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Letter from the Legal Adviser, United States Department of State

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United States Department of State
The Legal Adviser
Washington, D.C. 20520

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Professor Edward Gordon
Chairman, Committee on Grenada
Section on International Law and Practice
American Bar Association
1800 M Street, N.W.
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Dear Professor Gordon:

Thank you for giving us the opportunity to reiterate the legal position of the United States for the report of your Committee on Grenada. We clearly disagree with a number of the conclusions and judgments reached in the report. However, I believe this office shares with you and the other members of the Section the view that the way in which States articulate and interpret principles of international law is perhaps even more important to the development and maintenance of an effective international legal order than are debates as to whether the facts in a particular case warranted the invocation of such principles.

In the case of the action taken in Grenada, the legal position of the United States was based upon the application of a combination of three well established principles of international law to the unique and almost unprecedented circumstances presented by the murder of Prime Minister Bishop and key members of his cabinet and the resultant collapse of functioning institutions of government in Grenada. We consciously eschewed argu-

ments which might imply a weakening of established international legal restraints concerning the use of force. Accordingly, I consider it of the utmost importance that in analyzing various legal theories that have been put forward in the context of the Grenada mission, the report distinguish clearly the positions adopted by the United States from the arguments of others which do not represent the United States' view of international law.

Bases for U.S. Participation in the Grenada Collective Security Action

The United States, both before and after the collective action, regarded three well established legal principles as providing a solid legal basis for the action: (1) the lawful governmental authorities of a State may invite the assistance in its territory of military forces of other states or collective organizations in dealing with internal disorder as well as external threats; (2) regional organizations have competence to take measures to maintain international peace and security, consistent with the purposes and principles of the United Nations and OAS Charters; and (3) the right of States to use force to protect their nationals. These grounds were clearly articulated in testimony of Deputy Secretary of State Kenneth W. Dam before the House Foreign Affairs Committee on November 2, 1983. I would emphasize that the United States has not taken a position as to whether any one of these grounds standing alone would have provided adequate support for the action.

Request of Lawful Governmental Authority

The request of the Governor-General was regarded by the United States as entitled to great moral and legal weight, in light of the collapse of other established institutions of government in Grenada. We were unable to cite his request in our first statements of the United States position because of fears for his safety. At the time, his home was still surrounded by heavily armed forces. Our internal legal analysis, however, relied heavily upon this request from the time we were first advised of it on October 23. It was clearly an important factor in the decision reached by the President on October 24 to respond favorably to the request of the Organization of Eastern Caribbean States (OECS) for United States assistance. The request of lawful authority is a well established basis for providing military assistance, whether the requesting State is seeking assistance in the exercise of its inherent right of self defense recognized in Article 51 of the United Nations Charter, or for other lawful purposes, such as maintenance of internal order. *See*, I Lauterpacht, *Oppenheim's International Law* (1955), section 134 at p. 305. I am not aware of any authority for the proposition that

military assistance in response to the request of lawful authority is contrary to the prohibitions of Article 2(4) of the United Nations Charter.

Difficult legal issues may arise in determining what constitutes such lawful authority in a situation of factional strife involving contending factions with equivalent, colorable claims to authority. I would only point out that this was not such a case. The Governor-General was not the leader of one contending faction in a civil war; he was the recognized head of state of longstanding tenure confronted by the breakdown of government in his nation. Under both the Constitution of Grenada as well as the law and practice of the British Commonwealth, the Governor-General possessed a necessary residuum of power to restore order in these circumstances. *See generally* S. A. DE SMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS (1964), pp. 90–100; *see also*, *The Guardian*, Oct. 28, 1983 at p. 6, *The Economist*, Nov. 9, 1983, at p. 45.

Competence of the OECS

The October 21 decision by the members of the Organization of Eastern Caribbean States to take collective action provides further legal support for the United States action. Three principal issues have been raised in this regard: (1) Was the action consistent with the terms of the OECS Treaty? (2) Do regional organizations have the capacity to take such action? (3) Is the OECS a competent regional organization?

With respect to the first of these issues, much of the analysis to date has focused exclusively on the language of Article 8 of the OECS Treaty. Article 8, however, defines the jurisdiction of the Defense and Security Committee of the OECS, a subordinate body under that treaty. The decision to take military action on Grenada was reached by the heads of government of the OECS nations, who—unlike the Defense and Security Committee—have plenary authority under Article 6 of that Treaty. Article 3(2) of the OECS Treaty expressly empowers the heads of government to pursue joint policies in the field of mutual defense and security, and "such other activities calculated to further the purposes of the Organization as the member States may from time to time decide."

It is clear from statements of the OECS Secretariat that all OECS members present at the October 21 meeting of heads of government voted in favor of collective action. The provisions of Article 6 of the OECS Treaty provide that actions may be taken without the presence of a Member State if the absent state later ratifies the decision or abstains from voting. Given the authority of the Governor-General discussed above, his request for collective action manifestly constituted ratification on the part of Grenada. Perhaps the most important aspect of the debate over the OECS Treaty is

that all members of the OECS regard the action taken as consistent with the treaty. We submit that the views of the members of a regional treaty on questions of treaty interpretation are entitled to a weight greater than those of third-state commentators.

An issue of far greater import for the development of international law is that of the proper scope of competence of regional organizations to act to restore internal order in a member state. This issue requires careful analysis in circumstances where an organization acts on its own initiative, absent the invitation of the lawful authorities of the State concerned. In the case of Grenada, however, this difficult issue ultimately was not posed. With the invitation of the Governor-General, the member States of the OECS were doing no more collectively than they could lawfully do individually in responding to that request. Thus, the limits of what action a regional organization may properly take absent such a request were not tested in this case.

As a lawful action of a regional organization, the collective action of the OECS falls within Article 52 of the United Nations Charter. We are not aware of any serious contention that actions falling within the scope of Article 52 could violate Article 2(4) of the Charter, any more than actions taken at the request of lawful governmental authority could be considered to do so. Similarly, the request of lawful authority and the decision of the OECS bring the collective action within the scope of the OAS Charter. Military assistance provided at the request of lawful authority cannot be considered to violate the prohibitions of Articles 18 and 20 of that Charter, and lawful actions of a regional organization such as the OECS fall within the exceptions for regional arrangements set forth in Articles 22 and 28 of the Charter. While the *travaux preparatoire* of these articles do not indicate that the drafters consciously anticipated the development of collective security arrangements in this hemisphere apart from the Rio Treaty and the United Nations Charter, the *travaux* do indicate a clear decision not to refer specifically to those treaties in the Charter provisions. Accordingly, there is nothing to indicate that the drafters intended to foreclose the possibility of other similar treaties falling within the scope of Articles 22 and 28.

On a practical level, the United States has long supported the concept of dual adherences to the OAS Charter and the Rio Treaty by hemispheric countries. However, the hemispheric system has developed differently. The English speaking Caribbean countries—including the OECS states—are members of the OAS but not party to the Rio Treaty. The OECS Treaty is in effect the regional security arrangement for the Eastern Caribbean states. (And one which provides for much greater integration in the conduct of public affairs than either the OAS Charter or the Rio Treaty.) We see no principled basis for distinguishing the Rio Treaty with 23 members, from the

OECS Treaty with its 7 members. Since the Rio Treaty organ of consultation may take decisions by a 2/3 vote while the OECS Treaty authority requires unanimity, in practice the difference in institutional restraints on collective action under the two systems is not significant. We attach no weight whatsoever to the relatively small size of the OECS member States. All sovereign states regardless of population or area are entitled to enjoy the benefits of regional security arrangements, which may in fact be more important to states such as the OECS members for whom maintenance of significant standing security forces is extremely burdensome. If it were the case that the OAS Charter stood as a bar to the OECS states taking collective security action, then it would seem that OAS membership would impose burdens uniquely on these states which have the greatest need for collective security.

Protection of Nationals

The third basis for United States participation was the need to protect the 1,000 United States citizens on Grenada who responsible United States authorities considered to be threatened by the anarchic conditions on the island. Under circumstances where all specific United States proposals for the peaceful evacuation of United States personnel had been rejected by those elements which we considered to pose the greatest threat to their safety, the use of force to secure their evacuation was justified. Protection of nationals is a well-established, narrowly drawn ground for the use of force which has not been considered to conflict with the United Nations Charter. While the United States has not asserted that protection of nationals standing alone would constitute a sufficient basis for all of the actions taken by the collective force, it is important to note that it did clearly justify the landing of United States military forces.

The Arguments the United States Did Not Rely On

I would like to turn briefly to a discussion of the arguments which have been put forward by some commentators, but which the United States did not make in support of its actions on Grenada. We did not contend that the action on Grenada was an exercise of the inherent right of self-defense recognized in Article 51 of the United Nations Charter for the same reason that the United States eschewed such arguments in support of the actions taken by the United States and other Rio Treaty members in response to the Cuban missile crisis. We did not assert that Article 2(4) had somehow fallen into disuse or been overtaken by the practice of states; we regard it as an

important and enduring principle of international law. Nor did we put forward new interpretations of the language of Article 2(4). We did not assert a broad doctrine of "humanitarian intervention." We relied instead on the narrower, well-established ground of protection of United States nationals. Finally, we have emphasized the mutually reinforcing nature of the elements of the position we did take, and the unusual circumstances posed by the breakdown of lawful authority and the request of the head of state.

Effects on the Development of International Law

We share the concern of the Section that the legal position adopted by the United States in connection with the collective security action on Grenada not be considered as standing for the proposition that international legal restraints on the use of force have been eroding. We do not believe that it can properly be so construed. To equate United States reliance on established principles of international law with the Soviet Union's reliance on the so-called "Brezhnev Doctrine"—which on its face contradicts the United Nations Charter—could well have the effect of implying that international law is either to be determined by the policies of large powers or by transitory voting majorities in international fora, rather than through reference to carefully constructed and enduring principles of universal applicability.

Similarly, whether a principle of law has been properly applied cannot be judged without reference to the facts. The illegal Soviet invasions and continuing occupations of Czechoslovakia and Afghanistan involved undisguised efforts to replace one established government with another more amenable to Soviet wishes. There are no facts analogous to the request of the Governor-General which the Soviet Union can point to in either case. The Soviet Union cannot rely on any invitation from a regional security organization comprising autonomous and sovereign states acting within the proper scope of authority of such organizations. The most recent factual difference between the collective action on Grenada and the Soviet subjugation of two sovereign states was the prompt withdrawal from Grenada of all United States' armed forces combat personnel. (The activities of our remaining 300 personnel are limited to noncombat assistance, such as training and medical and reconstruction assistance.) We are looking forward to the conduct of early elections in Grenada, which will demonstrate once again the difference between United States and Soviet behavior in terms of respect for the principles of the United Nations Charter.

This Office is acutely conscious of the effect that United States legal positions may have on the development of international legal restraints on

the use of force. We also recognize the importance of reports of respected bodies such as the Section in furthering understanding of the United States' position as well as providing independent analysis of the complex issues posed by any resort to force. I therefore wish to thank you again for this opportunity to place on record the considerations which formed the basis of the United States legal position concerning the action on Grenada.

Sincerely,

Davis R. Robinson