

THE RIGHT TO DEFEND THE PANAMA CANAL

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During the next few minutes I will address certain issues related to intervention raised by the Panama Canal treaties. I am having some treaty texts and other references distributed that are germane to what I plan to say. While these papers are being passed out, I will take the opportunity to say that it is a real pleasure for me to be here to participate in a symposium honoring Dean Rusk. We at Vanderbilt Law School had the pleasure of having him make what I believe was his first public statement on American foreign policy after he left public office. Professor Rusk had for a period refrained from commenting upon issues in the international scene and our International Law Society was very grateful for his visit. I do remember specifically that the New York Times had just published an article that referred to Dean Rusk's "exile to the State of Georgia." He informed the audience that if he had ever been in exile it had been earlier and not later because as a native Georgian he was in fact an expatriate come home. Having seen this beautiful campus I understand exactly what he meant.

The dilemmas associated with intervention are illustrated by the problems faced by the United States and Panama in negotiating the Panama Canal treaties. The background of the Panamanian negotiations is relatively well known. To review briefly, agitation in Panama about the presence of the United States in the Canal Zone occurred after World War II. It continued until the treaties were finally signed by the United States and Panama on September 7, 1977. Distinguishing the two treaties is important. The first treaty, the Canal Treaty,¹ provided that the United States would administer the Canal for Panama until the year 2000, at which time full administration of the facility would pass to the Panamanians. The second treaty, the Neutrality Treaty,² declared that the Canal was

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¹ Panama Canal Treaty, Sept. 7, 1977, United States-Panama, — U.S.T. —, T.I.A.S. No. 10030, *reprinted in* 16 I.L.M. 1022 (1977).

² Panama Canal Permanent Neutrality and Operation Treaty, Sept. 7, 1977, United States-Panama, — U.S.T. —, T.I.A.S. No. 10029, *reprinted in* 16 I.L.M. 1040 (1977) [here-

to remain permanently neutral in both peace and war. Only the Canal is declared neutral. The country of Panama itself is not obligated to maintain neutrality. Leaving aside the question of how one makes a waterway neutral without making its littoral state neutral, I would like to discuss the right of the United States to participate in the defense of the Canal after December 31, 1999, both against third countries and against threats that might arise in Panama itself.

The treaties were politically highly sensitive in both countries. In the United States there was a great deal of resentment over what was seen by some as a giveaway of United States territory. Ultimately, whether the United States Senate would give its advice and consent to the treaties turned on two issues. The relevant issue for our purposes was the question whether the United States would have the right under the treaties after December 31, 1999 to defend the Canal against attack, either by hostile external forces or by Panamanian groups that might become hostile to United States interests.

The legal issues related to intervention arise in part from the treaty provisions. In the Canal Treaty, full rights of territorial sovereignty over the Canal and the Zone are recognized as residing in Panama. In turn, the Panamanians granted to the United States the right to maintain troops within Panamanian territory to defend the Canal until the year 2000. Article 1, paragraph 2, of the Canal Treaty is clear on this point. Article 1 states: "The Republic of Panama as territorial sovereign grants to the United States of America for the duration of this treaty the rights necessary to protect and defend the Canal."³ The right to defend the Canal results exclusively from this express grant by Panama. Neither party claimed that the right derived from any customary practice that might have arisen by virtue of long term United States presence in the Canal Zone.

Once the Canal Treaty lapses on December 31, 1999, rights and obligations between the two countries related to the Canal will be defined solely by the Neutrality Treaty which continues in perpetuity. The Neutrality Treaty, however, recognizes no right in the United States either to maintain troops in Panama or to enter that country to defend the Canal against either external or internal threat. Article 4 of the Treaty states only that the two countries

inafter cited as Neutrality Treaty].

³ Panama Canal Treaty, *supra* note 1, art. 1, para. 2.

would "maintain the regime of neutrality" established in the Treaty. Article 5 explicitly limits the right to defend the Canal by providing that "[a]fter the termination of the Panama Canal treaty, only the Republic of Panama shall operate the canal and maintain military forces, defense sites and military installations within its national territory."⁴

The Canal Treaty and the Neutrality Treaty were negotiated as part of the same transaction and they must therefore be read *in pari materia*. Consequently, since defense rights were given to the United States only for the duration of the Canal Treaty, and since that explicit grant was before the negotiators when they negotiated the Neutrality Treaty, it is clear that under the then existing texts of the two treaties the United States had no right to intervene in Panama to defend the Canal against either external or internal threat after the year 1999 without additional Panamanian permission to do so.

The United States and the Republic of Panama were faced with a serious political and legal dilemma growing out of issues related to intervention. The treaties were viewed as vitally important by the governments of both countries; but a right to intervene to protect the Canal was important to United States Senate approval—and an anathema to the Panamanian public. In an attempt to resolve the dilemma, President Carter and General Omar Torrijos, President of Panama, met and issued a joint communiqué—a "statement of understanding" of the meaning of the Neutrality Treaty. The communiqué stated that the correct interpretation of United States-Panamanian responsibility to maintain the regime of neutrality in the Canal after 1999 was

that each of the two countries shall in accordance with their respective constitutional processes defend the Canal against any threat to the regime of neutrality and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.⁵

This statement appears to be directly contrary to the then existing terms of the Neutrality Treaty, giving Panama the exclusive right to maintain a defense capability. Consequently, it could have effect only as a modification of the treaty text. The United States

⁴ Neutrality Treaty, *supra* note 2, art. 5.

⁵ Joint Carter-Torrijos Communiqué, 13 WEEKLY COMP. PRES. DOC. 1547 (Oct. 14, 1977).

Senate resolution approving the treaty added this language as a formal amendment, suggesting that the existing treaty language did *not* include common defense rights. When the communiqué was issued, it was explicitly characterized as being solely an interpretation of the existing text. Therefore, the clause created, at best, a way out of the United States domestic political dilemma, but not an escape from the legal one. On the other hand, this solution to the United States political problem would create serious domestic political and legal difficulties in Panama. An attempt to address this problem was made in the communiqué's next paragraph. That paragraph provided that:

This does not mean, [referring to the first paragraph] 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 ensuring that the Canal will remain open, secure and accessible and it shall never be directed against the territorial integrity or political independence of Panama.⁶

This paragraph, by including the phrase "against the territorial integrity or political independence," clearly incorporates by reference the corresponding provision in article 2, paragraph 4, of the United Nations Charter. One interpretation of that Charter language makes the territory of any state absolutely inviolate. Under this strict interpretation of the phrase, the second paragraph of the Carter-Torrijos communiqué explicitly denied the right of the United States to enter Panamanian territory to defend the Canal. This same paragraph was also added by the United States Senate as an amendment to the treaty. Thus, under this interpretation, any United States rights to defend the Canal that might be inferred from the first paragraph of the statement would necessarily be limited to action on the high seas.

A different and more limited interpretation of the Charter phrase would proscribe only activities designed to change the geographical boundaries of a state or to subject it to foreign rule or undue influence. Under this interpretation, the United States might in fact have the right to enter Panamanian territory to defend the Canal under the provisions of the first paragraph, but it could do so only as long as its use of force was directed against third parties and not, for example, against Panamanian insurrectionists. However, I believe this more liberal interpretation of the

⁶ *Id.*

language of the second paragraph is clearly foreclosed by the explicit provisions of the Charter of the Organization of American States (OAS), especially when those provisions are viewed in their historic context.

During the late 19th and early 20th centuries, the United States was viewed by many as the chief practitioner of intervention in Latin American affairs. This practice was hardly unknown, one might add, between the smaller states in the hemisphere as well. Leaving that aside, however, the threat of intervention came to be viewed, correctly or not, as a hallmark of United States diplomacy by some Latin American countries. The Calvo Doctrine, that both armed and diplomatic interventions to enforce private claims are illegal, and the Drago Doctrine, that armed intervention to enforce a public debt is illegal, were predecessors of eventual conventional agreements that outlawed intervention. In 1948, these efforts resulted in article 18 of the OAS Charter that explicitly forbids intervention of any kind in the "internal and external affairs of any other state."⁷ Article 20 of the OAS Charter provides: "The territory of a state is inviolable. It may not be the object even temporarily of military occupation or other measures of force taken by another state directly or indirectly on any grounds whatever."⁸ This prohibition could hardly be more absolute. Therefore, unless the Neutrality Treaty, as modified by the language in the Carter-Torrijos communiqué, waives Panamanian rights under article 20 of the OAS Charter, the United States received no right under the Treaty to enter Panama to defend the Canal. Such an interpretation could never have been intended by Panama, given the genesis and history of the negotiations and the political climate in Panama itself. Although Ambassador Boyd, the Panamanian Ambassador to the United States, did at one point tell a United States television audience that the Treaty did confer on the United States a right of entry to defend the Canal, that statement clearly did not reflect the intent of the Panamanian government about its obligations under the Treaty.

The only interpretation of the joint communiqué language simultaneously giving effect to the communiqué's first paragraph (addressing the United States defense role under the Neutrality Treaty) and preserving the territorial inviolability standards of the OAS Charter is one that: (a) confirms the right of the United

⁷ ORGANIZATION OF AMERICAN STATES CHARTER art. 18.

⁸ *Id.* art. 20.

States to act against third countries in defense of the Canal, but that (b) does not include in this right the legal authority to enter Panamanian territory or to resist threats arising inside Panama. Such an interpretation would make the communiqué consonant with article 2, paragraph 4, of the United Nations Charter, at least vis-à-vis Panama, and additionally would give effect to article 103 of that Charter, which provides: "In the event of a conflict between the obligations of members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present charter will prevail."⁹ Therefore, the only logical interpretation of the communiqué language that will give simultaneous effect to all pertinent international agreements and to existing customary law is one that limits United States defense rights to those that can be exercised without intervention in Panamanian Territory.

I now refer briefly to two other elements of the Treaty—the two reservations that were attached by the United States Senate. In effect, adoption of the reservations was the price of the Senate's advice and consent to the ratification of the Treaties by the President. These reservations were of much more serious concern to the Panamanians than was the addition to the Treaties of the language from the Carter-Torrijos communiqué by amendment.

Arizona Senator Dennis DeConcini submitted the following language, which was adopted in the Senate by a vote of 75 to 23 on March 15, 1978, as a reservation to the Neutrality Treaty. It provides that:

If the Canal is closed or its operations are interfered with the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary in accordance with its constitutional processes including the use of military force in Panama to reopen the Canal or to restore the operations of the Canal, as the case may be.¹⁰

The plain meaning of this reservation is that the United States may intervene militarily in Panama in order to keep the Canal open after the year 1999, without the need of any additional Panamanian consent. The Senate's adoption of this reservation outraged the Panamanian public. The government of Panama circulated a letter in the United Nations claiming that the United

⁹ U.N. CHARTER art. 103.

¹⁰ Neutrality Treaty, *supra* note 2.

States had taken, by reservation, a right to intervene militarily in Panama in violation of the principles of the United Nations Charter. To deal with this situation, Senator DeConcini agreed to the following reservation to the Canal Treaty which was approved on April 18, 1978:

Pursuant to its adherence to the principle of non-intervention, any action taken by the United States of America in the exercise of its rights to assure that the Panama Canal shall remain open, neutral, secure and accessible, shall be only for the purpose of assuring that the Canal shall remain open, neutral, secure and accessible, and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign territory.¹¹

Like the relationship between paragraphs one and two of the joint communiqué now ensconced as amendments to the treaty, these DeConcini reservations, taken together, give and take away with the same hand. They arguably leave the United States in the position, after 1999, of being able legally to enter Panama to protect the Canal against third countries, a right that apparently in the Senate's view did not exist under either the original Treaties or under the communiqué language. Even this right is doubtful, however, since the language of paragraph two of the communiqué explicitly prevents interference with Panama's territorial integrity and is now an amendment to the Treaty text, while in both instances, the DeConcini language is solely a unilateral reservation.

In conclusion, there is no right for the United States to enter Panama to protect the Canal under the existing Treaty provisions, amendments and reservations. There also is no such right in customary international law. It has been argued that perhaps a right to defend the Canal might be exercised on behalf of the international community without the requirement of Panamanian consent. That proposition raises exactly the same argument voiced by the British and the French in the Suez crisis which was rejected by the United States at that time. Another argument (specious, in my opinion) is that the acquiescence of Panama in the United States use of force to defend the Canal during World War II recognized that defense of the vital waterway amounted to the exercise of a right of self defense by the United States. The intervening promul-

¹¹ *Id.*

gation of article 51 of the United Nations Charter seriously affects that argument, even if intent in time of a world war could be transferred over sixty years to circumstances of lesser international exigency.

There is one last argument that I have heard. It is a non-legal argument and it may, I think, summarize most effectively the problem and the dilemma that we face. I was participating in an informal discussion of these issues with a group of lawyers from the State and Defense Departments while the Treaty texts were still in preparation. As I recall, one of those present was a member of the United States military who, I think, was not a lawyer. He sat and listened to the discussion for about twenty minutes without saying anything. Then he finally articulated what may be the bottom line. He said, "You know I found this a very interesting argument, but if the Canal is threatened, either from inside or outside Panama, I'm sure we will defend it, and it's obvious that we have sufficiently excellent lawyers here to find several legal bases from which any armed activity to defend the Canal could be justified—and if you can't find one, by the time you have finished debating it, we'll have won the war anyway."

Well, he clearly spoke facetiously. But he may in fact have pointed out the real dilemma—the dilemma that arises in all intervention situations. Intervention does not occur except when it is perceived to be in the important interests of the intervening country. At the same time, there is a vital systemic interest for all nations to prevent such acts in response to short-term national self interest in order to serve the greater long-term interest of all members of the community of states in maintaining a stable world order. To contribute to a system that will recognize both of these realities is an important role for the law of intervention. As is appropriate for any law professor, I merely raise these questions without providing any of the answers.