

the United States and Israel opposed, and 44 states abstaining. For reasons fully explained in my position paper, such General Assembly recognition of the new state of Palestine is constitutive, definitive and universally determinative.

The Palestinian uprising or *intifada* will continue until the Israeli Government is willing to sit down and negotiate an overall peace settlement with the PLO on the basis of a two-state solution. In this regard, the Palestine National Council has taken several steps in the Palestinian Declaration of Independence and in the Political Communiqué attached thereto in order to establish the framework necessary for negotiating a comprehensive peace settlement with Israel. First and foremost, the Declaration of Independence explicitly accepted the UN General Assembly's Partition Resolution 181 (II) of 1947. The significance of this acceptance by the Palestinian Declaration of Independence cannot be overemphasized. Prior thereto, from the perspective of the Palestinian people, the Partition Resolution had been deemed to be a criminal act that was perpetrated upon them by the United Nations. Today, the acceptance of the Partition Resolution in their actual Declaration of Independence itself signals a genuine desire by the Palestinian people to transcend the past forty years of history and now reach a historic accommodation with Israel on the basis of a two-state solution: the Declaration of Independence is the foundational document for the state of Palestine. It is definitive, determinative and irreversible.

Quite obviously, a remarkable opportunity for peace with justice for all has been created by the Palestinian Declaration of Independence, its attached Political Communiqué, and subsequent public statements made by Yasir Arafat acting in his official capacity as President of the new state of Palestine. What is needed now from the Bush administration is the same type of dynamic leadership and will for peace that was demonstrated by the Carter administration at Camp David over a decade ago. Failure by the Governments of the United States and Israel to seize this moment for peace will only make another general war in the Middle East an inevitability. I doubt very seriously that history will give any of us a second chance.

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TO THE EDITOR IN CHIEF:

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It seems to me that the title of the *Agora* essay by Professor Anthony D'Amato published in the April 1990 issue of the *Journal* (at p. 516), i.e., *The Invasion of Panama Was a Lawful Response to Tyranny*, would have been more accurate had it read "The Invasion of Panama Could Have Been a Lawful Response to Tyranny." The reason is to be found in the last sentence of paragraph 5 of section II (p. 522). This sentence refers to a deplorable characteristic of the operation, namely, that it was not carried out in such a way as to minimize civilian casualties. And the sentence clearly implies that this characteristic of the operation rendered it unlawful.

The underlying general question, which Professor D'Amato should have brought within the framework of his thesis that, under international law,

governments having the means to do so may forcibly overthrow foreign tyrants, is that of the maximum permissible cost of those operations in civilian casualties. Clearly, if a government forcibly rids a foreign country of a tyrant in such a way that the only injury its population sustains is a slight bruise on the thigh of a vigorous youth, then, if Professor D'Amato's thesis holds water, the government's intervention will have been altogether lawful. But what if, even though every care has been taken to minimize bloodshed, the overthrow of the tyrant has claimed the lives or physical integrity of 5 percent of the civilian population?

Professor D'Amato should have sought to tell us where the line of demarcation is to be drawn in this respect. In doing so, he would no doubt have adverted to an additional difficulty: should one, in ascertaining how far it is lawful to go in sacrificing civilians on the altar of democracy, factor in the more or less repressive and, particularly, genocidal nature of the tyranny and the likelihood that purely internal forces may overthrow it in the not-too-distant future? If, for instance, the tyrant is young and healthy, the prospect of his being overthrown by his subjects is dim, and he is systematically exterminating large numbers of them, would his overthrow by foreign forces not be lawful even if the number of civilian casualties it involves would appear excessive were the tyranny less savage?

Another factor that cannot be overlooked is to be weighed on the other scale of the balance. I refer to the degree of probability that, once the tyrant is removed, democracy will take root. This will normally depend, chiefly but not exclusively, on the existence of vigorous democratic traditions in the country concerned. If conditions there are such that a relapse into tyranny is likely, the overthrow of the tyrant might well be unlawful even if it can be accomplished with relatively minor harm to the population. Except, of course, if the intervening government is willing to tutor the local authorities and the population at large in the ways of democracy. But to do this, it will have to exercise, for a sufficiently long time, some degree of control over the local authorities, which involves occupying the country. Does Professor D'Amato believe that international law would allow the government that ousted the tyrant to render this complementary "service"?

Does Professor D'Amato believe that in assessing the lawfulness or otherwise of the overthrow of a tyrant by outside forces, the toll taken on the tyrant's military can be disregarded? Since, in stating that the casualties the invasion of Panama entailed were excessive, Professor D'Amato refers only to *civilian* ones, it might be that this question should be answered in the affirmative. But is it fair in all cases to tar the tyrant's military with the brush made for him? Did all the German soldiers in their teens or early twenties who fell fighting for Nazism deserve their fate? Obviously, the answer is no.

Professor D'Amato should therefore have refined his doctrine about the overthrow of tyrannies by conditioning the lawfulness of the crusades he advocates on the need to keep within certain bounds not only civilian casualties, but also those suffered by the tyrant's forces. And it is hardly necessary to add that material and other purely economic losses inflicted on the target country deserve to be taken into account in a similar manner.

Professor D'Amato should also have discussed a defect from which his doctrine obviously suffers: in the nature of things, it operates very unevenly. As a result of the need to meet what could be dubbed the "Rambo condition" (in no Rambo movie would it do for the hero to end up grievously

wounded), governments will overthrow foreign tyrants by force of arms only if the casualties their military thereby incurs can be expected to be, if not minimal, at least below a certain minimum. Since real life is not exactly what we see in Rambo movies, this ensures that only countries that are weak and small (preferably, ministates), easily accessible and not likely to be succored by powerful allies, will “benefit” from the application of Professor D’Amato’s doctrine. Thus, the “favor” the United States did to the people of Panama is not one that the people of North Vietnam can look forward to.

Also in the interest of realism, yet another factor making for unevenness in the application of the doctrine should have been noted (and regretted) by Professor D’Amato. I refer to the disinclination that, for obvious reasons of domestic politics, a government (at least a democratic one) will, in the absence of special circumstances, normally have to use its military to oust a foreign dictator; unless relations between the government and the dictator are seriously strained and he is in bad odor with the majority of the population of the country concerned, its government is not likely to seek to overthrow the tyrant. Thus, even if the United States could overthrow certain other Third World despots without its military sustaining other than minimal casualties, it would not do the people under their yoke the “kindness” it did to the Panamanian people.

To conclude, I wish to make it clear that it is by no means on the sole ground of its having resulted in avoidable bloodshed that I share Professor D’Amato’s opinion that the invasion of Panama was unlawful. For I am in general agreement with the views expressed by Professors Farer and Nanda in the same *Agora* section (84 AJIL at 503 and 494, respectively). If those views are correct, no need exists for the invidious calculus by which the blessings of prospective democracy are balanced against the loss of life, other human suffering and economic losses attendant on the overthrow of despotic regimes by foreign forces.

ROBERTO LAVALLE

Professor D’Amato replies:

Mr. Lavalley may be surprised that I basically agree with him. The factors he mentions certainly must be taken into account in assessing the legality of any particular humanitarian intervention. The daunting nature of that assessment drives many people to abandon the enterprise entirely and seek only bright-line prohibitions against any transboundary use of force. But to me the latter choice is an abdication. The real world is complex and messy; we should not turn away from it because we insist that our legal rules be clear and simple. Those who choose simple rules are, in my opinion, doomed both to observing their constant “violation” and then rationalizing the results in law journals.

In the space of my brief essay on Panama, I was only able to suggest a few of the permutations that Mr. Lavalley notes. If my essay succeeds in convincing people to put aside the superficial clarity of Article 2(4) and take up instead the task of working out the complexities of the law of humanitarian intervention, it will have been worth writing. I hope that Mr. Lavalley will be one of those who accept the challenge.