GRENADA - LEGALITY OF ACTION TAKEN BY THE UNITED STATES AND THE ORGANISATION OF EASTERN CARIBBEAN STATES (OECS), 25 OCTOBER 1983. VIEWS OF AMERICAN BAR ASSOCIATION SUB-COMMITTEE. RESPONSE OF UNITED STATES STATE DEPARTMENT LEGAL ADVISER.

The controversy arising from the US-OECS intervention in Grenada was outlined in a previous issue of AILN (see Professor DHN Johnson, [1984] AILN 6-35; Noted: id, 83-84). These issues have now been the subject of a Report by an Ad Hoc Committee on Grenada (Chairman, Professor Edward Gordon, Albany Law School; the other members were Professor R.B. Bilder, Mr. A.W. Rovine, Professor D. Wallace Jnr.) of the Section on International Law and Practice of the American Bar Association. Their Report of 10 February 1984 was submitted to the Council of the ABA Section on International Law and Practice, accepted by the Council as a report of the Committee. The Report did not necessarily represent the position of the Council or members of the ABA Section of International Law and Practice. The Editors are grateful to Professor Gordon for permission to reprint extracts from the Report. The Report in draft form was responded to by the Hon. Davis Robinson, Legal adviser to the State Department. The ABA Report, and Mr. Robinson's reply are to be published in the next issue of The International Lawyer ((1984) 18 Int Law 331).

ABA, Section of International Law and Practice - Report of the Committee on Grenada, 10 February 1984

The Report sets out in helpful detail the background to the Grenadian operation (pp.1-16), and discusses (pp.16-31) the disputed issues of fact and Grenadan law, in particular the status of the various groups after the murder of Prime Minister Bishop, and the position in law and fact of the Governor-General of Grenada, Sir Paul Scoon. The Report states, in particular:

> Given the deterioration of law and order in Grenada following Bishop's assassination, the OECS, the U.S., Barbados and Jamaica, and, later, even the UN accepted Mr. Scoon's authority to act in Grenada's behalf. To an extent, this represents political recognition of Mr. Scoon's authority, at least by authorities outside Grenada and after his de facto control of Grenada had been assured by the interposition of foreign military force. The apparent popularity of Mr. Scoon's action among Grenadians may be said to represent an informal

> confirmation of his authority by the Grenadians themselves; it, too, reflects the control which the predominantly American military force has been able to establish in Grenada in Mr. Scoon's behalf.
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> There is reason to argue that under applicable rules of recognition, General Austin's Revolutionary Military Council was entitled to recognition as the de facto, if not the de jure, government of Grenada. Those who feel it should have been recognised point to the fact that the new RMC was in sufficient control of the island to impose a 96-hour curfew over the weekend preceding the invasion and that it was with members of this group that the United States, Great Britain and Canada negotiated at this time in their efforts to assure the safety of their nationals. ... The United States Government has indicated that it regarded the situation on the island as one of anarchy, and that it concurred in Prime Minister Adams' [of Barbados] judgment that "the Governor-General of Grenada was the only constitutional authority remaining in the country, and the only one who in addition to any treaty rights which might and did exist could issue a formal invitation to foreign countries to enter Grenada to restore order ... " ...
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> We are not in a position to judge whether Mr. Scoon acted in accordance with his authority under Grenadian constitutional law ...
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> Whatever may be said of Mr. Scoon's authority to ask the OECS and other states to restore order, and whether and when he did so, the OECS' action is suspect by virtue of the reference in the OECS Secretariat's statement to the organisation's request to friendly governments "to form a pre-emptive defensive strike" to rid the region of the threat to peace and security posed by the situation in Grenada. The words themselves reinforce the impression that the OECS, at least, thought it was acting under Article 8 of its treaty, since Article 8 justifies the action it contemplates by referring to Article 51 of the UN Charter, which deals with individual and collective self-defense."
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> (Report, pp.25-29)

The Report goes on to deal with three justifications given for US action, reaching the following conclusions with respect to them:

A. Lawful intervention under Charter Art 51 at the request of a competent Grenadian authority

On the assumptions that 'the Governor-General of Grenada was authorised to act in Grenada's behalf, that the Governor-General requested the OECS to intervene in the way it did before the fact, and that the help sought by the OECS from the United States and other Caribbean States was consistent with the Governor-General's request', the Report comments:

> " ... an interpretation of Article 51's reference to the inherent right of states to act in their self-defense which has the effect of vindicating calls by factions in an internal strife for outside help cannot be said to enjoy unanimous acceptance in the world community. It is true that the legitimacy of calls for French assistance in internal uprisings in Francophone Africa, though called into question, does not appear to have been the subject of a sustained challenge by the world community. Nor have Britain's intervention in Tanzania in 1974, Tanzania's intervention in Uganda later, and other incidents of this type elsewhere in Africa. But it would be difficult to find support for the assertion that the legitimacy of such intervention is readily accepted in the Americas, other than pursuant to Article 3 of the Rio Treaty or under the auspices of the OAS, even before but especially in light of the criticism of the military intervention in Grenada by representatives of Latin American states at the meeting of the Permanent Council of the OAS on October 26th, immediately after the intervention. ...
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> In terms of the purposes and principles of the UN Charter and Rio Treaty, it is difficult to square the commitment to sovereignty, political independence and self-determination with allowing foreign forces to decide which of rival factions will prevail in an internal struggle for power. Where, as was here the case, the foreign forces are called in by a barely credible government, the likelihood that a foreign state will forsake its own national policy interests in favour of unconditional local self-determination is usually scant. In fact, the ordinary course of events leads to the emergence of a government acceptable to the intervening state, whether or not it happens as well to be preferred by the nationals of the state whose independence has thus been compromised. In this respect, one of the least desirable consequences of intervention in circumstances like those presented by the situation in Grenada is to lend a measure of legitimacy to the otherwise discredited Brezhnev Doctrine, under which the Soviet Union claims the right to intervene in any system that has adopted a socialist government, for the purpose of preventing any change in that form of government. That, strictly speaking, the

Brezhnev Doctrine does not appear to depend upon a request from the state concerned is of little moment, since in practice the Soviet Union has generally contrived to have a request of this sort available from someone in the target state, however flimsy the cover.

(Report, pp.59-62)

B. Lawful collective action under the UN and OAS Charters

On this point the Report comments:

> Beyond consideration of the language of Article 52 of the UN Charter and Articles 22 and 28 of the OAS Charter lie profoundly unsettling questions about the effect that strained interpretations of them have as precedent. Once a superpower has effectively asserted such an interpretation it becomes more difficult to repudiate or distinguish from comparably strained interpretations. The fibre of the constraints on the use of force are weakened just when they are most in need of strengthening. Like "collective self-defense" that anticipates improbable armed attacks, "collective security" that serves to justify unilateral prerogatives concerning the use of force is dangerous because it applies reciprocally and is contagious.
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> Earlier we indicated that we are not in a position to determine whether the OECS states complied with their constituent instrument in joining with Barbados, Jamaica and the US in using military force to remove the threat to their peace and security posed by the situation in Grenada. Of course, if one takes the position that regional action under Article 52(1) of the UN Charter can be undertaken by any group of states, however loosely organised, then the OECS states' compliance with the terms of the OECS Treaty may not be critical to compliance with Article 52(1). But if this is the case, it would only seem to strengthen the contention that any collective action involving military force has to be regarded as "enforcement action", that is, it operates under Article 53 of the Charter and has to be ordered or authorised by the Security Council. Otherwise, the use of force is open to any two or more states meeting the easy criteria of regional arrangement, regardless of whether they are subject to any institutional control mechanism. It is difficult to see how such a construction of Article 52 carries out the intentions and policies underlying Article 2(4) of the UN Charter or Article 20 of the OAS Charter.
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> (Report pp.70-71)

C. Humanitarian intervention

Finally the Report comments briefly on the humanitarian intervention claim:

> Even among those who accept the lawfulness of attempts to rescue one's own nationals endangered abroad, as in the Entebbe situation, there is virtual unanimity in the view that only a short-term use of armed force is justified. The U.S. military troops, as noted, remained on Grenada for nearly two months, long after those Americans who wished to be evacuated had left.
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> The Grenada intervention seems to resemble the US intervention in the Dominican Republic in 1965 and similar episodes in the past in which the rescue of the intervening state's nationals appears to have been collateral to the primary purpose of favourably resolving an internal political struggle.
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> (Report, p.73)

Conclusions

The Report concludes (p.75):

> We are drawn to the conclusion that the U.S. intervention in Granda is incompatible with those articles of the UN Charter, the Rio Treaty and the Charter of the OAS that proscribe the use of force in international relations other than in limited circumstances, none of which appear to be applicable in this instance. We do not suggest, as others have, that the US was acting insincerely or without regard to the factors which were cited publicly in justification of the intervention. Nor are we to say to what extent these factors implicated important national security interests. But we do say that the constraints imposed by the several relevant treaties are not peripheral regulations; they lie at the core of international efforts to minimise unilateral military intervention by states. For the United States, moreover, they represent treaty commitments of the most fundamental kind. These constraints, our own international commitments and the rule of law themselves represent national security interests, vital ones.

Legal Adviser, US Department of State, Response

By letter to the Chairman of the Committee of 10 February 1984, the Legal Adviser responded to these arguments. The letter is set out here in full: