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Cluster 1: Peace, Security, and Human Rights

Legality of the 1989 Panama Invasion and the “Responsibility to Protect” doctrine

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ABSTRACT

The morning of 20 December 1989 marks the first US military intervention that was not related to the Cold War since 1945. This event, codenamed as Operation Just Cause by the Pentagon, is simply remembered as “the invasion” by Panamanians. This unilateral intervention violated international laws, regional agreements and bilateral treaties. This paper explores each of the reasons that then President George H. W. Bush cited to argue the legality of the intervention, and tries to assess the validity of each of them. An overview of the international community’s reaction coupled with the aftermath of the invasion sets the scene to explore what role could the Responsibility to Protect (R2P) principle have had if it existed during that period.

KEYWORDS: *Responsibility to Protect, Panama invasion, Intervention*

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I. INTRODUCTION

Most Panamanians will agree the country would not be enjoying today's growth if the political landscape had not changed in the early 90s. Changes triggered by the overthrow of General Manuel Antonio Noriega's dictatorship during the 1980s through an invasion carried out unilaterally by the USA violated international laws, regional agreements and bilateral treaties. On one hand, it is difficult to approve the infrastructure destruction and the thousands of deaths left by the invasion, especially for the surviving families; on the other hand, it is naive to think that the country would have achieved the same prosperity that it is enjoying today without the US intervention to remove the military hegemony over Panamanian politics. The next question to explore, then, is if there could have been a better approach to address the situation— a solution that could have achieved a better balance between diplomacy and some type of international intervention, without the massive destruction and civilian casualties that resulted from a unilateral decision to invade a country.

Furthermore, what would have happened if the United Nations had had the legal arguments to rightfully intervene in Panama through a set of resolutions supported by the international community and had implemented it in a comprehensive way, including a recovery plan to address civil security and judicial warranties? This is in contrast to the exit strategy used by the Bush administration, which considered only the retrieval of the military forces without any plan for the stabilization of the country to deal with the aftermath of the intervention.

II. RELEVANCE OF THE EVENT

The morning of 20th December 1989 marks the first US military intervention that was not related to the Cold War since 1945. It was the first attempt to shift foreign policies to pursue interventions under moral and ideological grounds. These ideals were fostered by the fall of the Berlin Wall one month earlier, a structure that for all its purposes represented the division of the Cold War. Its fall signaled the emergence of the US as the remaining power, with the desire to defend democracy under its own terms. This view of democracy was articulated by US ambassador to the Organization of American States (OAS), Luigi Einaudi. Addressing the OAS delegates within two days of the US military force invasion he warned of "a time when a great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that people, not governments, are sovereign."

This point of view, if it becomes widely accepted, can dangerously throw some serious ambiguity in the interpretation of Article 2(1) of the UN Charter where “sovereign equality” is recognized for “all its members”. Based on Article 4(1), the members of the UN are defined as “peace-loving states”, and not specifically the people. Redefining who actually enjoys the sovereignty status matters because actions can be pursued against one state claiming that Article 2(1) is not being violated if the sovereignty of the majority of the population of such states is not affected. This idea was exercised in the Panamanian invasion, with the US claiming that its decision was widely accepted by the Panamanians.

The invasion of Panama also represented a whole new era of US warfare evolution, where 24,000 troops were mobilized and dozens of targets were destroyed within 24 hours. This was orchestrated through multiple military divisions representing a level of coordination and technology unseen before, including the usage of smart-guided bombs. This intervention provided the template to be followed a year after during the first Gulf War operation codenamed Desert Storm in January 1991. It can be said that Desert Storm implemented the lessons learned in Panama, not only in terms of the high level of coordination and new weaponry usage, but also in terms of the clear guidance followed by the US forces. This became known as the Powell Doctrine, named after Colin Powell, the US Secretary of Defense under President George W. Bush.

Among the questions that the Powell Doctrine requires asking before engaging into a conflict situation, is whether or not the American people support such actions. With the Panama invasion, authorities sought to attain this by bombarding American viewers with live feeds of the invasion, using a tactic of shock-and-awe journalism. This was a stark contrast from past conflicts where most military activities were carried out in secret, or public information was at least delayed for days. The new strategy proved to be an effective tool to secure the popular acceptance, and it eventually became a standard model during Desert Storm.

III. POLITICAL CONTEXT PRIOR THE INVASION

As with most military interventions, the set of events that culminated with the US invasion in Panama was not only the product of Panamanian socio-political turmoil and the “noble” pursuit of the US to ensure democracy throughout the region. It was also induced by pressures on the Bush administration from his constituents clamoring for foreign policy changes, and by the embarrassment for failing to control Noriega, a well-known ally and asset of the US Government. This embarrassment became evident a year before the invasion, when in 1988, the US Senate Subcommittee on Terrorism,

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Narcotics and International Operations declared: "The saga of Panama's General Manuel Antonio Noriega represents one of the most serious foreign policy failures for the United States. Throughout the 1970's and the 1980's, Noriega was able to manipulate US policy towards his country, while skillfully accumulating near-absolute power in Panama."

Noriega became a CIA asset even before consolidating his power back in 1983 when he took command of the Panama Defense Forces (PDF), while he was still in the Military School of Chorrillos in Peru. During his first few years as a CIA asset, Noriega was a key ally in the prevention of the spreading of communist regimes across Central America. He even served as an intermediary for financing and arming the "Contras" in Nicaragua, and was still under the CIA payroll until February 1988. Noriega's utility was not only limited to the CIA, but also to the Drug Enforcement Administration (DEA) where he acted as an operative against the drug trafficking in the region. A reason which eventually led to his downfall was when he double-crossed the DEA by also supporting the Medellin Cartel. Noriega facilitated money laundering through the national banking system, thus effectively betraying both sides at the same time.

In the political sphere, there wasn't any resemblance of free democratic elections during Noriega's regime. Presidents were appointed and removed by his will. In 1984, after allowing Presidential elections and upon foreseeing the victory of the opposition party, he stopped the process and declared the victory to Nicolas Ardito Barletta Vallarino. Later on, after providing some comments to the US press that he was going to pursue the gruesome murder of a known adversary of Noriega's regime, Vallarino was forced to step down, appointing the vice president as his replacement. In the May 1989 elections, after the opposition party won the election, Noriega once again nullified the results, calling upon the illegal contribution that the Bush Administration provided for the campaign of the elected president Guillermo Endara.

The moment which marked the end of Noriega's usefulness to US interests was not brought about by the gross violations of human rights in the country, or his complete disregard of the Panamanian political process. It started with the US announcement of drugs as a major threat to American society— a change of policy that occurred while a Federal Court in Florida indicted Noriega under charges of drug trafficking and racketeering in February 1988.

At that point, the US government was more actively seeking the removal of Noriega, by urging a change of command to the Panamanian military officers. This ended up in a failed attempt to overthrow Noriega's regime in October 1989. A set of economic sanctions and asset freezes from the US in the months preceding the invasion resulted to the Panamanian National Assembly declaring a "state of war" with the US on 15 December 1989. A day after, during an incident in Panamanian territory outside the US-controlled zone, a US soldier under civilian clothing was killed in a military

road inspection. The next day, on 17 December 1989, President Bush gave the order to invade Panama. The invasion commenced in the morning of 20 December 1989.

IV. LEGAL REVIEW: US REASONS FOR THE PANAMA INVASION AND INTERNATIONAL LAW

In his 20 December 1989 address regarding the military actions to be taken by the US forces, President George H. W. Bush cited four reasons for the intervention: “*to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal treaty.*” Reviewing each of these four reasons under International Law, Customary Laws, Regional Agreements and bilateral treaties, serious doubt of the legality of the actions taken by US can be raised.

Furthermore, not only International Laws were broken, but US national Laws as well. During the second day of the Panama Invasion, President Bush sent to the Congress a report justifying the motive of the military intervention in Panama in accordance with the War Powers Resolution enacted in 1973. The third section of the Resolution requires a report to be sent to the Congress within 48 hours of any military intervention; more important than this, however, is the provision under the second section which stipulates that “The President, in every possible instance, shall consult with Congress *before* introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.”

It is evident that the President failed to comply with the provision to conduct due consultations with the Congress *before* engaging in an armed conflict. The purpose of the law is not only to ensure that both branches of the government can fully grasp the repercussions of the decisions, but also to prevent any unilateral decision driven by passion rather than rationality from one person who can be influenced by personal feelings and beliefs. Such was the case for the military actions in Laos and Cambodia authorized by President Nixon; the consequences of these unilateral decisions led to the enactment of the War Powers Law.

It is also important to consider this law under the uniqueness of each situation. Setting the requirement of consultation as “*in every possible instance*” implies there is some room for flexibility on this, based mainly on necessity. Such was the case when President Carter sent American commandos without any consultation to release US hostages in Tehran given the time urgency of the situation. But

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one can hardly argue that the events developing in Panama required a time-constrained decision to involve the country in an armed conflict. Moreover, it can be argued the decision was greatly influenced by a passionate rationale, considering that the order to invade came within 24 hours of the isolated death of a US serviceman.

A. Safeguard the lives of American

The actions undertaken in 1989 by the US are in clear violation of the provisions under Article 2(4) of the UN Charter where the “threat or use of force” is strictly prohibited, even if we consider the exception under Article 51 where “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”. First, the incident that resulted to the death of one American serviceman on the night of December 17 cannot be categorized as an armed attack to call upon this exception. Second, preemptive attacks on the fear of possible future incidents are not permitted, assuming that the declaration given by the Panamanian National Assembly of being at a “state of war” represented a credible threat. Considering that the context of the declaration was in response to the sanctions imposed and military maneuvers done by the Bush Administration, it can be presumed that the statement was oriented to refer the status of the relationship between the two governments rather than an actual war declaration. Moreover the Bush administration was never able to provide any evidence of future threats or attacks; neither was it able to justify the fear that the US citizen couldn’t be safely protected within the restricted American-controlled Canal Zone.

The invasion also violated regional agreements under the Organizations of American States. Article 21 of the OAS Charter declares that “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever.” International Customary Laws were also broken, as the proportionality and efforts to minimize collateral damage were not taken.

The well-known Entebbe Principle was also clearly disregarded. This principle, based on an incident where Israeli nationals were targeted when a French Airline plane was hijacked and forced to land in Uganda, is considered to be a textbook execution on how to protect nationals abroad. During the incident, Israeli forces, without authorization of Uganda’s government, assaulted the plane in a rescue operation. In this case, three main concepts can be highlighted. First, there was an *immediate and real threat* in the hostage situation, where the lives of the hostages were being endangered, and time could not be spared for lengthy negotiations. In contrast, there is a lack of evidence that a pacific solution could not have been achieved in the Panama case; this is especially evident considering that prior to the invasion, negotiations were already being conducted with Noriega for him to step down as

General of the PDF. Second, the Ugandan military helped the terrorists by separating Israeli nationals from non-Israeli passengers in an *active act* that can be viewed as *supporting the targeting of Israeli nationals*. Meanwhile in the case of Panama, the “state of war” declaration did not actively target individuals, but rather relationships between nations. Third, the hostage rescue operation performed by the Israeli forces was considered successful since the *proportionality* of the intervention itself ensured minimal casualties as possible while assuring the maximum amount of gains possible; in contrast, the tactic used by the US forces called for a shock-and-awe intervention by sending as much force as possible without concern of the international opinion, without apologizing for doing what was needed get the job done.

B. Defend Democracy

There is no provision either in the UN Charter or the OAS Charter that allows any type of intervention of one state in the affairs of another state regarding their political system. There are, on the other hand, explicit articles that prohibit such interference. Article 2(1) of the UN Charter stipulates the protection of both the “territorial integrity” and the “political independence of any state” from any threat or use of force. Article 19 of the OAS Charter declares that “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.” In 1986, three years before the Panama invasion, the International Court of Justice declared the following regarding the Case Concerning Military and Paramilitary Activities in and against Nicaragua (more popularly known as the Nicaragua v. United States of America case): “The Court cannot 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.”

The only provision that could have been called upon to legitimize the US invasion was if the legitimate government of Panama had invited the US forces to enter the country to help with efforts to capture General Noriega. Arguments have been made that the regime of Noriega was an illegitimate one, and the legality of the intervention was to seek the restoration of sovereignty and democracy back to the people of Panama. The gap in this argument lies in the fact that no such request was arranged by the incumbent government at the time, or by Guillermo Endara, whose ‘rightful’ presidency was illegally nullified eight months earlier. The United States cannot assume that an invitation has been extended to them by the general population, no matter how popular the intervention might seem among the citizens.

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Furthermore, when the Bush administration supported the electoral campaign of Guillermo Endara with 10 million USD as a way to change the political command, and sent messages urging a military coup to overthrow General Noriega, the US government arguably already violated the articles earlier mentioned regarding the political sovereignty of Panama even before the invasion. Such message was taken into action on October 3, 1989, when Moises Giroldi, a trusted officer of Noriega, organized a joint attempt with the US army stationed in Panama to capture the General. The plot failed and ultimately resulted in the torture and murder of Giroldi.

C. Combat Drug Trafficking

In a letter sent to the Speaker of the House of Representatives by President Bush in December 21, 1989, he explains that one of the goals of the US invasion in Panama was “*to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988.*” In 1989, the United States Justice Department considered that there was no violation of US laws if US military apprehended drug traffickers in other states without the consent of such states. However, this does not preclude the fact that such an action is still in violation of International Law in matters of state sovereignty, where a state cannot send forces without the consent of the implied state agents for the capture of a person to be detained somewhere else. Issues such as basic human rights can be called upon, where an individual has the right to be detained under a recognized legal authority and thus have access to recognized legal courts to appeal the charges. Given that the presence itself of the US forces was illegal and unrecognized by any legal authority, the arrest conducted by the DEA agents can be constituted as illegal and in violation of Noriega’s human rights.

A similar circumstance can be recalled, in a better-known case which is universally-recognized as a violation of international law: the abduction of Otto Adolf Eichmann, a major architect of the Holocaust, in 1960 by undercover Israeli Mossad intelligence agents. The said agents illegally entered Argentina to bring Eichmann to stand trial in Israel. This series of events resulted in his death sentence in 1962. When confronted by Argentinian objection of the incident, Israel admitted this violation and apologized for the events. But important differences can be drawn from these two events. First, Israeli intervention in Argentina was *limited to a small covert operation* in contrast to the 24,000 troops sent by the US to Panama. Second, the *collateral damage consequence of the operation was basically non-existent* in the former case, compared to the widespread destruction in the latter, produced not only during the US invasion itself, but also from the looting that followed afterwards. Third, it was evident that the Israelis had *no intention to interfere in the political sovereignty* of Argentina, whereas in the case of Panama, President Bush explicitly declared that the political dimension was a key factor in the US intervention.

D. Protect Integrity of the Panama Canal Treaty

Since its conception, the treaty that granted US permanent control of the Panama Canal and its management was opposed by the country and was a constant source of conflict between the two nations. In 1973, the United Nations Security Council met in Panama City to draft a resolution to pave the way for a solution to the disagreement, but it was eventually vetoed by the US. In 1977, President Jimmy Carter seized the opportunity to negotiate the return of the Panama Canal and all the associated assets back to Panamanian control when he recognized that the strategic value of the Canal had diminished in recent years. As a consequence, two new treaties were signed. The Panama Canal Treaty refers to the transfer of assets to Panama by December 31, 1999. The second one, the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, provides the legal rights for the US to defend the Canal against an armed attack by an outside power. Under the Reservations a(1), the Treaty states, “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 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 integrity.”

Once again, it becomes evident that under the bilateral treaties signed between Panama and the US, there are explicit prohibitions for any type of intervention and political interference against state sovereignty. It is noteworthy to highlight that the last of the four reasons provided by President Bush for the Panama invasion does not claim the exercise of the Treaty itself. Instead, it claims to protect the “integrity” of the Panama Canal Treaty, as if using the same basis of preemptive actions. Once again, we see a line of reasoning which assumed, without solid evidence, that more lives were at risk, or in this case, that somehow the operation of the Panama Canal could have been at risk. Any legal argument that may be invoked to support this preemptive rationale, such as those in the UN Charter, does not apply, since both scenarios of perceived risk require an armed attack to occur to be able to act upon these provisions.

V. AFTERMATH OF THE INVASION

Operation Just Cause, the codename for the Panama Invasion, was considered to be an efficient military operation- executed fast and simple, with the presence of ground troops for only a couple of weeks since their insertion on December 20th, achieving their final objective of capturing General Noriega on January 3rd, and leaving days after. According to Brigadier General John Brown, a

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historian at the United States Army Center of Military History, Operation Just Cause was “one of the shortest armed conflicts in American military history.” But this ‘effective’ exit strategy from the tactical military standpoint took a high toll on the human security aspect.

Up until today, the final number of civilian casualties remains unknown. Numbers range from 300 based on early estimates by the Pentagon, and go up to 3,000 based on a report from a delegation of The Commission for the Defense of Human Rights in Central America (CODEHUCA) sent in 1990. A report done by Human Rights Watch in 1991 asserted that “American forces violated the rule of proportionality, which mandates that the risk of harm to impermissible targets be weighed against the military necessity of the objective pursued... Under the Geneva Conventions, attacking forces are under a permanent duty to minimize harm to civilians. We concluded that the command of the invasion forces violated that rule.”

Ensuring basic security beyond the military intervention was apparently not contemplated. Looting and crime impunity afflicted Panama City for weeks under the US military watch. Economic losses hit local enterprises, and a group of 60 of those afflicted filed a joint lawsuit in the Federal District Court in New York City against the United States Government in 1991. An aid package promised by the Bush administration of 1 billion USD, out of the 2 billion USD estimated as damages caused by the invasion, had also proven to be ineffective. Most of the fund transfers were either delayed as a political pressure mechanism, or they were directed to pay debts that affected US institutions, making direct contribution to the affected and displaced families only a small fraction. For the first 500 million, only 42 million were disburseable directly for humanitarian aid.

VI. INTERNATIONAL REACTIONS TO THE EVENTS

In December 22, 1989, a draft resolution condemning the US invasion of Panama submitted by Algeria, Colombia, Ethiopia, Nepal, Senegal and Yugoslavia to the Security Council recalling Article 2(4) declared that it “strongly deplores the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States” and “demands the immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States.” The draft resolution was vetoed by France, United Kingdom and US. Seven days later, in December 29, 1989, an almost identical resolution, A/RES/44/240 was passed in the General Assembly instead by 75-20 votes, with 40 abstentions.

On a regional scale, the OAS voted on December 22 by 20-1, with 6 abstentions on a resolution OAS CP/Res. 534 (800/89), where it expressed a “deep(ly) regret [for] the intervention in Panama” and was demanding a “call for the withdrawal of the foreign troops used for the military intervention” advocating for “the right of the Panamanian people to self-determination without outside interference.”

Although on both instances the resolutions condemning the US actions were passed, the vote result on the UN General Assembly provides some hints that the actions taken by US, even though not widely accepted, were not hugely deplored either. There was little doubt that the democracy in Panama was in a precarious situation at best, with little room for the international community to act upon. It is probable that the vote result reflected just the conflict between the need to do something versus the legal means to do it.

VII. RESPONSIBILITY TO PROTECT: A RETROSPECTIVE REVIEW

It is clear that under International Laws, including the UN Charter and the OAS Charter, there were no provisions back in 1989 to legally intervene with a military action to remove General Noriega from power. His actions did not demonstrably put international peace and security at risk enough to activate the Security Council to take actions. Furthermore, considering the right of each state to sovereignty, self-determination and political independence, the oppressive regime conducted Noriega, although wrong, seemed to be protected. But would it have been that easy in today’s world for regimes like that to live in impunity for so long?

In December 2001, the term *Responsibility to Protect* appeared for the first time in a report of the International Commission on Intervention and State Sovereignty in response to Secretary-General Kofi Annan’s question on when the international community needs to intervene for humanitarian reasons. By 2005, at the 60th session of the General Assembly, 191 heads of state unanimously endorsed the resolution supporting the Responsibility to Protect Doctrine. Could this virtually universally-accepted doctrine have provided the legal framework to mobilize actions from the international community to prevent the gross human rights violations that happened in Panama back in the 1980’s?

The Resolution (A/RES/60/1, para. 139) adopted by the General Assembly in September 2005 calls upon the enforcement under Chapter VII, “In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations

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as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” If an individual state were to fail in fulfilling its obligation to protect its citizens, which in the case of Panama was true, such framework would have provided the means for the international community to legally intervene in the internal affairs of that individual state.

The Responsibility to Protect not only provides the enforcement methods, but the justifications to do so. Under the same Resolution (para. 138), “Each individual State has the responsibility to protect its populations from *genocide, war crimes, ethnic cleansing and crimes against humanity*.” As defined by the International Criminal Court, crimes against humanity include acts such as “enforced disappearance of persons”, “persecution against an identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds” and “other inhumane acts of a similar character intentionally causing great suffering or serious bodily or mental injury”. All of these crimes happened in Panama during Noriega’s dictatorship. The most prominent case was the murder of Dr. Hugo Spadafora, who publicly denounced Noriega’s ties to drug trafficking and other crimes. Days after being captured and tortured by the military, Spadafora’s body was found decapitated. Other atrocities include how opposition party’s candidates were flogged after winning the election in May of 1989 just before the election results were nullified.

VIII. CONCLUSION

Beyond providing legality to international interventions, the Responsibility to Protect doctrine provides a better assurance that any action taken has a better chance to have a comprehensive approach, better proportionality in scale, higher consensus between relevant parties, and a better scope of prioritizing the protection of civilians at the heart of the intervention.

As reviewed earlier, the US invasion of Panama clearly lacked of a comprehensive approach. Only the military portion of the intervention was planned, with a clear exit strategy of the troops, while there was complete disregard of the economic and social aftermath on human security. In contrast, better support could have been achieved, even if the events were to escalate to a military intervention, based on Resolution 1674 from the Security Council in 2006 which states that the Responsibility to Protect “stresses in this context the need for a comprehensive approach through promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law, and respect for, and protection of, human rights, and in this regard, urges the cooperation of Member States and underlines the importance of a coherent, comprehensive and

coordinated approach by the principal organs of the United Nations, cooperating with one another and within their respective mandates.”

Twenty five years have passed since the invasion. The fact that the toppling of Noriega’s regime has proven to be immensely favorable for Panama’s growth cannot be disputed. The fact that the actions taken unilaterally by the US was in violation of international law nevertheless remains true. The lack of internationally accepted doctrines to legally address oppressive dictatorial regimes after the Cold War proved to be an issue that split the nations in half, as reflected in the moderate margin with which the UN resolution condemning the US actions was passed in the General Assembly. We can only speculate that the Responsibility to Protect doctrine, if existed back in the 1980’s, could have given a better solution. At the very least, it would have provided the legal framework for the international community to act upon Panama’s dire situation at the time.

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