush* repeated these four goals as the "objectives" of Operation Just Cause in a speech given on 3.1.1990, after General *Noriega* had been taken into custody,[11] when he announced that the United States had "used its resources in a manner consistent with political, diplomatic and moral princi-

[5] Note, too, his remark at the very end of his speech, that "I took this action only after reaching the conclusion that every other avenue was closed and the lives of American citizens were in grave danger.", Statement by President *Bush* (note 3).

[6] Statement by President *Bush* (note 3).

[7] In a section of the speech devoted to "reasons for military action", Statement by President *Bush* (note 3).

[8] *A. D. Sofaer* (note 1), 187.

[9] *L. Henkin* has observed that "[f]or a student of international law it is not easy to disentangle the web of claims and justifications, to isolate text from pretext, or to distinguish the legal grounds on which the United States seeks to stand from rhetorical flourishes", in *L. Henkin*, The Invasion of Panama under International Law: A Gross Violation, Colum. J. Transnat'l L. 29 (1991), 293, 294.

[10] See *A. D. Sofaer* (note 1).

[11] In the same order: Remarks Announcing the Surrender of General *Manuel Noriega* in Panama (3.1.1990), in: Public Papers of the Presidents of the United States: George Bush, 1990: Book I – January 1 to June 30, 1990, 1991, 8. See, too, the "objectives" of Operation Just Cause as set out by the State Department: *M. Nash Leich*, Contemporary Practice of the United States Relating to International Law, AJIL 84 (1990), 536, 547.

ples".[12] As it happens, when U.S. Ambassador *Thomas R. Pickering* wrote a letter to the Security Council on 20.12.1989, he advised the Council that

> "United States forces have exercised their inherent right of self-defence under international law by taking action in Panama in response to armed attacks by forces under the direction of Manuel Noriega",[13]

but he also stated that the United States had engaged in its action

> "after consultation with the democratically-elected leaders of Panama – President *Endara* and Vice Presidents *Arias Calderon* and *Ford* – who have been sworn in and have assumed their rightful positions. They welcome and support our actions and have stated their intention to institute a democratic Government immediately".[14]

This leads us onto our second observation: while it might be thought that the United States was involved in empanelling a separate and additional claim of an intervention underwritten by the consent of the Government of Panama, its representation to the Security Council made abundantly clear that its action occurred with the "consultation" – note: this is not necessarily the same as saying the *consent* – of the Government of Panama.[15] Indeed, the precise nature of the formulations made to the Council – regarding "the democratically-elected leaders of Panama" as well as "their *intention* to institute a democratic Government"[16] – are indicative of the serial fragilities of régime transition and suggest the need for enormous caution in accepting who constitutes the "Government" of a State at any given moment in time,[17] such that any consent issued within these precarious conditions

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[12] Remarks Announcing the Surrender of General *Manuel Noriega* in Panama (3.1.1990), in: Public Papers of the Presidents of the United States (note 11), 8, (though "[t]he failure to include 'legal' among the other principles […] may have been inadvertent", see *V. P. Nanda*, The Validity of United States Intervention in Panama under International Law, AJIL 84 (1990), 494).

[13] U.N. Doc. S/21035 (20.12.1989), an action "designed to protect American lives and our obligations to defend the integrity of the Panama Canal treaties".

[14] U.N. Doc. S/21035 (20.12.1989).

[15] Hence *N. Tsagourias*, The US Intervention in Panama – 1989, in: T. Ruys/O. Corten/A. Hofer (eds.), The Use of Force in International Law: A Case-based Approach, 2018, 426, 437 ("the United States did not actually claim such a right").

[16] Emphasis added.

[17] In fact, Ambassador *Pickering* also referred to the fact that the action of the United States had been taken "after Noriega, after assuming the role of 'Head of Government' of Panama, declared on 15 December that a state of war existed with the United States", U.N. Doc. S/21035 (20.12.1989). On the declaration of war as "at best, a half-truth, at worst a flagrant distortion", see *T. H. Draper*, Did Noriega Declare War?, The New York Review of Books, 29.3.1990.

could not reasonably have been said to have manifested the valid consent of Panama. This conclusion is certainly borne out by a closer inspection of the facts of the "hurried, furtive nature" of the swearing-in ceremony convened for *Guillermo Endara* – at the very time, let it be noted, that "American troops were launching their military drive against Noriega".[18] It is these facts that perhaps help explain why the United States had instead resorted to the rhetoric of the restoration of democracy in Panama, which followed the annulment of the election of May 1989 by the Government of General *Noriega* – an election that, by all accounts, it had stood to lose by a 3-to-1 margin. However, as we have seen all too clearly, the components and implications of such a claim were only ever given the barest of expressions before the Security Council.

Our third and final observation: there is and must remain a place for multiple legal justifications in any normative framework or adversarial proceeding: arguments are often developed in the alternative, forming part of an intricate strategy of persuasion and rebuttal by one side against another. These arguments, too, may be summoned to complement one another as has been said for Operation Allied Force in the spring of 1999 – where there was "no shortage of theories to legitimate the Kosovo campaign", with

> "the legal scholar fac[ing] a paradox reminiscent of Justice Cardozo's famously maddening opinions [where] no single argument quite carries the day, even while the ensemble seems sufficient".[19]

This is surely one way of looking at things. Another is to regard each justification independently and to assess each on its own terms or merits; for this to occur, it is probably best if there is a clear and detailed articulation of the claim – of the "novel right" or "unprecedented exception" – that is being made, which would be by way of preface to ascertaining whether that claim is "shared in principle by other States" so as to "tend towards a modification of customary international law".[20]

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[18] *J. Mann*, Combat in Panama: Finally, Opposition's Endara Gets His Chance: Panama: The New President, Who Won by 3-1 Margin, has Little Government Experience, L.A. Times, 21.12.1989. Note, especially, *A. D. Sofaer* (note 1), 187 ("[t]his [welcoming] came very close to the intervention, it is true, but it was not a bolt out of the blue. We were well aware of his attitude and well aware that it was inconceivable politically to ask him to take a stand on what his position would be formally before we were committed to act.").

[19] *R. Wedgwood*, NATO's Campaign in Yugoslavia, AJIL 93 (1999), 828, 829. See, further, *C. Scott*, Interpreting Intervention, CYIL 39 (2001), 333, 355 (on "the cumulative persuasive force of the totality of arguments […] assessed in terms of the aesthetics of the ensemble.").

[20] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. USA*) (Merits) (1986) ICJ Rep. 14, 109 (§ 207).