Parachutes at Dawn: Issues of Use of Force and Status of Internees in the United States-Cuban Hostilities on Grenada, 1983

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I. INTRODUCTION

On October 25, 1983, units of the U.S. Rangers parachuted onto an airstrip under construction at Point Salines, Grenada. They soon became involved in hostilities with a group of Cuban workers who were building the airstrip. The hostilities resulted in the deaths of twenty-four Cubans and approximately five Rangers. While the question of the U.S. intervention in Grenada itself has been the subject of scholarly scrutiny, the United States-Cuban "sideshow" has not. Yet the hostilities between the U.S. Rangers and the Cuban workers raise disputed issues of fact and novel issues of law on the use of force by states and on the status of internees.


2. A PRELIMINARY REPORT, supra note 1, at 1. The Departments of State and of Defense reported that 18 U.S. personnel were killed in action and 116 wounded. Id. Two more died later. Columbus Citizen-Journal, Oct. 22, 1984, at 16, col. 3. Of the 20, apparently only five Rangers were killed at Point Salines, and these could have been killed by Grenadian troops. Wash. Post, Nov. 9, 1983, at A34, col. 3.

Analysis of both the use of force issue and the status of internees issue is rendered difficult by the fact that the United States and Cuba differ markedly in their versions of the events, into which no impartial body has inquired. This Article will examine available information on the events and draw tentative conclusions as to what actually occurred. This Article will also address both issues on the use of force and the status of internees based on the facts given by each state.

The use of force issue concerns, in the first instance, who attacked whom, and who is consequently responsible. The hostilities occurred between a unit of U.S. Army Rangers and Airborne troops, and a group of Cuban construction workers after the Rangers parachuted onto an airstrip. The Cuban Government claims that the Rangers attacked the non-combatant workers. The U.S. Government claims the Cuban workers, acting as part of the defense of Grenada, opened fire on the Rangers. If the Cuban version is correct (that the Cubans were attacked by the Rangers), then the United States is probably responsible to Cuba. If the U.S. version is correct (that the Cubans, acting as part of the defense of Grenada, attacked the Rangers), then the question of whether Cuba is responsible to the United States turns on whether the U.S. attack on Grenada was lawful.

The internee question raises two issues. The first is whether a non-national civilian force that resists an invading army (the U.S. version of the events) should, after capture, be considered (a) prisoners of war entitled to repatriation, or (b) common criminals subject to execution after court-martial. This issue turns on whether non-national civilians are "inhabitants," which would qualify them as prisoners of war under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III). The second issue is whether a non-national civilian force that does not resist an invading army, but is prepared to resist if attacked, and does so resist (the Cuban version of the events) should, after capture, be considered under the Geneva Convention as (a) prisoners of war, or (b) civilian internees.

Both of these internee issues raise questions apparently not considered by the states who were parties to the Geneva Convention or to the predecessor conventions which promulgated the defi-

nition of prisoner of war. Though the parties probably did not intend to include these two classes of civilians as prisoners of war, it seems harsh to exclude them, because that means that they are subject to being executed after capture by an invading army. If Geneva III is not read to include such civilians, it is possible that a customary norm has developed to prohibit an invading army from executing them. Thus, there may be a need to revise the Geneva III definition of prisoner of war to include such civilians.

Since the facts are critical to the analysis of both the use of force issue and the status of internees issue, this Article will first analyze the facts as portrayed by Cuba and the United States.

II. POSITIONS OF THE UNITED STATES AND CUBAN GOVERNMENTS ON THE HOSTILITIES

U.S. Army Ranger units landed at Point Salines airstrip (southwest Grenada) by parachute at approximately 5:30 a.m. on October 25, 1983. Units of the U.S. Marine Corps had landed at Pearls Airport (eastern Grenada) approximately a half an hour earlier. These were the first units of what eventually became a U.S. invasion force of 6000 troops.

Upon landing, the Rangers engaged in combat with both the People's Liberation Army of Grenada (P.L.A.), and Cuban workers who were near their dormitories. The P.L.A. employed Grenadian anti-aircraft guns against the Rangers.

The United States and Cuban Governments disagree as to how the hostilities commenced between the Rangers and the workers. The Cuban Government has consistently maintained that the workers were not part of the defense of Grenada. While Cuba had anticipated a U.S. invasion, it had not planned to have its workers resist the entry of U.S. forces. However, the Cuban Government acknowledges that the workers were prepared to defend themselves if attacked, and that some had light weapons and had had previous military training. The workers were being prepared for such self-defense by a small number of Cuban military officers. Some of the workers had assumed defensive positions near their dormitories upon learning of the 5:00 a.m. Marine landing at Pearls Airport.

The Cuban Government maintains that at approximately 7:00 a.m. the Rangers fired at some of the workers, and that the workers fired back in self-defense. Cuba further maintains that the workers were prepared at all times to cease hostilities provided
they were not made to surrender to the U.S. forces.

The U.S. Government’s version is less clear. Unlike the Cuban Government, the U.S. Government did not, during the events in question, issue press communiques describing the events or a formal statement regarding the commencement of combat with the Cubans. In fact, while various U.S. spokespersons asserted that the workers formed part of the defense of Grenada and had initiated combat with the Rangers, the U.S. Government sent the Cuban Government, during the fighting, a message indicating U.S. “regret” over the combat.

An analysis of the contacts between the Cuban and U.S. Governments immediately prior to and during the events of October 25, 1983, will help to explain the aims and action of the two parties.

III. UNITED STATES-CUBAN CONTACTS PRECEDING THE U.S. INVASION

On Saturday, October 22, 1983, the Cuban Government sent a message to the U.S. Government indicating its awareness of the movement of U.S. ships towards Grenada and calling for collaboration in ensuring the safety of their respective civilian groups on Grenada in the event of U.S. military intervention. This message, delivered to the U.S. Interests Section in Havana at 9:00 p.m., read as follows:

That the U.S. side is aware of the developments in Grenada; that it is also aware of our position on these developments and of our determination of not interfering in the internal affairs of that country. That we are aware of their concern about the numerous U.S. residents there. That we are also concerned about the hundreds of Cuban cooperation personnel working there in different fields and about the news that U.S. naval forces are approaching Grenada.

That, according to the reports we have, no U.S. or foreign national or our personnel has had any problems. It is convenient to keep in touch on this matter, so as to contribute to solve favorably any difficulty that may arise or action that may be taken relating to the security of these individuals, without violence or intervention in the country.5

5. EDITORIAL DE CIENCIAS, supra note 1, at 35-36. John Ferch, Chief of the U.S. Inter-
John Ferch, head of the U.S. Interests Section, characterized the message as “bizarre” and not requiring a response. According to Mr. Ferch, the message that was eventually sent by the United States to Cuba shortly after the invasion commenced on October 25, was not a response to Cuba’s October 22 message.6

The United States may have been aware of the instructions sent to the Cuban workers in Grenada by Cuban President Fidel Castro. The message, sent on October 22, stated in part:

I believe that, in the face of this new situation, we must strengthen our defenses, keeping in mind the possibility of a surprise attack by the Yankees. The existing danger fully justifies our doing so. If the United States intervenes, we must vigorously defend ourselves as if we were in Cuba, in our camp sites and our work places close by, but only if we are directly attacked. I repeat: only if we are directly attacked. We would thus be defending ourselves, not the Government or its deeds. If the Yankees land on the runway section near the university or on its surroundings to evacuate their citizens, fully refrain from...
interfering.\textsuperscript{7}

The message further stated that Cuba had turned down a request made by General Hudson Austin, Chairman of the Revolutionary Military Council of Grenada,\textsuperscript{8} that the Cuban workers take part in the defense of Grenada against a possible U.S. intervention.

Convey to Austin and Layne\textsuperscript{9} the following oral reply to their proposals: That our force, essentially made up of civilian cooperation workers, is too small to be considered as a significant military factor vis-à-vis a large-scale U.S. invasion. That sending reinforcements is impossible and unthinkable. That the political situation created inside the country due to the people's estrangement on account of the death of Bishop and other leaders, isolation from the outside world, etc. considerably weakens the country's defense capabilities, a logical consequence derived from the serious errors made by Grenadian revolutionaries. That, due to the above situation, the present military and political conditions are the worst for organizing a firm and efficient resistance against the invaders, an action which is practically impossible without the people's participation. That they have to find a way to reach a reconciliation with the people; perhaps one way would be to clarify the death of Bishop and the other leaders and seek out those responsible.\textsuperscript{10}

While it is not known whether U.S. intelligence was aware of this message, it apparently was aware of the Cuban construction workers, and of the fact that they could not effectively resist a U.S. attack.\textsuperscript{11} This is indicated by the message sent by the State Department to Cuba at 5:00 p.m. October 25, stating: "The United States is aware that armed Cuban personnel do not have either the

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\textsuperscript{8}The Revolutionary Military Council was established by ranking members of the New Jewel Movement on October 19, 1983, following the assassination that day of Prime Minister Maurice Bishop. H. O'SHAUGHNESSY, GRENADA: REVOLUTION, INVASION AND AFTERMATH 140 (1984).


\textsuperscript{11}Berry, \textit{Ten Days of Urgent Fury}, \textit{All Hands} 18, 23 (May, 1984) (quoting Capt. T.A. Brooks, CinClant Assistant Chief of Staff for Intelligence).
\end{flushleft}
weapons or the ammunition stocks needed for a protracted action; thus, maintaining a belligerent position would entail a useless loss of human life."\textsuperscript{12}

A U.S. military intelligence officer stated that U.S. intelligence was aware that there were only "three or four dozen Cuban Army regulars" in Grenada,\textsuperscript{13} and that "they were not organized into a regular military unit, but were primarily advisers and instructors to the Grenadian military."\textsuperscript{14} The officer also indicated that U.S. intelligence was aware of the presence of about 600 Cuban construction workers and that they were "lightly armed with personal weapons."\textsuperscript{16} The workers were employed by the National Union of Enterprises—Caribbean (UNECA), which was doing most of the labor on the airport construction project under supervision of Plessey, Ltd., a British firm that served as general contractor.\textsuperscript{16}

U.S. military intelligence was probably also aware that of the 600 Cubans, approximately 100 were auxiliary personnel—clerical and administrative staff, as well as teachers who provided high school equivalency courses for workers,\textsuperscript{17} and that most were beyond combat age.\textsuperscript{18} The workers had military training of a type

\textsuperscript{12} Editorial De Ciencias, supra note 1, at 40-41.

\textsuperscript{13} Berry, supra note 11, at 23. This coincides with figures given by the Cuban Government. Editorial De Ciencias, supra note 1, at 300-14.

\textsuperscript{14} Berry, supra note 11, at 23. This also coincides with the Cuban version.

\textsuperscript{15} Id. This is in accord with the Cuban position on the issue. Cuba said in the Security Council: "A group of Cuban workers in Grenada had been given light arms." U.N. Chronicle, Nov. 1983, at 18. As indicated above, about 200 Cubans were captured carrying weapons. It is unclear how many more than the 200 Cubans had previous access to weapons. Interviews by the author with some of the Cuban workers suggest that the majority did not have weapons. Interviews, Puerto Escondido, Cuba, May 11, 1984. Deputy Secretary of State Dam was clearly wrong in asserting that the Cubans had "heavy weaponry." Situation in Grenada: Hearings Before the Senate Committee on Foreign Relations, 98th Cong., 1st Sess. 32 (1983) (Statement of Kenneth Dam, Deputy Secretary of State).

\textsuperscript{16} For a statement by Plessey that the airport was being constructed for civilian use, see London Times, Nov. 1, 1983, at 6, col. 5; Le Monde, Nov. 1, 1983, at 3, col. 1; Toronto Globe and Mail, Nov. 2, 1983, at 14, col. 1. U.S. officials exaggerated the military character of the Cuban workers. Deputy Secretary of State Dam told a Senate committee: "[W]e found in fact there were organized Cuban units. These were not just construction workers helping out the poor Grenadian people to build a little airfield." Situation in Grenada, supra note 15, at 16 (statement of Kenneth Dam, Deputy Secretary of State). A United Nations development official reported that the Cuban Government opposed construction of an airport at Port Salines, and had instead suggested expanding the existing airport at Pearls. Toronto Globe and Mail, Nov. 4, 1983, at 14, col. 3.

\textsuperscript{17} This appears from the list of names, ages, and occupations of Cubans on Grenada as of October 25, 1983, as published by the Cuban Government on November 4, 1983. Editorial De Ciencias, supra note 1, at 300-14.

\textsuperscript{18} Id.
given to adults in Cuba, but were not combat-ready. A U.S. Marine Corps analysis referred to "the low state of training on the part of the Cuban troops (actually only construction workers)." One ranking U.S. officer said, after the invasion, that he had not expected the Cuban workers to fight, even though the intelligence officer quoted above said that the idea that they might fight had been contemplated.

While this intelligence officer stated after the invasion that military intelligence had an accurate count of the Cubans in Grenada, high Pentagon officials told the press during the invasion that there were 1100. Only on October 30, 1983, did the Pentagon revise its estimate downward to between 700 and 750, a range close to the figure of 784 given by the Cuban Government. If the Pentagon did overestimate the number of Cubans, then it may have improperly portrayed the Cubans as a greater military threat than they were in fact.

Another factor reducing the likelihood of a Cuban military response to a U.S. invasion of Grenada—a factor most likely known by U.S. military intelligence—is that relations were strained between Cuba and Grenada prior to the invasion. The Cuban Government had strongly criticized the Grenadian group headed by General Austin and Bernard Coard for removing Maurice Bishop. According to former Grenadian Minister of Justice Kendrick Radix, relations between

19. Operational Overview, MARINE CORPS DEVELOPMENT AND EDUCATION COMMAND NEWSLETTER 31 (Jan.-Mar. 1984). The parenthetical phrase in the quoted material is part of the original quote itself. This issue of the newsletter is devoted in its entirety to an analysis of the military operation in Grenada. O'Shaughnessy writes that the workers "had for the most part only the most rudimentary military training." H. O'SHAUGHNESSY, supra note 8, at 23. U.S. military officials in Grenada told reporters that most of the Cubans captured were "only militia-trained construction workers." Christian Science Monitor, Nov. 7, 1983, at 1, col. 4. This contradicted the (inaccurate) statement made by Adm. Wesley McDonald that the Cubans housed at Point Salines were "well-trained professional soldiers" impersonating construction workers. N.Y. Times, Oct. 29, 1983, at A7, col. 3. It also contradicted the statement of Deputy Secretary of State Dam. Situation in Grenada, supra note 15, at 16.

21. Berry, supra note 11, at 23.
23. EDITORIAL DE CIENCIAS, supra note 1, at 318.
25. EDITORIAL DE CIENCIAS, supra note 1, at 10.
Cuba and the Revolutionary Military Council (Council) had so deteriorated that General Austin feared that the Cuban workers might participate in a revolt against the Council in an effort to reinstate Bishop. Radix reports that the Austin-Coard group deployed troops to surround the Cuban workers, removing the troops after the death of Bishop.26 A U.S. diplomat, who was in Grenada on October 23 and 24, said that Major Leon Cornwall, a ranking Council member, asked him for advice on establishing a civilian cabinet because "they couldn't go anymore to the Cubans for advice." He said, "the Cubans had already expressed their upset over the shooting of Bishop."27

Another circumstance suggesting that the construction workers were not intending to defend Grenada is that they apparently did little to fortify their dormitory area. The Cuban Government stated that there were no fortifications or trenches.28 The U.S. Government has issued no detailed information on this point, though one Pentagon official said "they [not indicating whether Cubans or Grenadians] were very well dug in all around the area [of the Point Salines airstrip]."29 The Washington Post reported that U.S. soldiers found a network of "hastily prepared" defensive trenches apparently dug recently because they lacked camouflage and communications lines.30 A Le Monde reporter who toured the dormitories found only "two blinds, nothing more, [that] guarded

26. Grenada Update: Interview with Kendrick Radix, Former Minister of Justice, 2 NEWSLETTER OF THE AMERICAN ASSOCIATION OF JURISTS 6 (1984). Several Cuban workers indicated that the Revolutionary Military Council did not permit the workers to leave the area of their dormitories or to work on the airstrip for four days following the killing of Bishop on October 19. Interviews by author in Puerto Escondido, Cuba (May 11, 1984). The Caribbean News Agency (CANA) quoted one of Bishop's aides as saying that shortly after Bishop was released from house arrest by his supporters, he (the aide) drove to the Cuban camp to convey Bishop's request for help. The report does not specify whether Bishop was requesting personal protection or help in regaining power. The aide stated that the Cubans (without specifying who) were sympathetic to 'the request but were unsuccessful in getting through by telephone to Havana to find out what to do. Toronto Globe and Mail, Nov. 22, 1983, at 16, col. 4.


28. EDITORIAL DE CIENCIAS, supra note 1, at 40. A Cuban military officer, Lt. Col. Orlando Matamoros López, who participated in the hostilities, stated that he and several others "were there in the parking lot at the entrance to the Mission [military mission located near workers' dormitories] behind a wall that was less than a meter high, made of cinder blocks of which the bullets went right through." EDITORIAL DE CIENCIAS, supra note 1, at 221.


the airport. They were quickly reduced to nothing." The lack of extensive fortifications is further evidence of the construction workers' lack of intent to defend, because the Cuban Government had been anticipating a U.S. landing at least since October 20, 1983.

A French cameraman present during the invasion concluded that the Cuban construction workers followed their instructions not to retaliate unless fired upon. He videotaped Dr. Raúl Jiménez, a teacher at the American medical college, who said he encountered a Cuban worker near the Cuban dormitories, on the morning of October 25, shortly before the Rangers landed. When Dr. Jiménez asked why the Cuban workers were armed with weapons, the worker stated that the workers anticipated a U.S. invasion but "would not fire unless they were fired upon."

IV. COMMENCEMENT OF UNITED STATES-CUBAN HOSTILITIES

The Cuban Government has from the outset claimed that the Rangers initiated the hostilities. In a note sent to the U.S. Government at 8:30 p.m. on October 25, the Cuban Government formally protested that the Rangers had attacked the construction workers. The United States has released no statement about the commencement of hostilities. Thus, it has not directly denied the Cuban charge. The U.S. Interests Section in Havana sent a message to the Cuban Government in the late afternoon of October 25, in which it said it "regretted" the hostilities. The note stated: "Lastly, it [the U.S. Government] regrets the armed clashes between men from the two countries and considers that they have occurred due to confusion and accidents brought about by your men's proximity to the area of operations of the multinational troops." This note places no blame on Cuba for commencement

32. This was the day when U.S. vessels en route to Lebanon from the United States were ordered to sail towards the waters near Grenada. Report by Adm. Wesley McDonald, Operation Urgent Fury Report: October 25-November 2, 1983, at 1 (1985) (unpublished report).
33. NBC-TV, First Camera, aired Oct. 30, 1983. The cameraman is Michel Barboux. See also TIME, Nov. 7, 1983, at 31 (observations by Dr. Raúl Jiménez).
34. EDITORIAL DE CIENCIAS, supra note 1, at 41. As indicated in note 5, supra, Ferch confirmed the accuracy of this message to the author. In the Security Council debate over Grenada, Cuba also charged the United States with attacking the workers, calling the U.S. action against the workers a "cowardly surprise attack." U.N. CHRONICLE, Nov. 1983, at 18.
35. EDITORIAL DE CIENCIAS, supra note 1, at 41. H. O'SHAUGHNESSY, supra note 8, at 23.
of the hostilities and comes close to acknowledging that the Rangers initiated it.

While there has been no statement from the U.S. administration on the commencement of hostilities with the Cuban workers, several officials made reference to the hostilities in such a way as to suggest that it was the Cubans who initiated the hostilities. Defense Secretary Caspar Weinberger told a House Subcommittee:

We did broadcast to the Cubans as quickly as possible that we were not attacking Cubans, and that they should not shoot at us, because our aim was to liberate the American students — American civilians there, and that we were dealing only with the Grenadian Armed Forces.

They didn't heed that, and as a result, we had to use force. Weinberger cited Cuban preparations as indicating that they resisted the entry of U.S. forces. "[A]bout two days before we got there, the Cubans sent a colonel and his staff, to take command of the Cuban forces, and in that time, they improved the deployments and the defensive positions to resist a landing." Major General H. Norman Schwarzkopf, Deputy Commander of the invasion, referred to "Cuban defenders on high ground overlooking the 9,000 foot runway at Point Salines" and said that they "put up a spirited fight which occupied the American forces for much of the first day of fighting." A Pentagon spokesperson said U.S. forces engaged the Cubans because the Cubans started the shooting.

The U.S. note further implies that fighting between the Cubans and the Rangers commenced only after the initial fighting between the Grenadians and the Rangers. Several sources reported that Grenadian army units were defending the airstrip. The Washington Post cited "U.S. spokesmen" as saying that the Rangers at

The reference in the U.S. note to "multinational troops" is misleading. The troops were only from the United States. Military personnel from other states did not participate in the initial assault on Grenada, and when they arrived they fulfilled policing functions and guarded detainees but did not participate in combat. Operational Overview, supra note 19, at 23. N.Y. Times, Oct. 28, 1983, at A12, col. 1.

36. Situation in Lebanon and Grenada: Hearings Before a Subcomm. of the House Comm. on Appropriations, 98th Cong., 1st Sess. 39 (1983) (Statement of Caspar Weinberger, Secretary of Defense). Weinberger's mention of broadcasting a message to the Cubans is probably a reference to the contact reported by the Cubans to have occurred at 1:45 p.m.
37. Id. at 40.
Point Salines had engaged both Grenadians and Cubans. The Post quoted an eighteen year-old Grenadian army private, Oliver Simmons, as saying that he had been in a trench near the Point Salines airstrip with seven other soldiers, but that his unit did not fire at the Rangers and instead waited for dark and slipped away undetected. Two Cuban workers said that two Grenadian soldiers on the runway had shot at Rangers during the Rangers’ descent.

It is conceivable that Rangers, when firing at the Grenadians, hit Cuban workers, who returned fire. The Rangers may have fired at the Cubans thinking they were Grenadians. Cuban workers, interviewed by the London Times, said that landing Rangers occupied positions in the hills near their dormitories and commenced firing. This assertion is consistent with a Pentagon statement that shortly after the Ranger landing “Company A and Company B of the 1st Battalion, each with 150 men, were dispatched to flank the high ground overlooking the runway.” The Cuban dormitories were located on the high ground.

Most of the Cuban workers interviewed placed the commencement of hostilities to be between 7:00 and 8:00 a.m. (two hours after the Rangers’ landing). One Cuban worker reported as follows:

I was at the old camp—the first one put up for the construction workers there—and we heard several planes approaching at dawn. . . . At about 5:30 a.m. . . . the first paratroopers landed between the sea and the runway. From that moment on, we took internal measures to defend ourselves if we were attacked and took up our assigned positions. The first Cubans who were attacked were those near the runway and that happened around 8:00. I was further north with a group of comrades.

A Cuban Government communique issued at 10:07 a.m. stated that

41. Wash. Post, Nov. 6, 1983, at A20, cols. 4-5.
44. Wash. Post, Nov. 9, 1983, at A34, col. 3.
45. Interview by author at Puerto Escondido, Cuba (May 11, 1984).
the Cuban workers were resisting "after three hours of fighting." They would indicate hostilities commenced at 7:00 a.m.

Some U.S. commanders have, however, acknowledged that according to the instructions they received the Cuban workers' area was a military objective. Major Jim Holt, who arrived late on the morning of October 25 as executive officer of the 2nd Battalion, 325th Infantry, 82nd Airborne Division, said that seizing the Cuban work and living area was his unit's first objective.

A report by the Joint Chiefs of Staff (JCS) confirmed 7:00 a.m. as the time of commencement of hostilities between the Rangers and the Cuban workers:

B [Company], 1st Ranger Battalion, 75th Infantry, on the western flank of the runway, started rolling up the flank of the Cuban defensive position from west to east by 0700. The company first sergeant led a three-man team to assault a Cuban position, killing two Cubans and capturing [twenty-eight] more. B [Company] rolled up the Cuban defenses until they reached the main Cuban camp. Ranger snipers took Cuban mortar positions under fire and killed or wounded 18 Cubans at ranges of 600-1,000 meters.

This language also indicates that the Rangers were the first to attack. The aforementioned quote by Defense Secretary Weinberger was contradicted by the JCS acknowledgement of the Rangers' attack. The report responded to critics in Congress who said that the Rangers made an assault from the front rather than from the flank. The JCS report, which defends the Rangers' tactics, states: "An analysis of Cuban defenses and the Ranger attack shows that the attack was made at the flank of the main Cuban defense."

The JCS report further acknowledges that the Rangers' attack on the Cuban workers had been planned in advance of the invasion and therefore was not a mistake, as suggested by the State Department note to the Cuban Government. Characterizing the scope of the invasion, the JCS report states:

49. L.A. Times, Nov. 6, 1983, at 6, col. 2.
51. Id. at 33.
The principal military mission was to rescue U.S. citizens and other foreign nationals. In order to achieve this objective, it was determined that Cuban and Grenadian forces would have to be neutralized and a stable situation on the island achieved.\textsuperscript{52}

Regarding the Cubans at Point Salines:

The plan called for the capture of the two airfields on Grenada to include the immediate neutralization of Cuban forces at Point Salines Airfield. . . \textsuperscript{53}

The report states that the Rangers accomplished this aim:

The surprise airborne assault on Point Salines Airfield by the Rangers effectively neutralized Cuban forces at the outset and led to the capture of several hundred Cubans despite stiff resistance.\textsuperscript{54}

Apparently, ground combat between the Rangers and the Cuban workers was not significant. This could be a further indication of the Cuban workers’ lack of intent to oppose the invasion. Apparently no more than nine Rangers were killed in Grenada from hostile fire and not all of these were at Point Salines;\textsuperscript{55} some were possibly killed by Grenadian soldiers. The Cuban workers had only about 200 light weapons,\textsuperscript{56} hardly a match for U.S. troops with air support. The \textit{Washington Post} reported that “early impressions and reports on the scale and intensity of the action. . .were exaggerated by the military, by the news media whose information initially was limited to what the Pentagon provided, and by pre-invasion reports by the Grenadian junta of a coming bloodbath, coupled with post-invasion Cuban propaganda about the fighting.”\textsuperscript{57}

The Pentagon had a motive to exaggerate the Cuban military role, because it was evidently reluctant to admit that the Grenadian army was putting up resistance to the invasion. “In this
war of propaganda, Washington wants to stress the role of the Cubans in the resistance in order to better demonstrate the power they achieved in Grenada—of whom [Grenada] only a small number of militia personnel would oppose the American advance—while Havana wishes to the contrary to demonstrate that the resistance continues even without them."

The Cuban Government had a motive to exaggerate the military role of the workers, because it wanted to show the United States that Cuban civilians, under a military command, could fight well. The apparent reason was to show what might happen in the event of a U.S. invasion of Cuba. According to Cuban Deputy Foreign Minister, Ricardo Alarcón, the fighting by the workers “is intended to have a demonstration effect. . . . The Americans now have to think of how many thousands of battalions they would need to subjugate Cuba or Nicaragua if all their technical and logistical strength hasn’t enabled them to take Grenada.”

Few Cubans were shot in ground combat. Most of the Cuban casualties resulted from aerial attack. This was reported by some of the Cuban workers and by a Washington Post reporter, who wrote that most of the Cuban casualties came from “naval guns, land-based artillery, Cobra helicopter gunships, AC130 gunships and jets from the carrier.” The Post reporter further described

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58. Le Monde, Oct. 28, 1983, at 3, cols. 2-3. Christian Science Monitor, Nov. 7, 1983, at 56, col. 1. A Guardian analyst wrote that the United States “over-reported the amount of Cuban resistance, under-reported the Grenadian resistance.” J. Steele, Guardian, Nov. 25, 1983, at 15, col. 3. O’Shaughnessy writes that “[t]he absence of the media from the invasion gave the U.S. Government full opportunity to manage the news to its best advantage. It allowed it to distort in specific areas: the impression conveyed to the world that the bulk of the fighting was done by Cuban troops and that Grenadian resistance had been minimal. As the invasion proceeded, the United States authorities inflated the number of Cubans on the island to 1,600. This was reduced after Saturday, October 29, when the Cuban Government published a list specifying the job descriptions of all the 784 Cuban personnel on the island. The United States, thereafter, admitted that the Cuban tally was correct.” H. O’SHAUGHNESSY, supra note 8, at 204. An effort to exaggerate the Cuban role may also have been the motive behind the dispatch to Cuba by the U.S. command of 37 corpses, only 24 of which were acknowledged by the Cuban Government to be Cubans. Id. at 209. An effort to exaggerate the Cuban role was probably the reason for the inaccurate statement that “the entire Point Salines facility was Cuban-controlled and sealed off from Grenadians” made by Adm. Wesley McDonald. Wash. Post, Nov. 1, 1983, at A22, col. 2. The Christian Science Monitor reported that most journalists in Grenada felt that “in its eagerness to emphasize the importance of the Cuban role in Grenada” the administration put out “a long string of significant inaccuracies.” Christian Science Monitor, Nov. 17, 1983, at 11, col. 3.

60. Interview by author at Puerto Escondido, Cuba (May 11, 1984).
the Cuban fighting as "short-lived and spotty at best," basing this account on interviews with U.S. military personnel. After the initial contact on the ground, the Rangers apparently called in aerial attacks against the defenseless Cubans.

The circumstances surrounding the Rangers' landing were such that had the workers intended to oppose the Rangers' entry into Grenada, they could have done so. According to Admiral Joseph Metcalf III, the U.S. plan had been to land the Marines at Pearls Airport and the Army Rangers at Point Salines simultaneously at 5:00 a.m. As a result of an aircraft navigation problem, however, the Rangers were delayed in arriving at Point Salines by twenty-seven minutes.

The delay is significant for two reasons. First, it gave the Cuban workers an opportunity to receive a warning that Marines had landed at the Pearls Airport and that similar action was likely elsewhere on Grenada. According to Admiral Metcalf, Radio Free Grenada announced a call to arms between 0500 and 0530. Colonel Pedro Tortoló said he ordered certain workers who had arms to take up defensive positions near the barracks prior to the first wave of Ranger landings. Thus, the Cuban workers had time to prepare for action. It is important to note that they did not take up positions that would have allowed them to shoot at the Rangers as they dropped onto the runway, which was the only level ground for a parachute drop or aerial landing.

Second, the delay meant that the first wave of Rangers to drop onto the Point Salines airstrip did so when the sun was already high enough to render them visible from the ground. Admiral Metcalf stated that as a result of the twenty-seven minute delay, "we lost the advantage of coming in at low light." If the Cuban work-

62. Id.
63. Because the Cubans had only light weapons, "American helicopter gunships were said to have operated with impunity, destroying, with heavy casualties, the main Cuban position at the Point Salines airfield." N.Y. Times, Oct. 28, 1983, at A12, cols. 1-2.
65. Id.
66. Granma Weekly Review, Nov. 13, 1984, at 4, col. 2. The Washington Post reported that the demotion in 1984 of Col. Tortolo, and of the other Cuban officers present in Grenada, was for not fighting hard enough against the Rangers. Wash. Post, June 19, 1984, at A4, col. 1. This report has been taken by some to indicate that the Cuban workers had been ordered by the Cuban Government to resist the entry of the Rangers into Grenada, and that they had not sufficiently done so. This failure by the Cuban officers is also consistent with the Cubans having been attacked but then failing to fight well.
67. Navy Times, Nov. 21, 1983, at 10. It was dark at 5:00 a.m. when Marine units
ers planned to shoot at the Rangers, they could have seen them well enough to do so. A Pentagon official said the descending Rangers presented “a perfect target for snipers.”

As the Rangers' planes approached Point Salines, they were met by anti-aircraft fire from the hills above the airstrip. There is no evidence that these anti-aircraft guns were fired by Cubans. The workers were not trained to fire these fairly sophisticated ZU-23 anti-aircraft guns. According to a U.S. Marine Corps analyst, “the Grenadian ZU-23 crews were among the most highly trained members of the People's Revolutionary Army. Weapons were well situated for point defense of key areas in St. George's as well as the Salines and Pearls airfields.” There is nothing written in U.S. military publications which suggests that the Cubans fired the anti-aircraft guns.

The Cuban version of events as told by construction workers, after their return to Havana, was found by foreign correspondents to be credible.

The consensus here, nevertheless, is that the Cubans are telling a straight tale.

They speak of how they saw the 82nd Airborne Division parachuting down on to the Point Salines runway, believing that the US forces had arrived simply to rescue and evacuate the American medical students on the island. With instructions not to fire unless they were attacked, the Cubans were given rifles landed at Pearls Airport. See Operational Overview, supra note 19, at 8 (noting that some Marine helicopter pilots used night vision goggles, which enabled them to identify appropriate landing sites).

68. Wash. Post, Oct. 29, 1983, at A10, col. 1. This is true even though the Rangers jumped from a low altitude. The planes made a second approach at 500 feet, a height that made it harder for the Grenadian army's anti-aircraft guns to train on them. Wash. Post, Nov. 9, 1983, at A34, cols. 1-2 (press conference of Gen. Schwarzkopf). From this height, the Rangers were in the air only about twelve seconds. The Cubans apparently had about 200 rifles. Wash. Post, Nov. 6, 1983, at A6, col. 1 (reporting that 200 Cubans were taken prisoner with rifles). If the Cubans had been deployed closer to the runway, which they would have had time to do given the advance warning they had of the landing, and if 200 Cubans had been shooting, it is likely that some of the Rangers would have been hit.


70. Id. For mention of a Grenadian soldier operating an anti-aircraft gun in St. George, see Newsweek, Nov. 7, 1983, at 75. O'Shaughnessy reported observing Grenadian crews operating anti-aircraft guns. See H. O'Shaughnessy, supra note 9, at 22.

71. The reference to the 82nd Airborne Division is an error. The 82nd Airborne Division did not arrive until later that day by aircraft, and not by parachute. The U.S. forces that arrived at Point Salines by parachute around 5:30 a.m. were U.S. Army Rangers.
and ammunition, took up positions around their huts and in the surrounding hills and watched while the Americans did the same.

They say that very quickly the Americans opened fire. The Cubans returned it immediately. Thereafter, naturally enough, the accounts diverge.

But many of the Cubans make a single forceful point. If they had intended to be the aggressors, they would have shot a great number of the first wave of US troops as they dangled from their parachutes in the sky. Their positions would have been chosen with that in mind, and they would have made a better job of holding off the invasion.72

The paratroopers were not hit during the jump,73 but a number of Rangers reported finding holes in their parachutes after they hit the ground.74 Their accounts give no indication whether the holes were caused by anti-aircraft guns (being operated by Grenadian PRA), or by small arms fire (in possession of both Cuban workers and Grenadian soldiers), or both. If the holes were caused by small arms fire, it seems unlikely that it came from the Cuban workers, given their distance from the Rangers.

Two Cuban workers stated that as the paratroopers descended, several were shot "on their way down by two Grenadian soldiers on the runway, a long way from our camps."75 Other workers stated, "these brave soldiers were killed by the invaders, who continued advancing toward our camp. After they had set themselves up in favorable positions, they began their attack [on the camp]."76

One Pentagon report stated that bullet holes in the parachutes were caused by anti-aircraft fire. An official said that "an anti-aircraft gun raked a line of paratroopers, shooting just a few feet too high as the men jumped from their plane, and that when the Rangers reached safety, every one found bullet holes in his parachute."77

Colonel Tortoló said that as he saw the paratroopers dropping,
he told workers "to follow their instructions to occupy positions. . .in keeping with the strict orders not to interfere with U.S. troops in their evacuation of the students and other U.S. citizens, to be concerned solely with our camp, to hold it, to go out and occupy our positions and to defend ourselves only in the event of being attacked."  

The Cuban version, that they were not offering opposition to the landing, is reinforced by the fact that after the Rangers landed, a number of the Rangers spent up to two hours removing barbed wire and equipment obstructing the use of the Point Salines airstrip for aircraft landings. The Cuban workers could have occupied positions closer to the airstrip and fired at the Rangers during this period. There is no report of Ranger casualties during the clearing operations. If such firing on the Rangers did occur, it could not have been intense. 

The Cuban construction workers had some, but limited, military experience. Most of the workers were young enough to fire a rifle but were well beyond military age. Hudson Austin asked the Cuban Government to "subordinate the Cuban construction and cooperation workers to the Grenadian Army" in order to help defend against a U.S. landing. After the workers were attacked by the paratroopers, many of them did in fact fight. There is no evidence of collaboration between Colonel Tortoló and the People's

78. Granma Weekly Review, Nov. 13, 1983, at 4, col. 1. See also Wash. Post, Oct. 28, 1983, at A9, col. 2. Fidel Castro told a CBS reporter at a news conference the night of the invasion, that "it was the United States that initiated and has kept up the attack" on the Cuban workers. Editorial De Ciencias, supra note 1, at 52. That same evening, at the United Nations Security Council, the Cuban foreign minister characterized the combat in a way that might suggest that the Cuban workers were defending Grenada from U.S. entry. Referring to the workers, the minister said, "Despite their small numbers they were steadfast in the defence of Grenada's territorial integrity, sovereignty and independence, even in the face of superior forces and equipment." Provisional Verbatim Record (2487th mtg.) at 63, U.N. Doc. S/P.V. 2487 (1983). This statement is inconsistent with the other reported Cuban government statements, which stated that the workers were defending themselves, not Grenada.

79. Soldiers, Jan. 1984, at 37, 39-41. Wash. Post, Nov. 6, 1983, at A20, col. 2. The placing of the barrels on the airstrip a few days earlier led Plessey, Ltd., the British general contractor at the airport, to inform the Revolutionary Military Council of Grenada that it was suspending work on the project. H. O'Shaughnessy, supra note 8, at 144. According to one Cuban worker, the workers placed at least some of these obstacles on the airstrip. Alberto Diaz Calderon, a bricklayer, referred to "all the obstacles we'd placed on the runway a time back." Granma Weekly Review, Nov. 13, 1983, at 7, col. 1.

80. Defense Secretary Caspar Weinberger said that U.S. forces had "removed [the obstacles] under fire." Situation in Lebanon and Grenada, supra note 36, at 40.

81. Editorial De Ciencias, supra note 1, at 37.
Revolutionary Army in planning to resist the U.S. landing.

Contrary to certain U.S. media reports, very few construction workers escaped their camp area to fight from other locations. The U.S. Department of Defense claimed that up to 500 Cubans fled into mountainous areas, but later retracted this claim.\(^2\)

The strongest evidence tending to show that the Cubans initiated hostilities is (1) that they prepared defensive positions (albeit rudimentary) and occupied them during the Rangers’ landing, rather than remaining in their dormitories; and (2) that the Cubans were not willing to surrender.

The evidence that is available favors the Cuban version of the invasion. It is well established that the Ranger-Cuban hostilities commenced only about ninety minutes after the Ranger landing; that Ranger-Grenadian hostilities preceded the Ranger-Cuban hostilities; and that the Ranger-Cuban hostilities commenced only after the Rangers surrounded the Cubans. Given these facts, it would have been foolish for the Cubans to commence hostilities; if they had wanted to, they would have had a much better opportunity to prevail had they commenced hostilities much earlier.

Cuba consistently denied initiating hostilities, while the U.S. came close to admitting initiating the hostilities in its diplomatic note to Cuba of October 25, 1983, and in the Joint Chiefs of Staff's August, 1984, report.\(^3\) The Los Angeles Times was on-point when it wrote: “U.S. commanders agree that certain Cuban positions were made objectives of the military assault, and the Cubans say their orders were to respond if attacked. This would account for the fighting around the Point Salines airport.”\(^4\)

V. USE OF FORCE ISSUES IN THE UNITED STATES-CUBAN HOSTILITIES

States are prohibited by international law from perpetrating aggression against other states. There exist, however, possible justifications for the use of force. The United States argued that its use of force in Grenada was justified, although the Cuban Government argued that it was not. If the United States committed aggression against Grenada, then any use of force by Grenada, or by

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\(^2\) H. O'Shaughnessy, supra note 8, at 210.
\(^3\) Supra notes 35 and 50-54.
\(^4\) L.A. Times, Nov. 6, 1983, at 6, col. 5.
Cuba (if in response to a request for assistance from Grenada), would be lawful, and the United States would be liable to Grenada and Cuba under the law of state responsibility.

On the other hand, if the U.S. military action was justified, then Cuba would be liable to the United States for using military force to oppose U.S. entry. But if Cuba did not use military force and the United States attacked the Cuban workers, then the United States is liable to Cuba.

This issue will be considered on two hypothesis: First, that the Cuban workers participated in the defense of Grenada by using force to oppose U.S. entry; and second, that the Cuban workers did not participate in the defense of Grenada but were attacked by U.S. troops.

VI. RESPONSIBILITY FOR USE OF FORCE IF THE CUBAN WORKERS WERE DEFENDING GRENADA

If the Cuban workers collaborated with the Grenadian Government in defending Grenada, then Cuba's action would be as lawful as Grenada's action. If the Grenadian Government was acting in self-defense, it could lawfully request assistance from another state under article 51 of the United Nations Charter (collective self-defense). Grenada was acting in self-defense if it was subjected to U.S. aggression. This appears to be the case, because the justifications proffered by the United States for its invasion are weak. Those justifications are as follows: (1) that the force was necessary to rescue U.S. nationals; (2) that the force was in lawful response to a request from the head of the Grenadian Government; and (3) that the force was a lawful response to a request from the Organization of East Caribbean States (OECS), a regional supra-national organization.

With regard to the rescue of nationals, it is disputed whether a state can use force. If it is illegal to use military force to rescue one's nationals, then the Grenadian Government's military action was clearly self-defense, and therefore legal.

The same is true if the rescue of nationals is permitted by in-
ternational law, but the facts here do not justify invocation of that doctrine by the United States. The facts are weak for the United States, because of the following: (1) the United States has not demonstrated that there were U.S. nationals in danger;\textsuperscript{88} (2) any possible danger faced by U.S. nationals was less serious than the danger created by the U.S. military action;\textsuperscript{89} (3) U.S. forces, upon arrival, did not immediately endeavor to evacuate U.S. nationals;\textsuperscript{90} and (4) U.S. forces intended from the outset to remove the Government of Grenada and to establish a different Government, an intent inconsistent with a rescue-of-nationals rationale.\textsuperscript{91}

If the U.S. invasion was pursuant to a request from the head-of-state of Grenada, then the Revolutionary Military Council was

\textsuperscript{88} The United States alleged neither actual harm to U.S. nationals nor any physical situation that threatened such harm. The United States instead argued that there was a possibility that U.S. nationals might be taken hostage but provided no support for such fears. The Revolutionary Military Council had provided assurances of the U.S. nationals' safety. In apparent control of the situation, they were able to provide such protection by imposing an effective curfew. The United Kingdom, given the same facts, concluded that its citizens were in no danger. See W. Gilmore, supra note 3, at 61-64. U.S. officials said that Pearls Airport was closed on October 24, soon after the invasion, preventing the United States from evacuating U.S. citizens. The administration acknowledged a few days later that it had "since learned" that four charter flights arrived and departed on October 24 from Pearls Airport. Wash. Post, Nov. 1, 1983, at A22, col. 1. A former U.S. official stated that he flew out of Pearls Airport on a charter flight on October 24. N.Y. Times, Oct. 29, 1983, at A7, col. 3.

\textsuperscript{89} A U.S. medical student, broadcasting over a ham radio from a medical school campus at Point Salines, described heavy firing by U.S. planes in the vicinity of the campus. Time, Nov. 14, 1983, at 70. U.S. commanders had not learned of the locations of U.S. medical students prior to landing in Grenada. In fact, the U.S. commanders were only aware of one location, when in fact there were three. This made it impossible to evacuate the students immediately upon arrival in Grenada. Wash. Post, Nov. 9, 1983, at A34, col. 1; Operational Overview, supra note 19, at 14; H. O'Shaughnessy, supra note 8, at 219. The head of the medical school stated that this delay meant that "if...they [the Revolutionary Military Council] had wanted to take revenge on the United States for launching the invasion they could have come on the campus and shot students." N.Y. Times, Oct. 28, 1984, at A10, col. 6.

\textsuperscript{90} Rangers landing at Point Salines did not immediately move in the direction of those students located there but instead engaged in combat with Grenadian army forces and Cuban construction workers. U.S. troops did not even reach a second, larger, group of medical students (at Grand Anse campus north of Point Salines) until the afternoon of the second day after the landing. Wash. Post, Nov. 9, 1983, at A34, col. 1; Operational Overview, supra note 19, at 18.

\textsuperscript{91} Upon arrival, U.S. forces distributed to the residents green handbills announcing that they landed "to restore democracy." This indicated that the rescue of U.S. nationals was not the sole aim of the landing. It also raises a possibility that it was a pretext for initiating a political change in Grenada. H. O'Shaughnessy, supra note 8, at 206. U.S. Marine commanders, briefing subordinates prior to the landing, told them that the goals were to neutralize the Grenadian army, evacuate U.S. nationals, and restore peace to Grenada. Operational Overview, supra note 19, at 7.
not really the Grenadian Government and the Council did not have the authority to ask Cuba for assistance. The United States claims that Governor-General Sir Paul Scoon was the sole lawful authority, and not the Revolutionary Military Council, because of the Council’s lack of control. This justification is weak for four reasons. First, it was not demonstrated that such a request was made by Scoon. Second, if such a request was made, it was made after the U.S. President decided to intervene. Third, it is not clear that Scoon, in his capacity as Governor-General, had the constitutional authority to request foreign military intervention. Fourth, the Revolutionary Military Council was in sufficient control of Grenada to be considered its Government, which means that Scoon did not have the authority to request foreign military intervention.

If the U.S. action was in response to a request of the OECS, then Grenada would have had to submit to the entry of the regional organization’s troops and could not request assistance from Cuba to oppose such entry. This justification is not tenable, however, because the action was not a legitimate regional action under the OECS Treaty. The Treaty requires unanimity of all member

92. The Economist concluded that “the Scoon request was almost certainly a fabrication concocted between the OECS and Washington to calm the post-invasion diplomatic storm. As concoctions go, it was flimsy.” Economist, Mar. 10, 1984, at 34. No written request from Scoon was made public prior to the U.S. landing.

93. Scoon says he wrote a request letter to the Organization of Eastern Caribbean States (OECS) on October 24. London Times, Nov. 1, 1983, at 1, col. 7. U.S. Marine commanders were informed of the code name for the operation (Urgent Fury) some time on October 23, the time of its initiation (0500 Oct. 25), and that it would be a joint operation with OECS nations. Operational Overview, supra note 19, at 4. A Navy source indicated Sunday, October 23, at 1:00 p.m., as the time the commanders were told of the mission’s nature. Berry, supra note 11, at 19. On October 22 (Saturday), under Presidential direction, the Joint Chiefs of Staff confirmed the mission’s nature to Adm. Wesley McDonald, the mission’s commander. Adm. McDonald was informed of the code name (Urgent Fury) and given the launch time of dawn, October 25. Lt. Col. Michael J. Byron, supra note 69, at 119, 124. U.S. Assistant Secretary of State for Inter-American Affairs, Langhorne Motley, told a Congressional committee that Reagan “signed orders to prepare for a broader mission to restore order in Grenada in cooperation with Caribbean forces” on October 22 (Saturday). 84 Dep’t St. Bull., Mar. 1984, at 70.


95. The Revolutionary Military Council was in peaceful control of Grenada even though many Grenadians objected to the Council’s overthrow of Prime Minister Maurice Bishop. The Revolutionary Military Council had effectively shown its control by maintaining a curfew.
states, and authorizes regional military action only in response to an outside attack. Neither factor was present.

VII. RESPONSIBILITY FOR USE OF FORCE IF THE RANGERS ATTACKED THE CUBAN WORKERS

If the Cuban workers did not participate in the defense of Grenada and were attacked by U.S. forces, then the United States may be responsible to Cuba even if the invasion of Grenada was justified. The United States would not be responsible to Cuba provided the United States was pursuing a valid military objective. The U.S. forces would not be justified in attacking the Cuban workers if those workers constituted a non-military objective. A resolution of the International Conference of the Red Cross approved by the United Nations General Assembly requires "that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." The principle requiring a belligerent to distinguish between civilian and military objectives has acquired the status of customary international law. Another principle that has become customary in international law is that civilians not engaging in hostilities against an invader are not subject to capture. These norms are reflected in the 1977 Protocol I to the Geneva Convention (Geneva III), which states that "parties shall distinguish between civilian population and combatant and between civilian objects and military objectives..."
and accordingly shall direct their operations only against military objectives;"¹⁰³ that "civilian objects shall not be the object of attack;"¹⁰⁴ and that "attack shall be limited strictly to military objectives."¹⁰⁵ It does not matter whether the civilians are nationals of the state being invaded, or nationals of a neutral or co-belligerent state.¹⁰⁶

The only possible legitimate reason for U.S. forces to attack the Cuban workers was that the workers were occupying a military objective. Protocol I defines military objectives as "those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."¹⁰⁷ The Cuban workers were located in or near their dormitories which were located on a hill in close proximity to a landing strip still under construction, but capable of use by aircraft. A military airport is a military objective.¹⁰⁸ The airstrip was not completed, but was capable of being used by military aircraft and in fact was used by U.S. airborne troops on October 25. Despite its status as a civilian airport,¹⁰⁹ the area was defended by Grenadian forces who used anti-aircraft guns to fire at U.S. planes as they dropped parachutists onto the airstrip. The airport would seem to qualify as a military objective.

Housing for civilians who are constructing a military objective is not a military objective. Castrén writes that while munitions factories are military objectives, “the houses of those working in the

¹⁰⁴. Id. art. 52.
¹⁰⁵. Id.
¹⁰⁶. The mistreatment of Italian civilians in France by Germany during World War I was characterized as a violation of the laws of war. C. PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 185-86 (1915).
¹⁰⁷. Protocol I, supra note 103, art. 52, para. 2.
¹⁰⁹. London Times, Nov. 1, 1983, at 6, col. 5 (statement of Plessey Airports, Ltd., general contractor). London Times, Nov. 8, 1983, at 15, col. 4 (letter of D.S. Collier, Managing Director, Plessey Airports, Ltd.) (citing fact that fuel storage tanks being built above ground indicated that the airport was not military). Le Monde, Nov. 1, 1983, at 3, col. 1 (quoting Plessey spokesperson Tony Devereux that three facts show civilian character of airport: that no below ground fuel storage tanks were built, that hangars were not made resistant to aerial attack, and that the control tower was not protected from aerial attack). H. O'SHAUGHNESSY, supra note 8, at 88, 96 (purpose of airport to promote tourism and exports), (International Monetary Fund approval of airport project).
factories" are not. The proximity of the dormitories to the airstrip does not alter their non-military status.

A belligerent must confine its use of force to objectives which foster its military needs. What constitutes military necessity has never been determined with precision. Spaight writes:

> How close must the connection be between the act of devastation and the operation of war to which it is ancillary? And this question is closely followed by another, not less difficult—What constitutes an imperative necessity of war? There is no conception in International Law more elusive, protean, wholly unsatisfactory, than that of war necessity. One can only determine its nature and scope by examining the actual events of war; theory is of little help.

This writer has discovered no precedent with facts similar to those presented here, namely, a group of non-national civilians who have armed themselves with intention to use those arms against the belligerent only if fired upon, where that group is located in a position near to, but not in the immediate vicinity of, a military objective (an airstrip).

The Rangers could have accomplished their military objective (taking control of the airstrip and ensuring the safety of the medical students) without engaging in combat with the Cuban workers. First, there was the diplomatic option—negotiating the fate of the workers with the Cuban Government. Had this been done prior to the invasion, it would have indicated the U.S. plan to invade. The plan, however, was already known in the Caribbean several days prior to October 25, although the exact time of the landing was not known. Thus, the U.S. forces would have relinquished surprise by negotiating beforehand.

Another option was to invade without negotiations, but to announce to both the Cuban Government and the Cuban workers, immediately after the invasion began, that the United States would not harm the workers. The Rangers did approach the workers during the first day of fighting, but only after the commencement of hostilities. It is not clear just what was said to the Cuban workers at that time, because the U.S. Army has not published its version of the encounter.

111. *J.M. Spaight*, *supra* note 102, at 113.
From the standpoint of the U.S. military commanders, such a policy could have caused negotiations to drag on for some time, leaving the Cuban workers' camp as enemy occupied territory and causing some U.S. troops to stay behind to surround the workers, while the remaining Rangers continued to the capital city of St. George's. It seems, however, that this could have been done without severely impeding the Rangers' military objectives. They could have moved to the medical school and to St. George's quickly and easily had they not engaged in combat with the Cuban workers. There is a possibility, however, that the workers' dormitory area might be considered a military objective regardless of its proximity to the airstrip. Article 25 of the Hague Convention on Land Warfare \cite{112} addresses attacks on undefended buildings. "The attack or bombardment of towns, villages, habitations, or buildings which are not defended, is prohibited." \cite{113} This rule probably carries the status of a customary norm. It is aimed at preventing a belligerent from attacking when military necessity does not require it. \cite{114} Does article 25 apply to buildings which house armed civilians, where those civilians do not plan to resist the invaders but are prepared to return fire if fired upon?

The assumption underlying article 25 is that if a town, village, habitation, or building is "defended," those inside are planning to resist the invader. Endeavoring to define "defended" with respect to a city, Fauchille writes that: "it must be a serious resistance, a real defense manifesting itself in notched buildings, barricades, etc. A few gunshots are insufficient to authorize recourse to bombardment." \cite{115} This definition suggests that the invader must have either been fired upon in a serious way, or otherwise have good reason to believe that the occupants plan to resist the invader. This means that even if the firing between the workers and the Rangers was initiated by Cubans, subsequent land and air bombardment of their camp was not justified unless the firing initiated by the Cubans was serious in nature.

Fauchille's definition also suggests that the fact that the Cuban workers had weapons and had erected defensive positions does
not necessarily indicate that their buildings were "defended." This is also suggested by Geffcken, who states that "[t]he legitimacy of the aggression does not depend on the fact of fortification but on the defense of a place with arms in hand." Geffcken indicates that the rationale behind permitting a belligerent to attack a defended city is that it is necessary to do so in order to take control of the city. Where the occupants are not intending to resist unless fired upon, however, it is not necessary to attack to gain control.

Castrén criticized article 25 for failing to provide a definition of the term "undefended." He states that "[t]he Conference probably adopted the view that in addition to actual defense it was possible to take into account the fact whether the area was fortified, although the wording of the article would seem to point merely to the first alternative." This suggests that there must be some "actual defense," meaning resistance manifested by the occupants. Castrén reinforces this view by stating as follows:

An attacking force should not in any case be allowed to open fire before the enemy has begun to offer some resistance. It might perhaps be suggested that the attacking force first inquire whether the area concerned will be surrendered without resistance, but this would entirely rule out the advantages afforded by a surprise attack.

Castrén assumes that the occupants of the area in question are nationals of the enemy and are combatants. Where neither of these facts is apparent, as here, the invading force must be considerably more circumspect before attacking. A group of non-nationals are less likely to offer resistance, especially if they are not members of an organized military force.

Castrén suggests that the invaders should inquire as to whether the occupants will surrender. This suggestion is based on an assumption that they are enemy nationals and combatants, because non-nationals need not surrender. Non-nationals are entitled to safe passage out of the invaded state. This fact, as indicated above, seems to have been the breaking point in the negotiations between the U.S. forces and the workers on October 25. The U.S.

118. Id. at 198-99.
forces said they did not want to fight the Cubans, and the Cubans said they would neither resist nor surrender.

If the Rangers did initiate hostilities, and if no justification for that initiation is to be found in the rules of warfare, another set of issues arises. Those issues involve the manner in which the Rangers initiated the hostilities. The precise circumstances may never be clarified, but there are a number of variants. One possibility—the least favorable to the United States—is that the Rangers understood that the Cuban workers were not trying to prohibit U.S. entry into Grenada or their passage to further points, but nevertheless initiated hostilities against them. Such a determination by the Rangers (to initiate hostilities) might have been based on a military judgment to eradicate all possible opposition, and the fact that the Cubans were not flying a white flag of surrender.

There exist a number of other possibilities. One can hypothesize the following: (1) that the Rangers fired at Grenadian defenders and hit Cubans by accident; (2) that the Rangers saw Cubans in their defensive positions, identified them as Cuban, assumed the Cubans were part of the defense of Grenada, and opened fire on them; (3) that the Rangers did not distinguish between the Grenadian soldiers and the Cuban workers and engaged the workers thinking them to be Grenadian soldiers; and (4) that the Rangers identified the workers as Cubans, intended not to shoot at them, but shot them nonetheless. The Ranger-Cuban hostilities may have been started by a minor incident—one Ranger shooting at one Cuban worker—leading to a reaction by other workers and counter-reaction by the other Rangers. These various possibilities raise an issue not frequently faced in the law of armed conflict. If an invading army engages civilians without intending to do so, what are the criteria in determining its legal responsibility?

At the outset, it would seem that the United States, under such circumstances, would not be responsible for aggression against Cuba. The definition of aggression given, for example, by the United Nations General Assembly in Resolution 3314,119 does not include attacks on citizens of a state not party to an armed conflict, but who are located in the territory of the conflict. The United States’ aggression was against Grenada. Its responsibility to Cuba comes through the general principles of state responsibility for endangering the lives of Cuban nationals. The possible respon-

sibility of the United States is not dependent on the fact that the action took place in a third state. If those same U.S. forces were in Cuba or in the United States, and a group of Cuban civilians were in the vicinity of their operations, the United States would be under an obligation not to harm those civilians.

One issue in determining the invading state's legal responsibility is whether, with respect to infliction of injury by the military forces of a state against the nationals of another, responsibility exists only if the injury is inflicted intentionally, or whether responsibility lies even if those forces inflicting the harm acted without intent. Several possibilities arise. The state could be responsible: (1) only if it or its agents were aware that they were engaging in acts that might lead to injury; (2) only if it or its agents were reckless in bringing about the harm, that is, they were aware of a risk that their acts might bring about the harm but they acted in disregard of that risk; (3) only if it or its agents were negligent in inflicting the harm; or (4) regardless of the animus with which the harm was inflicted (strict liability).

The law of state responsibility favors the strict liability approach. A state is typically responsible for harm inflicted by it or its agents regardless of animus. The municipal law analogy is to tort rather than to crime. Certain types of state responsibility may require animus (for example, a state has a duty to protect consular premises but is not responsible if it would have been impossible to avert the harm), but generally no animus is required. This is definitely the case where a state's agents directly cause harm, as where a state's troops shoot at nationals of another state.

One can see an analogy between state responsibility for injury and state responsibility for aggression. A state is responsible for aggression if its forces initiate combat against the forces of another state, even if the forces initiating the combat do so inadvertently.

The activity of the Cuban workers is a potentially complicating circumstance. Clearly, the United States is responsible if its forces attacked a group of Cuban civilians. But is this the result where, as here, the Cuban civilians had weapons and were deployed in a military fashion under the direction of military officers? Should this be considered akin to contributory fault on the

part of Cuba — that it put its civilians, who were in a combat zone, in a situation that made it appear that they might be planning to engage in hostilities?

The activity of the Cuban workers is irrelevant in determining the responsibility of the United States. Where no *animus* is required on the part of the United States, there is no *animus* to be negated by any possible contributory fault on the part of Cuba. The United States is strictly liable. However, a tribunal adjudicating U.S. responsibility might take this circumstance into account in awarding damages to Cuba.

There is another possibility that needs to be considered. It is conceivable that the Cuban workers were instructed to fire only if fired upon, and that they intended to follow that directive, but that some circumstance led some, or even one, of them to initiate hostilities. One can imagine circumstances, other than firing by the Rangers, that might lead a Cuban to fire a rifle in the Rangers' direction. A Cuban might have seen a flash in the sky and assumed it to be a shot coming in his direction; a Ranger might have shot at a Grenadian army defender, but a Cuban might have thought the shot to be against Cuban positions; the rifle of a Ranger might have discharged accidentally; a Cuban (or Cubans), seeing the Rangers encircling their positions, might have assumed the Rangers would attack and therefore fired first, either based on a tactical decision, or simply out of fear. Under such circumstances, a Cuban might have fired an initial shot that could have led the Rangers to respond, leading to a general exchange of shots.

With such a scenario, the United States could conceivably be held responsible on the theory that its forces assumed positions encircling the Cubans, and thereby led the Cubans to believe they were about to be assaulted and that they had to fire first in self-defense. One can imagine that from the standpoint of the Cubans, the circumstances might have appeared to represent a high likelihood of imminent attack. This would satisfy the standards for self-defense under customary law as reflected in the principles established by the *Caroline* incident,\(^2\) or the principles in municipal penal law.\(^3\)

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122. J. Moore, *Digest of International Law* 412 (1906).
Circumstances such as these might well negate any claim for responsibility that the United States might bring against Cuba, but would they render the United States responsible to Cuba? It seems that they might. A state should not permit its armed forces to so intimidate civilians of another state that those civilians believe that they need to use force to protect themselves. When a state does allow its armed forces to intimidate civilians of another state it should be held responsible.

Cuba urged other states to condemn the United States for assaulting its workers, but no other state became involved. The general lack of clarity in the circumstances of the “assault” may account for the reluctance on the part of those states. Cuba strongly condemned the United States for its action against its workers. It did not, however, make a formal claim for compensation from the United States.

VIII. STATUS OF CUBAN WORKERS AFTER CAPTURE

Another issue arising out of the United States-Cuban hostilities is the status of the Cuban workers after they were captured by U.S. forces. The U.S. forces apparently considered those Cubans carrying weapons when captured as combatants (about 200), and the others as civilian internees (about 400). If the Cuban workers were defending Grenada, the question becomes whether the U.S. forces were bound to consider the Cubans engaged in combat as combatants, or whether it could have considered them to be persons not entitled to engage in combat, and, hence, criminals subject to punishment for their use of armed force. If, on the other hand, the Cuban workers were attacked by the U.S. troops, the question becomes whether the U.S. forces should have considered all the Cubans to be civilian internees rather than combatants.

IX. STATUS CUBAN INTERNEES WOULD ENJOY IF THEY INITIATED HOSTILITIES

The first issue is whether, if the Cuban workers initiated com-

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bat with the Rangers, the Cubans were entitled to be considered combatants upon capture. Civilian non-nationals rarely take up arms against an invading army. Therefore there is little precedent for the United States-Cuba hostilities on the hypothesis that the Cubans acted to oppose the entry of the U.S. troops.

Article 4 of Geneva III defines prisoners of war. Paragraph (A)(6) of article 4 is the only section which one can, arguably, apply to qualify these Cubans as prisoners of war. Paragraph (A)(6) reads as follows:

Inhabitants of a non-occupied territory, who on the approach of the army spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

If the Cubans do not qualify as prisoners of war under article 4, then they would be subject to criminal punishment for their opposition to the U.S. invasion. The U.S. forces, however, considered the Cubans as combatants and treated them as prisoners of war rather than as criminals. The issue is whether the humanitarian law required the U.S. forces to accord these Cubans that status. If it did not, then an invading force, like that of the United States in Grenada, would be free to punish resisting non-national civilians, even to the point of executing them. While the United States did not seek to punish the Cubans for participation in the hostilities, the events in Grenada squarely raise the issue and provide an opportunity for considering both the state of the law and its possible reform.

The question is whether non-nationals of an invaded state who resist an invading army are entitled to be treated as prisoners of war. Article 4(A)(6) accords prisoner of war status to "inhabitants" only. This raises the question of whether the Cuban workers were "inhabitants" of Grenada. This question requires an examination of the rationale for article 4(A)(6).

The situation contemplated by article 4(A)(6) is called a "ris-
ing in mass” (French levée en masse). This first appeared in humanitarian law in the nineteenth century in order to protect civilians who defend against an invasion, even if they had not been asked to do so by their government. The major powers opposed the concept, but the smaller powers prevailed. The latter argued that such spontaneous citizen units could be vital in defense against larger powers. An 1874 Brussels conference of European states included in its draft articles on humanitarian law a provision rendering those participating in a levée en masse as prisoners of war upon capture.

Ariga, who attended the 1874 conference as a member of the Japanese delegation, describes the differences of opinion over the levée en masse as follows:

The countries that have large armies through a system of conscription—Germany principally—insisted that only those indicated by [article 1 should be considered belligerent; [article 1 referred to regular armies.] they stated that if all the inhabitants can fight without limitation, [article 1, which limits belligerent status to four essential conditions, becomes entirely useless; that the invading army will have no way to distinguish peaceful inhabitants from combatants, which could lead it to consider all the inhabitants as active enemies and to fight them. But the smaller states replied. They declared that if they are not constrained to maintain a large army based on conscription, they have nevertheless the right to defend their countries in case of need and that therefore they must be able to have recourse to a levée en masse.

Ariga writes that it was the inability of the two groups of states to agree on the concept of levée en masse that led to the failure of the European states to turn the Declaration of Brussels into a treaty. The major powers refused to agree to the 1874 lan-

130. Phillipson writes that levée en masse was recognized as a norm of customary international law by the period of the Franco-Prussian War (1870), although Germany did not observe the norm during that war. C. PHILLIPSON, supra note 106, at 119. On development of the levée en masse norm in the late nineteenth century, and in particular, its non-application to inhabitants of occupied territory, see G. BEST, HUMANITY IN WARFARE 190-200 (1980).
131. P. FAUCHILLE, supra note 115, at 105.
133. N. ARIGA, LA GUERRE RUSSO-JAPONAISE AU POINT DE VUE CONTINENTAL ET LE DROIT INTERNATIONAL 88 (1908).
134. Id.
guage, even though the lesser powers had compromised by including a phrase that would limit a levée en masse to territory "not yet occupied upon the approach of the enemy." This precluded citizens from rising up after an invader occupied a territory.

The same issue divided the 1899 Hague conference, but there the major powers agreed to the 1874 compromise. The 1874 language was written, without change, into the 1899 Hague Convention (II) with respect to the Laws and Customs of War on Land. It was carried over into the 1907 Hague Convention (IV) with respect to the Laws and Customs of War on Land, with the added requirement that civilians openly carry arms. The 1929 Geneva Convention (Relative to the Treatment of Prisoners of War) incorporated by reference the definition of prisoner of war contained in the 1907 Hague Convention, and the 1907 language was written, without change, into the 1949 Geneva Convention (Relative to the Treatment of Prisoners of War) as article 4(A)(6).

The rationale behind the concept of levée en masse is that the civilian inhabitants of an invaded territory have a right to defend their country. Their action, being legitimate, causes them to be considered prisoners of war if captured. The major powers objected to the concept of levée en masse because, they argued, it is difficult to identify the enemy if citizens are fighting.

In the few cases in which non-nationals of an invaded territory have risen up in mass to oppose an invader, state practice is not clear; publicists generally have concluded that such non-nationals, when captured, do not enjoy prisoner of war status. In what was apparently the first example, following the Hague Convention of 1899, of non-nationals rising in mass to oppose an invader, Japanese residents of the Chinese Manchurian city of Yingkow (also known Newchawng) armed themselves without being organized by the Japanese or Chinese Governments, and opposed an attack by Russian troops in January of 1905. One publicist, Rey, was of

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135. Id. At the 1899 conference, Great Britain and Switzerland said that inhabitants of occupied territory should have the right to rise in mass, but the major powers rejected the idea. 2 J. De Louter, Le Droit International Public Positif 255 (1920).
140. Rey, Chronique des faits internationaux, 16 Revue Generale de Droit Interna-
the opinion that this did not constitute a valid *levée en masse*, although the contrary was suggested, because the Japanese residents were not nationals of the invaded territory. Justifying this conclusion, Rey wrote:

> What was always kept in view at Brussels in 1874, as at the Hague in 1899 and 1907, to authorize the exceptional practice of a *levée en masse*, it is a spontaneous rising of the population to defend the national territory: the defense of the native land invoked by the lesser states in favor of the *levée en masse* was a sufficiently powerful reason to permit a derogation from the rules of the laws of war in favor of the inhabitants, and in absence of this essential condition, the general rule of article 1 [requiring regularly organized forces] resumes its sway.  

Fauchille, another publicist, also thought the action of the Japanese residents of Yingkow did not constitute a valid *levée en masse*. Referring to this incident, he wrote, "It is the 'population of unoccupied territory' that has the right to take up arms. It has on that basis been maintained that those other than nationals of an invaded territory may not participate in a *levée en masse*."

A second incident raising this same issue also occurred during the Russo-Japanese War. On July 10, 1905, Japanese troops invading Sakhalin Island (Russian territory) attacked the city of Vladimirivka. They were opposed by a force consisting largely of Russians who had been deported from European Russia to Sakhalin for criminal offenses. The Japanese took 150 of these Russians as prisoners and sentenced 120 of them to death in a court-martial proceeding.

The Japanese Government defended its refusal to consider this rising a *levée en masse*, in part, because it did not consider the deportees "inhabitants." Rey explains this argument as follows:

> But it is suggested that they [the Russian prisoners] could no longer rely on [article 2 of this regulation [the 1899 Hague Convention] regarding *levée en masse* "because article 2 contemplates ordinary inhabitants taking up arms to defend their houses, their property, their native land, whereas defenders of Sakhalin were convicts or vagabonds without houses, without

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141. *Id.* at 502.
142. *Id.* at 501.
property, and who had no native land. They knew nothing of the laws of war.” For this reason they were treated like miscreants subject to martial law.\textsuperscript{144}

While Ariga agreed with this reasoning,\textsuperscript{145} Rey objected to the Japanese version. Rey argued:

This reasoning does not convince us, and the conduct of the Japanese army in this situation did not conform to the law of war. . . . To say that these inhabitants were miscreants or vagabonds without homes or a native land is an affirmation contradicted by the facts, since the island of Sakhalin had a free Russian population of 12,000 inhabitants and since, of the 22,000 exiles, 6000 were peasants who conducted agricultural work.\textsuperscript{146}

The Japanese view was that to be qualified as an “inhabitant,” a person had to be defending his home. Rey does not dispute this point but asserts that many of the Russians who rose up were in fact defending their homes. Thus, both agree that an exile does not qualify as an “inhabitant.” This view is shared by Lawrence, who wrote of the Russian citizen action at Vladimirovka: “If they claimed to be a popular levy resisting invasion by a spontaneous impulse, they were not inhabitants. . . . The decision to execute them was probably right, since they satisfied the conditions of neither kind of irregular belligerency.”\textsuperscript{147}

Takahashi cites one example of non-nationals forming an armed force to oppose an expected invader which he deems a legitimate levée en masse. The incident, also from the Russo-Japanese War, occurred when a Russian attack was expected in the city of Kwangju, Korea, which was occupied by Japan but not yet annexed to it. As Korean forces were deemed insufficient for defense of the city, forty-eight Japanese residents organized themselves into a military force led by a representative of the Japanese consulate at Kwangju. The group never engaged in combat (the Japanese First Army arrived before the Russian army), so the legiti-

\textsuperscript{144} Rey, supra note 140, at 500. N. Ariga, supra note 133, at 87. Another Japanese author found that the Russians at Vladimirovka did not constitute a levée en masse but relied for that conclusion solely on the ground that they did not respect the laws of war. J. Shinobu, International Law in the Shanghai Conflict 69 (1933).

\textsuperscript{145} N. Ariga, supra note 133, at 87. The language is that of a Capt. Yamamoto, Ariga’s former student. Ariga quotes Yamamoto and then agrees with him.

\textsuperscript{146} Rey, supra note 140, at 500.

\textsuperscript{147} T. J. Lawrence, Principles of International Law 495 (1925).
macy of the volunteers’ status was never tested. Takahashi considered this action to be a valid levée en masse. Perhaps Takahashi believes that Japan’s status in Korea was tantamount to sovereignty, so that the volunteers could be considered to be in their native land. This is a difficult view to maintain, however, because Takahashi does not address the issue of the volunteers’ nationality.

Another example of a publicist considering a levée en masse by non-nationals to be valid is Ariga’s analysis of the Japanese Civilian Corps at Yingkow in January 1905, considered above. As indicated, Rey and Fauchille concluded that these civilians did not constitute a legitimate levée en masse, because they were not nationals of China. But Ariga found that they did constitute a legitimate levée en masse. Ariga does not address the fact that the Japanese were non-nationals of the territory in question. Ariga does, however, analyze the legal status of Yingkow in a separate section of his book on the 1905 War. He explained that the Russians held the territory from the Boxer Rebellion, until the Japanese drove them out in July 1904. Ariga described Yingkow during the 1905 War as follows:

[D]uring the war there was in this city a Japanese military administration and a Japanese consulate. The consul had only the powers conferred on him by the treaty of commerce with China; as for the commissioner of the military administration, he exercised both administrative and judicial powers. Foreign consuls were unanimous in recognizing the right of the commissioner to govern the city, as the Russian administrator had done formerly.

The implication of Ariga’s analysis is that the Japanese had sufficient authority in Yingkow; therefore a rising of Japanese civilians to defend the city from a Russian attack could be considered an uprising of inhabitants. Ariga does not argue that the Japanese volunteers might be members of a legitimate levée en masse regardless of nationality. In fact, he insisted that the Russian depor-
tees of Vladimirovka could not be considered members of a legitimate levée en masse, because they were not nationals of Sakhalin.154

While Ariga showed no regret over the execution of the Russian civilians who fought at Vladimirovka, he showed great solicitude for the Japanese Civilian Corps at Yingkow. "How great would have been our indignation," he writes, "if, taken by the enemy, these defenders, armed with pistols and daggers, had been shot as criminals!"155 Ariga's concern for the Japanese civilians at Yingkow, like Takahashi's for the Japanese civilians at Kwangju,156 may simply reflect the sentiments of nationalism.

The discussions leading to the inclusion of article 4(a)(6) in the 1949 Geneva III Convention apparently did not touch on the nationality issue.157 Most recent analyses of the levée en masse are also silent as to the nationality issue.158 But, publicists McDougal and Reisman state that the doctrine of levée en masse is "a concession to the perspectives of patriotic nationalism which presumably motivate the uprising," a view that seems to limit the doctrine to nationals of the invaded state.159

The issue of levée en masse was not mentioned in the 1977 Protocol I Additional to the Geneva Conventions of August 12, 1949, although certain provisions of the Protocol affect the status of a non-national participating in a levée en masse. Article 45(3) states, for example, that any person who participated in hostilities and who does not benefit from the Geneva IV convention is nonetheless entitled to certain guarantees enumerated in article 75 of the Protocol. Article 75 prohibits, among other things, murder, torture, and corporal punishment against such a detainee but does not preclude court-martial for actions related to the armed conflict. Presumably, a belligerent is entitled to consider the non-na-
tional's participation in the uprising as illegal and thus be permitted to court-martial him, imposing even the death penalty.

While Geneva III and the 1977 Protocol brought nothing new on the nationality issue, it should not be considered a closed subject. The infrequency of incidents in which non-nationals have taken up arms against an invader accounts for the lack of attention to the issue. If foreigners are residents in a state subject to invasion and they decide to resist, either out of solidarity with the invaded state or out of fear that if the invader gains control they may be subjected to atrocities, the resistance should be considered legitimate. The alternative—that the belligerent may consider the resisters criminals and, after court-martial, execute them—is harsh.

Non-nationals may feel the same outrage as nationals in the face of an invasion, particularly if their residence in the invaded state is one of long standing. They may have great sympathy for their state of residence. Thus, the same psychological factors that led to the right of *levée en masse* for nationals may in many situations apply as well to non-nationals.

Apart from the non-nationals' feelings of attachment, they may simply fear the invading army. They may be concerned that it will perpetrate atrocities that will affect them along with the nationals. While concern for such fears does not appear to have been considered in the decision to give a right of *levée en masse*, it is harsh to treat a group of civilians who organize themselves to oppose an invader whom they fear may slaughter them as criminals.

The question of the status of non-national civilians who oppose an invader must in the first instance be addressed under Geneva III. As indicated, the history of paragraph 4(a)(6) strongly suggests that the intent of the drafters of that provision and its antecedents was to exclude non-nationals from the protection given prisoners of war. The fact that the rule may be harsh is not relevant, because a treaty is interpreted in light of the intent of its drafters. A treaty's meaning does not change over time as concepts change.160 The only exception to this rule is that a treaty's principle loses force upon emergence of a new peremptory norm (*jus cogens*),161 but any rule regarding resistance by non-national civil-

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ians is not likely to be denominated as peremptory.

The practice of states under a treaty may also be considered in construing the treaty's terms. The United States-Cuban incident in Grenada, however, was the first incident since 1949, and there are no recorded incidents during the entire period following the Russo-Japanese War to consider.

The appropriate mechanism would be a revision of article 4(a)(6). The 1977 revisions resulting in the two protocols of that year did not address the issue. For the reasons indicated above, it would seem appropriate for Geneva III to be revised to include non-nationals as legitimate participants in a levée en masse.

X. STATUS CUBAN INTERNEES WOULD ENJOY IF U.S. FORCES INITIATED HOSTILITIES

Only in rare circumstances has an invading army attacked non-national civilians. There have been no prior incidents involving attacks that appear similar to the Cuban version of the events, that is, non-national civilians attacked without initiating hostilities, yet also prepared to defend themselves if attacked.

If U.S. forces attacked the Cuban workers, then the workers probably qualify for treatment as civilian internees under the 1949 Geneva Convention (Relative to the Protection of Civilian Persons in Time of War) (Geneva IV). They would seem to come within the definition of "protected persons" under article 4 of Geneva IV, and therefore be protected from mistreatment under article 27. If some of the Cuban workers attacked the U.S. forces but others did not (U.S. sources acknowledge that most of the Cubans did not engage in hostilities), those who did not attack would seem to qualify as "protected persons" under article 4. Article 4, paragraph 1, states: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Upon

162. Id. art. 31(3)(b).
163. On August 21, 1914, German troops invading France entered the village of Jarny and found a group of Italians it suspected of having fought to defend the village. It arrested a number of them and immediately shot them. C. PHILLIPSON, supra note 106, at 185-86.
165. Id. art. 4, para. 1.
being interned, the Cubans would qualify as being "in the hands" of U.S. forces. "In the hands of" means "that the person is in the territory which is under the control of the Power in question." 166 Shortly after interning the Cubans, U.S. forces were in control of Grenada.

Article 4, paragraph 2, presents a potential obstacle in considering the Cubans "protected persons." It reads, in part, as follows:

National of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. 167

If, as we are assuming in this section, the Cubans were attacked by the U.S. troops, Cuba would be a neutral state. Neutral-state nationals are not considered "protected persons" because "the position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them." 168

While Cuba and the United States do not have diplomatic representation at the ambassadorial level, they both have an "interests section" in the other's capital functioning as part of the embassy of a third state. The Cuban Interests Section is part of the Czech embassy in Washington, while the U.S. Interests Section is part of the Swiss embassy in Havana. 169 Pictet quotes approvingly the rapporteur of the relevant drafting committee as stating that normal diplomatic representation is "that which functions in peace time comprising at least one diplomatic representative accredited to a Ministry of Foreign Affairs." 170 Pictet notes that in the French text of the rapporteur's report, the phrase "accredited to" is rendered as "trouvant audience auprès de."

The heads of the Cuban and United States Interest Sections are not "accredited to" the foreign ministry of the other state, but

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166. O. UHLER & H. COURSIER, supra note 56, at 47.
167. Geneva IV, supra note 164, art. 4, para. 2.
168. O. UHLER & H. COURSIER, supra note 56, at 49.
170. O. UHLER & H. COURSIER, supra note 56, at 49.
they do have access to those ministries. Therefore, it might be argued that they “find an audience” there. Pictet states that this phrase means only that “the representations made by the diplomatic representative will be followed by results and that satisfactory replies will be given to him.” During the Grenada invasion the head of the U.S. Interests Section was in contact with the Cuban foreign ministry, and messages were exchanged between them. The U.S. Interests Section did not, as noted above, respond to the initial Cuban message of October 22, 1983 — perhaps an indication that “satisfactory replies” were not given.

Pictet further specifies that “[i]t would also seem essential for the representatives in question to have sufficient liberty of action and liberty of movement to be able to visit their fellow-countrymen and come to their help when circumstances so require.” It is doubtful that this requirement was met in the relations between the United States and Cuba in October, 1983. Immediately following the invasion, the new provisional Government of Grenada required Cuban diplomats to leave Grenada. One Cuban diplomat remained to facilitate the departure of Cuban nationals, but was not permitted to visit the Cuban internees. The United States treated Cuba as a belligerent during the Grenada events. It did not grant Cuban diplomatic representatives the liberty of action and movement which was seen as a necessity for “normal diplomatic representation.”

Thus, the Cubans, if attacked by U.S. forces (and those who by everyone’s agreement did not attack U.S. forces) were “protected persons,” under Geneva IV. As “protected persons,” they were entitled to the same protections that Geneva IV extends to civilian internees.

XI. LEGALITY OF INTERNMENT

A civilian protected under Geneva IV may not be interned un-

171. Id.
172. Interview with John Ferch, Chief of the United States Interests Section in Havana, Cuba, in Havana (May 10, 1984).
173. O. UHLER & H. COURSIER, supra note 56, at 49.
174. A State Department official was quoted, immediately following the invasion, as saying, with regard to Cuban diplomats in Grenada, “We don’t want them rattling around the island.” TIME, Nov. 14, 1983, at 22. U.S. forces vandalized the Cuban ambassador’s residence, smashing furniture, breaking windows, and writing an obscene message on a wall. Id. at 23.
less "the security of the Detaining Power makes it absolutely neces-
sary." 175 U.S. forces took into custody all the Cubans it found at
Point Salines. 176 It is questionable whether such detention was
"absolutely necessary" to the security of the U.S. forces. The U.S.
forces detained approximately 630 Cubans at Point Salines; of
these, approximately 500 were construction workers. The remain-
der were clerical and other personnel connected with the construc-
tion operation. Many were teachers who provided high school
equivalency courses for the workers. There were about forty Cuban
military personnel in Grenada as advisors. A certain number of
these—it is not clear just how many—were at Point Salines and
were taken into custody. The construction workers were employees
of the National Union of Enterprises—Caribbean (UNECA in the
Spanish-language acronym), a Cuban state-owned firm that en-
gages in general construction work. 177

Most of the approximately 630 Cubans did not engage in hos-
tilities against the U.S. troops. They remained in the dormitory
buildings during the hostilities, awaiting the outcome of the en-
counter. Approximately 200 Cubans were captured with weapons.
Those captured without weapons were considered civilian internees
by the U.S. forces, while those captured with weapons were consid-
ered combatants and interned as prisoners of war. 178 This categori-
zation was based on the proposition that the Cubans started the
shooting against the U.S. forces. 179 Because that proposition is
highly unlikely, 180 the categorization is incorrect. If the Cubans did
not initiate combat, then they are civilians.

If, as the Cuban Government asserted, the Cubans with weap-
ons were prepared to defend themselves if attacked, then the U.S.
might argue that they were security risks, even if they did not ini-
tiate combat with the U.S. troops. This would be a difficult pro-
position to sustain, however, because one is not a combatant unless
one intends to participate in hostilities, and, according to the Cu-
ban Government’s version, that was not the workers’ intent.

175. Geneva IV, supra note 164, art. 42, para. 1.
177. Interview with workers of UNECA who returned from Grenada, at Puerto Escon-
dido, Cuba (May 11, 1984).
178. "A distinction was made between ‘combatants’ and those not ‘combatants.’ Those
captured with weapons in hand were considered combatants, which were about 200, or a
third, of the prisoners." Le Monde, Nov. 1, 1983, at 3, col. 5.
180. Text following note 82, supra.
XII. Treatment in Confinement

The Cubans, once interned, were entitled either to the protections of Geneva IV, or, in case they were "combatants," the protection of Geneva III. Admiral Wesley McDonald indicated that the U.S. Government considered itself bound by humanitarian law. He stated to the press with regard to the interned Cubans: "We're treating them exactly under the Geneva Convention."181

The Cuban workers did not allege that the United States committed any physical brutality against them. They have, however, alleged certain acts which would constitute violations of their rights either as civilian internees or prisoners of war. A number of Cubans stated that U.S. troops conducted mock executions, lining them up against a wall and leading them to believe they were to be shot.182 U.S. sources, however, have not commented on these allegations. If these acts did occur, they would be in violation of humanitarian law. Geneva III prohibits acts of intimidation against prisoners of war,183 while Geneva IV prohibits threats of violence against civilian internees.184

The Cuban workers also complained of being exposed to the sun for long periods of time, sitting on hot asphalt or in the dust.185 Geneva IV obligates the detaining power to use "buildings or quarters which...provide efficient protection against the rigors of the climate."186 Geneva III requires "premises...affording every guarantee of hygiene and healthfulness."187 These standards

182. Granma Weekly Review, Nov. 13, 1983, at 7, col. 3 (statement of Alberto Diaz Calderón). Ayda Osorio, a secretary, said that she and several fellow prisoners were blindfolded and made to stand against a wall while a squad of U.S. military personnel cocked their rifles, causing the Cubans to believe that they would be executed. London Times, Nov. 5, 1983, at 6, col. 3. Sara Carcases Verdecia, a Spanish teacher who conducted classes for the workers, said that this was done to a group that consisted of seven women and five men, of which she was a part, shortly before their release. Id. at 5, col. 1. See EDITORIAL DE CIENCIAS, supra note 1, at 214.
183. Geneva III, supra note 4, art. 13, para. 2.
184. Geneva IV, supra note 164, art. 27, para. 1.
185. London Times, Nov. 5, 1983, at 5, col. 1. Evaristo Garcia, a 50-year-old construction foreman, stated that he did not have a weapon but was wounded by two bullets, including one in a lung. He further stated that he was denied medical attention the first 24 hours of his captivity and had to lie in the sun on his stomach, hands behind his head, under guard. Garcia said he fled when the fighting started but was shot when he returned to rescue a wounded friend. London Times, Nov. 5, 1983, at 6, col. 1, R 17.
186. Geneva IV, supra note 164, art. 85, para. 1.
were apparently not met, at least in the initial period of confinement. A Pentagon film made October 27 showed "the [Cuban] prisoners. . .lying close together on the pavements, many of them covering themselves with large straw hats from what was apparently hot sun." Admiral McDonald wrote that completion of a camp for the detainees "took several days due to the lack of readily available equipment, causing a delay in moving the Detainees to an acceptable facility."

A number of the workers stated they were not permitted access to toilet facilities. Geneva IV requires that "internees shall have for their use, day and night, sanitary conveniences which conform to the rules of hygiene," while Geneva III states that "prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene."

Women internees said that male soldiers carried out a "shameful search" of their persons, putting their hands inside the women's clothing. Geneva IV states that "a woman internee shall not be searched except by a woman." Geneva III states: "Women shall be treated with all the regard due to their sex."

U.S. forces apparently interrogated the Cuban workers, and according to some of the workers, U.S. Spanish-speaking interrogators encouraged them to defect to the United States. But there were no allegations of physical or psychological coercion to get information from internees. Therefore the interrogations conducted did not violate the humanitarian conventions.

189. Report by Adm. Wesley McDonald, supra note 32, at III-9. The Cuban construction workers were kept outdoors for six days, at which time a tent city was erected for them. Time, Nov. 14, 1983, at 23.
191. Geneva IV, supra note 164, art. 85, para. 3.
192. Geneva III, supra note 4, art. 29, para. 2.
194. Geneva IV, supra note 164, art. 97, para. 4.
196. Adm. Wesley McDonald stated: "We're trying to get information, as much as we can." N.Y. Times, Oct. 29, 1983, at A7, col. 1.
198. Neither Geneva III nor Geneva IV prohibits interrogation, but both prohibit coercion. "No physical or mental torture, nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind." Geneva III, supra note 4, art. 17, para. 4. "No
Cuban workers also stated that property belonging to them personally, as well as property of their construction company, was taken and retained by U.S. forces. Workers claimed that personal items such as cameras, watches, radios, tape recorders, fans, hair dryers, and articles of clothing were removed from them and never returned.\(^{199}\) Some confirmation of these charges is provided by the fact that the workers who arrived at Havana Airport carried no luggage.\(^{200}\) The humanitarian conventions prohibit the taking of personal effects from prisoners or internees and require any items taken to be returned upon release.\(^{201}\)

Workers also said that large bulldozers and other construction equipment of the Cuban construction firm, mostly manufactured in Japan, were taken by U.S. forces.\(^{202}\) According to a U.S. journalist, U.S. forces at Point Salines "commandeered Cuban cars, trucks, tractors and even a navy blue Mercedes-Benz sedan with ambassador's flagstaffs on either fender."\(^{203}\) These vehicles apparently have not been returned to the Cuban Government or to its state-owned company, the National Union of Enterprises —Caribbean.

According to the so-called right of angary, a belligerent is entitled to appropriate property of a neutral state located in belligerent territory.\(^{204}\) Property may be seized if it is urgently needed for physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them." Geneva IV, supra note 164, art. 31. One internee reported that conditions improved after representatives of the International Committee of the Red Cross arrived to arrange repatriation: "They didn't try to provoke us so much." Editorial De Ciencias, supra note 1, at 214. Cubans received medical treatment from U.S. personnel assisted by medical students at the St. George's Medical School True Blue Campus. N.Y. Times, Oct. 27, 1983, at A20, col. 6.

199. Carcaces stated: "The living quarters were sacked, our suitcases emptied and many of our belongings stolen." She reported seeing her Zenith camera on the cartridge belt of a U.S. officer. London Times, Nov. 5, 1983, at 5, col. 1. Interview with Cuban workers who had returned from Grenada, at Puerto Escondido, Cuba (May 11, 1984).


201. Geneva III, supra note 4, art. 18, para. 1. Geneva IV, supra note 164, art. 97, paras. 1 and 5.

202. Interview with Cuban workers who had returned from Grenada, at Puerto Escondido, Cuba (May 11, 1984). Editorial De Ciencias, supra note 1, at 225.


204. M. Greenspan, supra note 158, at 581.
military purposes or to prevent its use by the enemy.\textsuperscript{206} It is not clear why U.S. troops appropriated the Cuban vehicles. They apparently wanted to move the vehicles off the airstrip in order to use it for incoming aircraft. The right to take neutral-state vehicles extends only to military need. Thus the vehicles should have been returned as soon as hostilities ceased.

\textbf{XIV. Conclusion}

The United States-Cuban military encounter on Grenada presents difficult issues, both factual and legal, with respect to the use of force. If the Cuban workers were part of the defense of Grenada and endeavored, upon instruction from the Cuban Government, to prevent entry into Grenada by U.S. forces, then responsibility for use of force turns on the legality of the U.S. military action. If the United States was justified in its use of force in Grenada, then the Cuban Government would not be justified in using force to oppose it. The Cuban Government would be responsible to the United States under the law of state responsibility. If, on the other hand, the United States was not justified—and this seems the more tenable position—then the Cuban Government would have been justified in using force, provided the Grenadian Government had requested them to do so, pursuant to article 51 of the United Nations Charter (collective self-defense provision).

With respect to the status of internees issue, the result again varies depending on the version of events one believes. The U.S. version is that the Cuban workers constituted a group of non-national civilians who resisted by force of arms the entry of an invading force. If true, then the U.S. forces were entitled to execute the Cubans as criminals. This result, while allowed by Geneva III, seems harsh and indicates a need for revision of the \textit{levée en masse} provision of Geneva III.

Under the facts as portrayed by the Cuban Government, the situation is quite unique: a group of non-national civilians presented no resistance to the entry of an invading force but were unwilling to surrender, and therefore prepared to defend themselves by force of arms. If true, then the Cubans were entitled to be considered as civilian internees rather than as prisoners of war.

Under either version of the facts, the U.S. forces violated the

\textsuperscript{205} \textit{Id.} at 581-82.
humanitarian law by retaining property of the Cuban workers and of the state-owned Cuban construction company and may have also violated the humanitarian law in several respects relating to the treatment of internees.