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Letters to the Editor

LETTERS TO THE EDITOR

The Grenada Committee Report

Dear Editor:

The shock wave that hit this country and much of the rest of the world when the news was flashed of the United States-Caribbean States military intervention in Grenada October 25, 1983, quickly produced an amazing outpouring of news, commentary and analysis regarding that event. Attempts to blame, explain and declaim United States actions could be found in journalistic sources, congressional hearings and scholarly periodicals. This writer, although certain to have missed some of the pieces brought before the public, has made a special effort to familiarize himself with this production and has found no single article yet to compare with the scholarship and judgments made by the Committee on Grenada of the American Bar Association. (Committee on Grenada:—Edward Gordon, chairman, Richard B. Bilder, Arthur W. Rovine, Don Wallace, Jr., *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAWYER 331(1984)) (hereafter cited as Gordon Report). Although some critical comments will be offered regarding specifics of the Gordon *et al* analysis, there is no question that it will remain a high watermark in the effort by legal scholars to combine an historical commentary with a delineation of the legal issues, and to bring to bear the weight of scholarship of the legal community and the findings of the courts in those cases of relevance to the Grenada episode. So much of the writing, including that of the members of the academic community has been polemical, disguised as scholarship, that a sense of *déjà vu* is rekindled with thoughts of similar debates on the Vietnam War. Gordon's committee has gone beyond the confines of the issue as set forth by the United States Department of State, but that is not to their discredit for their assignment was to explore the legal issues as they pertain to the entire "affaire Grenada." While they may not have done this in every instance, they are by no means to be faulted for not restricting themselves to the Department's claims of rights reiterated in the response by Davis Robinson, the Department's Legal Adviser. As we move *seriatim* through the Committee's Report, the following commentary seems appropriate, although not all points are of equal weight.

In reference to the seven-member Organization of Eastern Caribbean States, the authors list eight names, which to the uninitiated may be confusing. Barbuda is mentioned separately from Antigua, of which it is administratively a part. (Gordon Report, at 337, n.7.) The records are still not clear whether the absence of Montserrat and St. Kitts-Nevis signatures regarding the decision to intervene reflect a degree of disagreement with the interven-

tion, or the unwillingness to send troops. It certainly would be naive to assume that the latter governments could not have spared any individuals to serve as part of the occupying force, or that the United States would not have been willing to foot their bill. It would also be important to note what monies, if any, have been set aside to meet each government's costs in participating in the intervention, and whether any United States funds were provided to offset these costs. Further examination will have to be undertaken to answer these questions.

The size of the military buildup in Grenada as well as the airport project became a major rallying point against Grenada by President Reagan and all of the governments which participated in the military action. But this matter needs to be much further explored. In the first place all governments acknowledge that they were not as aware of the extent of the buildup before the landings as they were after. Second, as the authors note, many of the other islands whose governments intervened had airports with even larger runways, one of which, Barbados, allowed Cuba to use it as a refueling station on its way to Angola without producing any retribution by the United States. And that same Grenada airport which was denounced by the Reagan Administration as being economically unnecessary, the whole world now knows is being given top priority by this same U.S. administration.

However, the larger question is whether Grenada was perceived by the other island states as a threat and whether the members of the OECS under their treaty or whether the non-OECS members who participated in the intervention, namely, Barbados, Jamaica, and the United States, violated the terms of the Organization of American States treaty or the United Nations Charter.

This reviewer is in complete accord with the record presented by the Gordon Committee and its interpretation of these various treaties. The Committee's stress on reducing the incidence of force in world affairs and the threat or application thereof as evidenced in the debates and terms of the League of Nations Covenant, the Kellog-Briand Pact and the other similar international agreements in which the United States government was such an active participant, is critical in this regard. The authors are to be commended for providing this brief historical account for it reminds the reader what the essential condition in these undertakings was assumed to be in the effort to build a more peaceful and law-abiding world. Every legal scholar knows that there may be more than one approach to the interpretation of a treaty or agreement, but one of the most beneficial is to reiterate the intent of the framers. The essence of this historical struggle had been to reduce the incidence and reliance on force in international relations, and interpretations that truly support that approach are to be commended.

However, the Gordon Report criticism of the participating states' be-

havior is merited on an equally important and tangential aspect of the issue, namely the extent to which the provisions of each of the relevant treaties were met by those participants. These provisions require efforts to reach political settlement of disagreements before any military action is justified—an effort that to a very considerable extent appears to be missing from the record. Gordon *et al.* make note of this but do not explore it in detail. Let us briefly do so.

From March 13, 1979 when the New Jewel Movement overthrew the Gairy government until October 1983 there is no record of any of the participants of the Grenada intervention raising a formal protest about the size of the military buildup in Grenada, calling for any special meeting to deal with the assumed threat to their security or even placing an accusatory item on the agenda at meetings of the OECS, OAS or UN. At interviews which this reviewer has had with officials of the island governments involved, references were made to critical comments made to Bishop at CARICOM meetings regarding the lack of elections in Grenada and the close ties with Cuba. But no one referred to protests that had been made or expressions of fear or danger arising from Grenada's military power. In fact, it is reported that when Reagan called a Caribbean Summit Conference in Barbados, April 9, 1982, some strong differences emerged between President Reagan and Prime Minister Adams regarding Grenada in which Adams is reported to have said that the Caribbean nations did not perceive Grenada as a military danger. The essential point is that any claims of the right to collective security action which the Eastern Caribbean states put forth is seriously undermined by the omission of the appropriate procedural steps provided in Article 8 of the OECS Treaty, Articles 23–26 of the OAS Treaty and Chapter VI of the UN Charter. Although the authors of the ABA Committee Report do not suggest it, it would be interesting to speculate what the position of the International Court of Justice or some other competent juridical body might have been, had Grenada raised charges of its rights being violated under any of the above treaties.

Perhaps the most serious omission in the Gordon Committee study pertains to the status of the office of the Governor-General. It is not that the Committee did not recognize the importance of the question, but being aware of its intricacies they decided to forgo any serious attempt to explore it. There is no space here for this reviewer to fill the gap but he has attempted to do so elsewhere. (M. Waters, *Grenada 1983: Liberation? Invasion? Collective Security? Collective Intervention? Whose Rights Are Right?*, paper presented at the Caribbean Studies Association, IX Annual Meeting, St. Kitts, West Indies, May 1984.) Not only is the claim of the many governments which have commented on the issue open to question, but none has put forth serious arguments as to why Sir Paul Scoon had authority to act as he allegedly did.

As the ABA Committee Report notes, and as this reviewer has concluded from interviews held with officials of the United States and other governments, the claim is made that Sir Paul Scoon as Governor-General had authority to act in seeking assistance in restoring "law and order" in Grenada. The issue of whether his action occurred prior to, during or subsequent to the military intervention is not addressed by the report, and neither will it be by this reviewer. The more critical issue is one of competence. As Gordon's report points out, the 1973 Grenada Constitution states that the executive authority is vested in the Queen and is exercised on her behalf by the Governor-General. The meaning of the term "executive authority" is nowhere spelled out and writers on the British and Commonwealth constitutional system do not take the position that there is any significant grant of authority established thereby. (For greater discussion on this point see Waters, Caribbean Studies Association paper, *op. cit.*, pp. 5–9.)

In fact, Sir Paul in his own assessment of his role expressed in an interview referred to in the Report is reported to have stated that he was conscious of the fact that "my job is more or less just a ceremonial one . . ." And whatever the assessment is of his authority under the 1973 Constitution, that document had been suspended under The People's Laws of the Bishop administration. From 1979 on, he was subservient to the People's Revolutionary Government and the functions it assigned. Thus, although he may still have been representative of the Queen in her "executive authority", it seems obvious that that was a titular position which if it carried any authority at all was not pertinent to the functions "assigned" by outside states in October 1983. It seems much more logical to construe the term "executive authority" as representing an "office" in October 1983 rather than a "power".

Once again the Gordon Committee elucidates the nature of the problem. If the office is to be construed as one with power, i.e. the authority to act, we are then confronted with the situation of a divided government. On the one hand we have Austin's Revolutionary Military Council which is attempting to set up a new constitution and government and which has de facto control in the island, and on the other hand Scoon who apparently has set himself up in opposition to Austin and wants him and his council removed. Thus we have an embryonic condition of a civil war—at least a government that is internally divided. Under those circumstances, as Gordon *et al.* note, customary international law requires outsiders to refrain from interfering, and the American regional position even more heavily emphasizes this view.

This conclusion is even more significant if one considers the United States record of involvement from October 19th on. According to the testimony of Kenneth Dam, Deputy Secretary of State, and Langhorne Motley, Assistant Secretary for Inter-American Affairs, our official contacts were always

with Austin and his representatives. Even when our Barbados based embassy staff went to Grenada with the Deputy British High Commissioner, they spoke with Austin's representatives while David Montgomery of the High Commission staff met with Scoon. Thus, we gave de facto recognition to Austin while we intervened on behalf of Scoon.

There are two final points deserving of comment in the ABA Committee study. One pertains to the widespread report that a secret treaty exists between Barbados and the participating Eastern Caribbean states which provided the basis for the decision to invade Grenada. (Was this the true basis for the action rather than the OECS Treaty?) If such a treaty exists it is not only an unregistered treaty but more important a secret one. Thus, its legal nature is highly questionable. In fact one may go further and suggest that the reports regarding its objectives would seem to indicate that it runs contrary to international law as provided under the UN and the OAS Charters. There is no indication of any mediating machinery to deal with disputes and furthermore the reports concerning it indicate that it may be implemented at any time against any (member?) government whose leadership is about to be or has been overthrown. This would be a violation of Article 2, Sections 4 and 7 of the UN Charter as well as Chaper VI, and of Chapter IV of the OAS Charter. It is to be admitted that the existence of such a treaty and of course its terms, in addition to the question of whether it was operative in the Grenada intervention is unsubstantiated. Nevertheless, the dangers that are inherent in this possible arrangement cannot be ignored by the international community. This obviously includes the United States which less than any of the other actors involved can claim self defense as the motivating factor for its participation. More intensive scholarship of the quality represented by the Gordon Committee Report is needed if those questions are to be answered and if the long standing struggle to provide principles of international justice is to continue.

Dr. Maurice Waters
Professor of Political Science
Wayne State University
Detroit, Michigan

Dear Maurice:

Many applauded the Gordon Report as a scholarly, objective and sensible analysis. Your additional thoughts are helpful and appreciated.

REL

Japan's Unwritten Law and TIL's Uncitely Pages

Dear Editor:

Lansing and Wecselblatt's apologia for Unwritten Law in Japan (Vol. 17, no. 4) could better be expressed as a haiku also applicable to other countries with underdeveloped legal systems

Even signed
Words are only words
Not bonds
Let's talk, again

Some practitioners have more pungent terms for this practice than found in academe.

Also, please can you mark the cite (Volume, month) on each note in every *International Lawyer*. For those who tear out articles by subject it is impossible to cite you.

Thomas B. Trumpy
Resident Counsel
Obermayer, Rebmann,
Maxwell & Hippel
Brussels, Belgium

Dear Tom:

Thank you for your idea. I beat you to it, however. As you will note, starting with vol. 18, no. 1, each page is so marked.

REL