BELATCHEW ASRAT

JURISDICTION IN USA v. NORIEGA

WITH SPECIAL REFERENCE TO THE HONECKER CASE

78

SKRIFTER FRÅN
JURIDISKA
FAKULTETEN
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JURIDISKA FAKULTETEN I UPPSALA

78

Redaktör: Nils Jareborg

To the memory of my

mother, Debrework Tassew
aunt, Gennet Wolde Gebriel
sister, Zewdnesh Asrat
sister, Turusew Asrat

Jurisdiction in *USA* v. *Noriega*

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Belatchew Asrat

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Uppsala, November 1999
Belatchew Asrat

Contents

ABBREVIATIONS

ABCNY	Association of the Bar of the City of New York
AFDI	Annuaire Français de Droit International
AIDI	Annuaire de l'Institut de Droit International
AILC	American International Law Cases
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public and International Law
ALI	The American Law Institute
All ER	The All England Law Reports
Ann. Dig. PILC	Annual Digest of Public International Law Cases
Art.	Article
BILC	British International Law Cases
BYIL	The British Year Book of International Law
Cir.	Circuit
Ch.	Chapter
CJIL	Connecticut Journal of International Law
CJTL	Columbia Journal of Transnational Law
CLR	Columbia Law Review
CWILJ	California Western International Law Journal
DEA	Drug Enforcement Administration (Agency)
Doc.	Document
DSB	The Department of State Bulletin
EPIL	Encyclopedia of Public International Law
ETS	European Treaty Series
FP	Foreign Policy
FRG	Federal Republic of Germany
GAOR	General Assembly Official Records
GDR	German Democratic Republic
GYIL	German Yearbook of International Law
HL	House of Lords
ICCPR	International Covenant on Civil and Political Rights
ICI	Independent Commission of Inquiry
ICJ	International Court of Justice
ICLQ	The International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross

ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institut de Droit International
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Imm.	Immunity
IMT	International Military Tribunal
IYHR	Israel Yearbook on Human Rights
JDI	Journal du Droit International (Clunet)
LNTS	League of Nations Treaty Series
MLR	Michigan Law Review
NJIL	Nordic Journal of International Law
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OAU	Organization of African Unity
Oppenheim (9th)	Oppenheim's International Law
Para.	Paragraph
PCIJ	Permanent Court of International Justice
PDF	Panama Defence Forces
PPF	Panamanian Public Forces
QBD	Queen's Bench Division
RCADI	Recueil des cours de l'Academie de droit international de la Haye
RCDIP	Revue critique de droit international privé
Resol.	Resolution
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
SAYIL	South African Yearbook of International Law
Sect.	Section
SJIL	Stanford Journal of International Law
Suppl.	Supplement
UK	United Kingdom
UNCIOD	United Nations Conference on International Organization Documents
UNCLS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US/USA	United States of America

VCLT	Vienna Convention on the Law of Treaties
VLR	Virginia Law Review
Vol.	Volume
YILC	Yearbook of the International Law Commission
YJIL	Yale Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

PREFACE

The US military invasion of Panama effected, *inter alia*, the removal of Manuel Noriega from authority and his transfer to Miami, Florida, to have him subjected to prosecution on drug-related charges. At the time of the invasion Noriega had the title of Maximum Leader and was for all practical purposes the head of the Panamanian State. The US invasion was an apparent breach of norms of international conduct entrenched in the UN legal order.

Issues of jurisdiction and judicial discretion involved in the US exercise of adjudicatory jurisdiction over Manuel Noriega constitute the burden of the present study. This burden is preceded by a survey of the essential rules pertaining to jurisdictional immunity and the exercise of criminal jurisdiction, and by matters that bear on the relational complexion of the US and Panama. It is followed by the German case of Erich Honecker that was commenced in Berlin. The study is accordingly divided into four parts: Part I, Basic Legal Aspects of Jurisdictional Immunity and Criminal Jurisdiction; Part II, USA and Panama: Relational Dimensions Essential for the Study; Part III, USA and Noriega in Jurisdictional Perspective; Part IV, The Honecker Case in Comparative Perspective.

Recent developments in international enforcement machinery as manifested in the Rome Statute of the International Criminal Court are referred to in footnotes that correspond with the parts of the ILC Draft Statute considered in the text of the study. The recent domestic circumscription of jurisdictional immunity that was narrowly held in the British House of Lords judgment in the Pinochet extradition case, and the opinions of certain other judges in the case, are similarly referred to in appropriate footnotes.

The prosecution in Berlin of Erich Honecker, the former head of State of the former GDR, was abandoned due to his grave illness. Although his eligibility to jurisdictional immunity was not decided on, his case is given a limited consideration in the study for its symbolic reflection of the jurisdictional issues raised in certain cases of the former GDR officials, and for purposes of comparison with the *Noriega* case.

The study refers to judicial opinions from the US and other domestic jurisdictions that it considers in appropriate instances from the perspect-

ive of international law as presently structured and from a postulated mutual supportiveness of the international and domestic legal orders. This is particularly so with regard to the continued sway of the jurisdictional maxim *male captus, bene detentus* in the case of Noriega and other similar cases.

The study indicates in conclusion that the US military invasion of Panama for the purpose of bringing Noriega to trial in Miami, Florida, did not set a valid international precedent that others could follow with legal impunity.

PART I

BASIC LEGAL ASPECTS OF JURISDICTIONAL IMMUNITY AND CRIMINAL JURISDICTION

Chapter 1 Jurisdictional Immunity

Part I introduces the basic legal aspects of jurisdictional immunity and criminal jurisdiction that constitute a necessary background for the central concern of the present study. The exceptions to the general rule of the applicability of territorial jurisdiction are dealt with synoptically in this chapter; the bases and reach of national criminal jurisdiction, the enforcement of international criminal law, and the constraints on the exercise of jurisdiction are taken up in chapter 2. We shall accordingly survey here matters that pertain to the entitlement of States, their organs, and other agents to immunity from foreign jurisdiction. The chapter is divided into four sections: Sovereign/State Immunity, Materials Relating to State Immunity, Act of State, and Head of State Immunity.

1.1 Sovereign/State Immunity

As terms go, State immunity may be taken as the contemporary equivalent of the term sovereign immunity, which signified the personal immunity of the sovereign ruler during the period when the ruler personified the State.[1] In the era of international relations dominated by personal sovereigns, it was the ruler's personal attributes that imparted the status of sovereignty to his State, and the doctrine of sovereign immunity was principally designed to protect his position.[2] Where then the identity of the ruler and the State was to all intents and purposes considered the

[1] See, eg, J.-F. Lalive, "L'immunité de juridiction des États et des organisations internationales", 84 *RCADI*, 1953-III, p. 213; J.L. Mallory, "Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings", 86 *CLR*, 1986, p. 170; H.F. van Panhuys, "In the Borderland Between the Act of State Doctrine and Questions of Jurisdictional Immunities", 13 *ICLQ*, 1964, p. 1196; S. Sucharitkul, *State Immunities and Trading Activities in International Law*, 1959, p. 4. *Cf. Draft Convention and Comment on Competence of Courts in Regard to Foreign States* (Harvard Draft Imm.), 26 *AJIL*, 1932, *Suppl.* p. 476; L.J. Damiani, "The Power of United States Courts to Deny Former Heads of State Immunity From Jurisdiction", 18 *CWILJ*, 1988, p. 360; *U.A.R.* v. *Mirza Ali Akbar Kashani*, 57 *AJIL*, 1963, pp. 939-40.

[2] See, eg, I. Sinclair, "The Law of Sovereign Immunity. Recent Development", 167 *RCADI*, 1980-II, p. 121; C.J. Lewis, *State and Diplomatic Immunity*, 2nd ed. 1985, pp. 1, 21, 159; A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", 247 *RCADI*, 1994-III, p. 35.

same, the doctrine of sovereign immunity embraced both head of State immunity and State immunity.[3] Although no particular significance generally appears to be attached to the present use of the term sovereign immunity in relation to State immunity, and the two terms appear interchangeable,[4] they could, nonetheless, be theoretically distinguished.[5]

We need not, however, dwell on terminological distinctions, but proceed to consider the highlights in the development of the doctrine of sovereign immunity insofar as they bear on issues involved in our study.

The doctrine of sovereign immunity concerns the exemption of States and their organs from the exercise of territorial jurisdiction by other States in cases covered by acknowledged principles of international law or particular terms of agreement. Even though the exercise of territorial jurisdiction is manifestable on the legislative, judicial, and enforcement level, the immunity that has attracted prime attention is that which relates to judicial and enforcement jurisdiction.[6] It is maintained that except in certain specific matters, as in respect of diplomatic and consular activities,[7] immunity, when due, would appear to envisage the non-enforceability of the territorial law rather than its inapplicability.[8] Sovereign immunity concerns the status of a party who is directly or indirectly impleaded or whose interests are involved in cases that give rise to issues of jurisdictional immunity.[9]

[3] *Cf.* Sucharitkul, *supra,* n. 1, pp. 23-5, 47.

[4] See, eg, I. Brownlie, "Contemporary problems concerning the jurisdictional immunity of States", *AIDI,* Vol. 62-I, 1987, p. 46; S. Sucharitkul, "Immunities of Foreign States Before National Authorities", 149 *RCADI,* 1976-I, p. 97. *Cf.* The definition of State in the Harvard Draft Imm., *supra,* n. 1, p. 475, and in the ILC Draft Articles on Jurisdictional Immunities of States and Their Property, *YILC,* 1991, Vol, II, Pt. two, p. 14.

[5] See, eg, Sinclair, *supra,* n. 2, p. 197.

[6] See L. Henkin, R.C. Pugh, O. Schachter, H. Smit, *International Law. Cases and Materials,* 3rd ed., 1993, p. 1126; R. Higgins, *Problems & Process: International Law and How We Use It,* 1994, p. 78, where the terms "jurisdiction to *prescribe* and jurisdiction to *apply*" are indicated as a better description of the territorial competence; F.A. Mann, *Further Studies in International Law,* 1990, pp. 4, 21, 32 about the territorial character of jurisdiction, and about the validity of legislative jurisdiction over a particular matter not necessarily entailing a valid enforcement jurisdiction in a foreign territory. *Cf.* Art. 1 and Commentary (2), in the ILC Draft, *supra,* n. 4 , p. 13.

[7] The diplomatic and consular immunities from the jurisdiction to prescribe is said to "include exemption from certain taxes and custom duties...and immunity from requirements of alien registration and national service". — *Restatement (Third): The Foreign Relations Law of the United States,* 1987, p. 439.

[8] See, eg, *ibid.,* pp. 438-9. In particular, it is stated that "[e]xcept for these limited and specific immunities [see the foregoing n.], the sending state (and its diplomatic and consular personnel) are subject to local law and can be required to comply with it, even when that law cannot be enforced through legal process or police action....In the United States, a foreign state is subject to State and local as well as federal law." — *Ibid.,* p. 439.

The exemption from the exercise of foreign jurisdiction accorded to States is generally considered to emanate from their independence, sovereign equality, and dignity,[10] and to constitute a principle of customary international law.[11] Predicated as it must necessarily be on certain commonly held notions of State equality, and in the absence of particular indications to the contrary, the doctrine of State immunity would not normally extend its benefit to an entity that has not been recognized as a State.[12] But once recognition takes place, it brings forth a formal acknowledgement of the legal equality of the recognizing State and the recognized entity, together with the *inter se* applicability of the rights and duties flowing from the doctrine of sovereign immunity.[13]

The principle of the sovereign equality of States and its attributes have furnished the ground for the emergence of the maxim *par in parem non habet imperium* or *par in parem non habet jurisdictionem*. This maxim, which has been considered to admit of no derogation save that based on a valid consent to that effect, crystallized immunity of States from each other's exercise of territorial jurisdiction. The substance of the maxim found judicial reflection, for instance, in *The Schooner Exchange*, where

[9] See, eg, Lewis, *supra,* n. 2, pp. 2, 159-60.

[10] See, eg, *The Charkieh*, 3 *BILC*, 1965, p. 293; *The Parlement Belge*, *ibid.,* p. 327; *Mighell v. Sultan of Johore*, *ibid.,* p. 175, where it is affirmed that "[t]he independent sovereign of the smallest state stands on the same footing as the monarch of the greatest"; *L'immunité d'exécution de l'État étranger*, Cahiers du CEDIN, 1990, p. 12; Ch. Rousseau, *Droit International Public*, IV, 1980, pp. 10-1. *Cf.* P.D. Trooboff, "Foreign State Immunity: Emerging Consensus on Principles", 200 *RCADI*, 1986-V, p. 325; A. Weiss, "Compétence ou incompétence des tribunaux à l'égard des États étrangers", *RCADI*, 1923, pp. 529, 543. See 1 Oppenheim (9th), pp. 341-2, where doubt is expressed about these criteria supplying a satisfactory basis.

[11] See, eg, *The Parlement Belge*, *supra,* n. 10, p. 326; *Mobutu v. SA Cotoni*, 91 *ILR*, p. 260; 1 Oppenheim (9th), p. 343; Panhuys, *supra,* n. 1, p. 1195; Ch. Rousseau, *supra,* n. 10, p. 9; *Restatement (Third)*, *supra,* n. 7, p. 390; Sucharitkul, *supra,* n. 1, p. 355. But see Lalive, *supra,* n. 1, pp. 251 *et seq.*

[12] *Cf.*, eg, *The Charkieh*, *supra,* n. 10, pp. 291-2, where non-recognition was one of the grounds on which the Court of Admiralty rested its judgment that denied the Khedive of Egypt any entitlement to immunity; Comment on Art. 3 of the Harvard Draft Imm., *supra,* n. 1, pp. 503-5; E.W. Allen, *The Position of Foreign States before National Courts*, 1933, pp. 7, 25, for the inconsistency of earlier State practice, and p. 301, where the author concludes that the "[t]he entity claiming the immunity need not be a 'state' in the traditional sense, but it must be a person of international law".

[13] See, eg, *The Cristina*, 3 *BILC*, 1965, pp. 397 *et seq.*; Henkin, Pugh, Schachter, Smit, *supra,* n. 6, pp. 244-5; 1 Oppenheim, (9th), pp. 158-60; P. Daillier & A. Pellet, *Droit international public*, 5e éd., 1994, pp. 529-30, 532-4. The "recognition" referred to in the text does not relate to the constitutive role of recognition, but only to the attendant legal parity of the concerned municipal jurisdictions. Absence of recognition has effect on such legal parity and, consequently, on the status of the entity and its organs before the municipal authorities of the non-recognizing State.

the Supreme Court of the United States expressed in its oft-quoted passage:

> The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.[14]

As we shall presently see, before certain States began subjecting the applicability of the maxim *par in parem non habet imperium* to certain restrictions, its effect in the sphere of sovereign immunity was absolute.[15]

The maxim appears to have been fully and generally implemented until the end of the 19th century; but it lingered on in the UK and the US afterwards. An opinion of the English House of Lords expressed in its 1938 judgment in *The Cristina* may be cited as an instance of the grounds held to justify the doctrine of absolute immunity:

> The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.[16]

During the maxim's operational heyday, no activity undertaken by States was considered to be suitably differentiable from others recognized as falling within the proper scope of the exercise of sovereign authority. Whenever, therefore, the issue of directly or indirectly impleading a State in a foreign jurisdiction arose, its status of statehood

[14] *The Schooner Exchange v. M'Faddon*, 6 *AILC*, p. 465. *Cf.* G.M. Badr, *State Immunity: An Analytical and Prognostic View*, 1984, pp. 12-3.

[15] See, eg, *The Porto Alexandre*, 3 *BILC*, 1965. p. 353; G. Fitzmaurice, "State Immunity from Proceedings in Foreign Courts", 14 *BYIL*, 1933, p. 124. Inasmuch, however, as jurisdictional immunity envisaged exceptions, such as those based on waiver, the qualifying term "absolute" does not appear to figure in its strict sense. *Cf.* Brownlie, *supra,* n. 4, p. 17.

[16] *Supra,* n. 13, p. 405. The opinion was stated in full cognizance of the existence of contrary State practice in regard to the property of a sovereign that was private or was used for commercial purposes. See also, eg, the House of Lords judgment in *I Congreso del Partido*, 1981-2 *All ER*, p.1069; US Supreme Court judgment in *Argentine Republic v. Amerada Hess Shipping Corporation*, 28 *ILM*, 1989, p. 385, n. 1.

alone enabled it to be accorded immunity.[17] So long as the general State practice remained indiscriminate in clothing any act and property of States and their organs with immunity from the application of the processes of foreign jurisdiction, the rationale for the doctrine of absolute immunity was not disturbed.

But with the gradual encroachment of State activities on domain viewed to be outside the traditional purview of the exercise of public authority, the underpinnings of the doctrine of absolute immunity began to give way. The growing engagement of States in "commercial, or other private law, transactions with individuals",[18] and the need to provide those individuals with a process that was preferable in terms of better availability and effectiveness for redressing their grievances than that which was likely to be open to them through diplomacy, made it imperative that States be denied immunity from the exercise of foreign jurisdiction in cases involving such transactions. The doctrine of absolute immunity had to give ground to the necessities of justice, and the doctrine of relative immunity established itself on the international scene.[19]

The sustained judicial practice that made an early inroad into the rule of absolute immunity is credited to Italian and Belgian courts; these were later emulated by the courts of Switzerland, Egypt, Roumania, France, Austria and Greece.[20] It would therefore be in order to cite a couple of instances from the pioneering judgments of the Italian and Belgian courts.

The Court of Cassation in Naples declared in 1886 that

> [n]o one can deny that the foundation of international law is [the principle of] the sovereignty and independence of States; and that in consequence of this principle each State, in the exercise of its powers, is exempted from the jurisdiction of other States. But the fallacy consists in considering the State exclusively and always as a body politic, although its activity as a civil entity cannot be gainsaid, when it performs acts acquiring rights and assuming obligations in private relationships, like any other physical or juristic person being capable of exercising civil rights. ... To desire that such contractual relationships be governed by the law of nations, is to confound different causes and ideas, and to push a just principle to the most absurd

[17] See Higgins, *supra,* n. 6, p. 79; Sinclair, *supra,* n. 2, pp. 122-34, for the review of the jurisprudence of selected States.

[18] *I Congreso del Partido*, *supra,* n. 16, p. 1070.

[19] See generally 6 Whiteman, *Digest of International Law*, pp. 553 *et seq. Cf.* Allen, *supra,* n. 12, p. 301; Henkin, Pugh, Schachter, Smit, *supra,* n. 6, pp. 1127-8; Sinclair, *supra,* n. 2, p. 147; 1 Oppenheim (9th), pp. 357-60.

[20] Allen, *supra,* n. 12, p. 301.

> conclusion. ... Therefore, it is not at all to be feared that the State should, solely because it is a foreign [State] be offended by the exercise of jurisdiction assigned to define its civil relations when the national State subjects itself thereto without the danger of offense to its sovereignty.[21]

In broadly similar lines, the Belgian Court of Cassation declared in 1903:

> Attendu que la souveraineté n'est engagée que par les actes de la vie politique de l'Etat; ...
>
> Mais attendu que l'Etat ne doit pas se confiner dans son rôle politique; qu'en vue du besoin de la collectivité, il peut acquérir et posséder des biens, contracter, devenir créancier et débiteur; qu'il peut même faire le commerce, se réserver des monopoles ou la direction de services d'utilité générale;
>
> Que, dans la gestion de ce domaine ou de ces services, l'Etat ne met pas en oeuvre la puissance publique, mais fait ce que des particuliers peuvent faire, et partant, n'agit que comme personne civile ou privée; ...
>
> Que pour ces Etats, comme pour l'Etat belge, la souveraineté n'est pas en jeu, quand ils sont en cause, non pas comme pouvoir, mais uniquement pour l'exercice ou la défense d'un droit privé;....[22]

With the doctrines of *absolute* and *relative immunity* now ensconced in the practice of States and employed to circumscribe the extent of the proper exercise of municipal jurisdiction, a formula had to be worked out as to when either of these doctrines could be made applicable to State activities and transactions at issue in particular cases. State activities that attracted entitlement to absolute immunity were designated *acta jure imperii* and those that did not were designated *acta jure gestionis*, and accordingly the attempt was made to define the bases for deciding to exercise or to decline the exercise of jurisdiction in due cases.

By means of this approach, which some consider pragmatic and functional[23] but others view as contradictory,[24] State activities that are deemed to be carried out in the execution of public policy and responsibility would come within the category of *jure imperii*, while those considered to be commercial and other types of private acts would fall under

[21] (*Typaldos, Consolé di Gregia* c. *Manicomio di Aversa*), Harvard Draft Imm., *supra,* n. 1, pp. 623-5.
[22] (*Société anonyme des chemins de fer Liégeois-Luxembourgeois* c. *Etat néerlandais*), *ibid.,* pp. 613.
[23] Henkin, Pugh, Schachter, Smit, *supra,* n. 6, p. 1127.
[24] Brownlie, *supra,* n. 4, p. 26.

the *jure gestionis* category. *Acta jure imperii* would then entail immunity from the exercise of foreign jurisdiction, but *acta jure gestionis* would not. Some have considered such a manner of distinguishing of State activities to be incorrect,[25] but the classification has not been abandoned. The sufficiency of a mere plea of status whenever States were impleaded thus gave way to the legitimacy of the exercise of foreign jurisdiction in regard to those types of State activities that were disrobed of immunity.

Different municipal jurisdictions, however, proceeded to appraise differently similar State activities and transactions, producing certain amusing inconsistencies in the *acta jure imperii* or *acta jure gestionis* classification of those matters.[26]

It might well have appeared feasible to distinguish and categorize State activities under the titles *acta jure imperii* and *acta jure gestionis*; but the basis for making such a distinction did not prove to be satisfactorily tractable.[27] The *purpose* for which a State engaged itself in an activity was previously made the criterion for categorizing the particular activity. But that criterion was found to be inapt in face of State activities or transactions that more and more were felt to be outside the scope of *acta jure imperii*; the *nature* of those activities or transactions then came to be accepted as the preferable criterion for their categorization. As an instance of this development, reference may be made to the judgment in the *Claim Against the Empire of Iran Case*, where, after reviewing the practice of different jurisdictions, some treaty provisions, codification efforts, and the views of authorities, the Constitutional Court of the Federal Republic of Germany held:

> The distinction between sovereign and non-sovereign State activities cannot be drawn according to the purpose of the State transaction and whether it

[25] Eg, Fitzmaurice, *supra,* n. 15, p. 124; H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *BYIL*, 1951, p. 224. See also W.T.R. Fox, "Competence of Courts in Regard to 'Non-Sovereign' Acts of Foreign States", 35 *AJIL*, 1941, pp. 634 *et seq.* for criticism of the different types of distinction.

[26] Eg: "The purchase of shoes for the army, held to be a private act by Italian courts,...was held to be the exercise of 'the highest sovereign function of protecting itself against its enemies,' in the United States,...while in France, the courts refused to assume jurisdiction over a similar contract... . Whereas the operation of a merchant shipping line is one of the clearest instances of a 'private' act for the courts recognizing such a possibility, [a South African judge held that] 'any use of a vessel for the purpose of obtaining revenue for the state is a public purpose just as its use for the protection of the state is public'." — Allen, *supra,* n. 12, p. 42. See also Lalive, *supra,* n. 1. p. 256; Lewis, *supra,* n. 2, p. 123.

[27] The divided opinion of the UK House of Lords in the characterization of the nature of the measures taken by a Cuban State enterprise in respect of the cargo on the ship Marble Islands in *I Congreso* case is a striking example: *Supra,* n. 16, pp. 1077, 1080, 1082, 1083.

> stands in a recognizable relation to the sovereign duties of the State. For, ultimately, activities of State, if not wholly then to the widest degree, serve sovereign purposes and duties, and stand in a still recognizable relationship to them. ...
>
> As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity.[28]

It has been maintained that the difficulty of drawing the borderline between sovereign and non-sovereign State activities[29] should be no cause for abandoning the distinction, and that reliance on the nature of the activities can help bring forth a workable test that will go far to obviating the inconsistencies manifested in the application of the distinction.[30]

Despite the reservations some States still have about accepting the doctrine of restrictive immunity,[31] it appears that contemporary international law "does not require the courts of one state to afford absolute immunity from jurisdiction to a foreign state or government".[32]

Besides the contribution of courts, the development of sovereign immunity from a doctrine that principally related to the personal sovereign, who for all practical purposes was, as noted earlier, the embodiment of his State, to one that related to the State, which now embraced its head and other organs, owes much to international agreements, national legislations, and the studies of institutions of jurists.

[28] 45 *ILR*, p. 80. See also Art. I(C)(2), *Revised Draft Articles for a Convention on State Immunity*, 66 *ILA* Conference, 1994, where it is provided that "the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose".

[29] Lalive, eg, maintains that "[l]es distinctions entre les actes de l'Etat sont empiriques et souvent arbitraires. Tout d'abord ceux qui parlent d'une double personnalité de l'Etat, — comme si celui-ci était un Janus, dont une face serait tournée vers les fonctions dites 'publiques' et l'autre face orientée vers les activités privées — font de la poésie et non du droit. Quant à la distinction fondée sur les actes eux-mêmes (nature, comme le proposait le juge Weiss, ou finalité de l'acte), elle se révèle insuffisante dans un certain nombre de cas." — *Supra*, n. 1, pp. 282-3.

[30] See *Claim Against the Empire of Iran*, *supra*, n. 28, p. 79; Lewis, *supra*, n. 2, p. 124. *Cf.* Brownlie, *supra*, n. 4, *loc cit*; Panhuys, *supra*, n. 1, p. 1210.

[31] See, eg, Higgins, *supra*, n. 6, p. 81; Watts, *supra*, n. 2, p. 61, where it is indicated that the "denial of immunity to States for their acts *jure gestionis* is at the moment no more than a strong trend, and is not yet universal or probably even general State practice, and accordingly may not yet be a rule of customary international law".

[32] *Ibid.*, p. 82. *Cf. Claim Against the Empire of Iran*, *supra*, n. 28, p. 61.

1.2 Materials Relating to State Immunity

We shall briefly survey under this section certain principal materials that relate to State immunity.

1.2.1 International Conventions

The growing incidents of liabilities for damage, injury, and other causes incurred by public ships while outside their State territory, impelled most of the concerned States to work out uniform rules for regulating questions of immunity pertaining to those ships. As a result, the *International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels* and its Protocol were signed at Brussels on 10 April 1926 and on 24 May 1934 respectively.[33] The Convention seeks to subject State-owned or State-operated vessels to the same rules of liability that apply to private vessels in respect of claims relating to the operation of vessels or the carriage of cargoes, and to exempt public ships used "exclusively on Governmental and non-commercial service" from the exercise of foreign, but not domestic, jurisdiction.[34] Convention-based claims that arise against public ships and that do not meet the test of exclusivity of assignment could, therefore, be lodged with a competent foreign jurisdiction. On the other hand, claims against public ships entitled to immunity, could be lodged with a competent authority of the State concerned.

Despite the limited number of its adherents, the Convention is credited to have served as a model for bilateral treaties that pursued similar objectives,[35] and to have consequently helped enlarge the number of States obligated to observe the qualified terms of immunity of public ships. Nonetheless, it might have been difficult at times to decide whether or not a vessel was employed in commercial activities.[36]

Still on the multilateral agreements level, reference may be made to the *European Convention on State Immunity* signed at Basle on 16 May 1972 and in force since 11 June 1976.[37] The Convention enumerates in Arts. 1 to 14 the instances where the Contracting States do not enjoy immunity from each other's jurisdiction, and establishes in Art. 15 the

[33] 176 *LNTS*, pp. 199, 214.
[34] *Ibid.*, Arts. 1, 2, 3.
[35] G.C.R. Iglesias, "State Ships", 11 *EPIL*, 1989, p. 322.
[36] 1 Oppenheim (9th), p. 1172.
[37] Nr. 74, *ETS*, 1972, p. 29 and The Council of Europe's Chart of Signatures and Ratifications .

residual State immunity.[38] In order to give the materials to be mentioned later a comparative perspective, it will be helpful to specify at this stage the various instances in the Convention that obviate the Contracting States' immunity from the jurisdiction of the forum State. Those instances may be indicated in the following general terms: Submission to jurisdiction arising from counterclaims, interventions and other steps taken in proceedings; existence of a proper obligation to submit to jurisdiction; proceedings relating to obligations falling due in the State of the forum; cases concerning contracts of employment with individuals not coming within the exceptions of Art. 5(2) for works to be performed on the territory of the State of the forum; cases concerning the relationship between a Contracting State and organizations with registered offices in the State of the forum; cases concerning industrial, commercial or financial activities carried out on the territory of the State of the forum by a Contracting State's organizations; cases concerning patents and related rights governed by the law of the State of the forum; cases relating to immovable property and to rights arising by way of succession, gift or *bona vacantia*; cases relating to injury or damage brought about on the territory of the State of the forum; cases relating to arbitration where the law of the State of the forum is applicable.

A Contracting State, according to Art. 27(1), does not include "any legal entity...which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions". But the entity, according to Art. 27(2), enjoys immunity "in respect of acts performed by [it] in the exercise of sovereign authority (*acta jure imperii*)". The explanatory report of the Convention describes entities to "be, inter alia, political subdivisions...or State agencies, such as national banks or railway administrations".[39] As recited in its preamble, the Convention has taken into account the tendency in international law of restricting the scope of State immunity. The Convention has itself contributed to the widening of the scope of that restriction.

1.2.2 National Legislation

On the level of selected national legislation, reference in a chronological order may first be made to the United States *Foreign Sovereign Immun-*

[38] See the explanation of these Articles in M.-O. Wiederkehr, "La convention européenne sur l'immunité des États du 16 mai 1972", 20 *AFDI*, 1974, pp. 928-35.

[39] Explanatory reports on the European convention on state immunity and the additional protocol, 1985, p. 37.

ities Act of 1976,[40] which came closely after the European Convention on State Immunity. In Section 1603, the US Act defines a foreign State to include "a political subdivision...or an agency or instrumentality" thereof, and further defines "agency or instrumentality" to mean any entity which, inter alia, "is an organ of a foreign state...".[41] Section 1604 affirms the rule of jurisdictional immunity of foreign States "subject to existing international agreements to which the United Sates is a party..." and to the exceptions provided in sections 1605 to 1607.[42] The exceptions in these sections are essentially similar to those in the European Convention on State Immunity with which they correspond materially. In other respects, it may be of interest to note that particular mention is made of cases that relate to "rights in property taken in violation of international law",[43] and of suits in admiralty.[44]

The US Act codifies rules regarding the restrictive principle of sovereign immunity which was adopted by the Department of State and communicated in 1952 in the famous Tate Letter.[45] Under the Act, determination of sovereign immunity, which previously was exercised by the Department of State, became the function of the judiciary:[46] Courts are likely to assess particular facts and situations differently. They are, nevertheless, functionally better equipped than the Department of State to show, in the long run, more consistence in their determinations of sovereign immunity, and hence to contribute more markedly to the development of the law in question.

The *State Immunity Act 1978*[47] of the United Kingdom affirms in Section 1 the general rule of the jurisdictional immunity subject to the exceptions provided in the Act. The exceptions formulated in Sections 2 to 9 are essentially similar to the corresponding exceptions in the European Convention on State Immunity. As in the US Act, under the terms of Section 10, suits in admiralty are brought within the exceptions. Value added taxes and other charges too are excepted under Section 11. Section 14 provides, inter alia, that "references to a State include references

[40] 15 *ILM*, 1976, p. 1388.
[41] *Cf.* Congressional Committee Report on the Jurisdiction of United States Courts in Suits Against Foreign States, 15 *ILM*, 1976, p. 1406.
[42] See *ibid.* p. 1407.
[43] Section 1605(a)(3).
[44] Section 1605(b).
[45] 26 *DSB*, 1952, p. 984.
[46] See *ibid.* pp. 1401-2.
[47] 17 *ILM*, 1978, p. 1123. The South African Foreign States Immunities Act bears similarities to the British Act. See W. Bray and M. Beuker, "Recent Trends in the Development of State Immunity in South African Law", 7 *SAYIL*, 1981, p. 35.

to...the sovereign or other head of that State in his public capacity"; and that a separate entity is immune if "the proceedings relate to anything done by it in the exercise of sovereign authority". Under the terms of Section 20(1)(a), a sovereign or other head of State is, "[s]ubject...to any necessary modification", covered by the law regulating diplomatic privileges and immunities.

The particular reference to sovereign or head of State as included within the term "State" is of interest as an indication of the development of the concept of jurisdictional immunity from that which, in a strict sense, was properly sovereign immunity, to that which is properly State immunity. But as indicated earlier, and as could be observed from the title of the United States Act referred to before, different characterizations of immunity would appear to bear only on terminological preferences.[48]

The Canadian *State Immunity Act*[49] establishes in Section 3 the general rule of jurisdictional immunity subject to the exceptions specified in the Act. Section 2 defines foreign State as including "any sovereign or other head of the foreign state...while acting as such in a public capacity". The exceptions are enumerated in Sections 4 to 8; and they are essentially similar to the corresponding exceptions in the European Convention on State Immunity.

The Australian *Foreign States Immunities Act 1985*[50] establishes in Section 9 the general rule of immunity from jurisdiction subject to specified exceptions. Under the terms of Section 3(3)(b), reference to foreign State includes the head of State. The exceptions are enumerated in Sections 10 to 21, and they are in line with similar provisions of the European Convention on State Immunity.

1.2.3 Works of Institutions of Jurists

Passing on to the contributions of institutions of jurists, brief mention may be made in line with the foregoing paragraphs to the works of the Harvard Law School,[51] the International Law Commission,[52] The Institute of International Law,[53] and the International Law Association.[54]

[48] *Supra,* p. 18.
[49] 21 *ILM,* 1982, p. 798.
[50] 25 *ibid.,* 1986, p. 715.
[51] *Supra,* n. 1, pp. 455 *et seq.*
[52] ILC's Draft Articles, *supra,* n. 4, pp. 12 *et seq.*
[53] *Resolution, AIDI,* Vol. 64-II, 1992, pp. 389 *et seq.*
[54] (ILA) *Report of the Sixty-Sixth Conference,* 1994, pp. 21 *et seq.*

The Harvard Draft includes the government of a State and the head of State within the term "State",[55] and the exceptions to immunity that it enumerates in Articles 8 to 13 appear to have helped advance and consolidate the type and substance of similar provisions in later legislative efforts.[56]

The Institute of International Law had entitled its Resolution of 1891 as *Projet de règlement international sur la compétence des tribunaux dans les procès contre les États, souverains ou chefs d'État étrangers.*[57] Art. III of the Resolution put sovereigns or heads of State on par with States as regards their immunity and the limited exceptions indicated in Art. II.[58] In its Resolution of 1991,[59] the Institute opted for making no presumption of priority as between the competence and incompetence of municipal jurisdictions in regard to the immunity of foreign States, and adopted instead criteria for the determination of the existence or otherwise of the competence in issue.[60] Even though the Resolution departed from the general practice of stating the rule of jurisdictional immunity and enumerating its exceptions, the criteria formulated to indicate the competence of the relevant organs of the State of the forum would generally appear to correspond to the exceptions found in other instruments. In different respects, and in view of the stage of development of the law of sovereign immunity, it is noteworthy that the Institute deemed it necessary to specifically incorporate the principle of good faith, which it did in Art. 6 of its Resolution.

The International Law Commission brought to fruition its extensive studies on jurisdictional immunities by the adoption of its *Draft Articles on Jurisdictional Immunities of States and Their Property*; [61] and, as acknowledged in the commentary on its Art.1,[62] the Commission thereby sought to formulate rules of international law on that topic. Along a line similar to that in the foregoing instances, the Commission's Art. 5 declares that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles". The commentary on the Article indicates it to be a compromise formula that states a basic principle of immun-

[55] *Supra,* n. 1, Art. 1(a).
[56] *Cf. supra,* p. 26, the exceptions provided for in the European Convention on State Immunity.
[57] II *AIDI,* édition nouvelle abrégée, 1928, pp. 1215 *et seq.*
[58] *Cf. supra,* p. 17.
[59] *Supra,* n. 53.
[60] *Ibid.,* Art. 2.
[61] *Supra,* n. 4, pp. 13 *et seq.*
[62] *Ibid., Commentary,* para. (1).

ity and its exceptions.[63] And the exceptions that figure in the Draft are essentially of the same nature as the corresponding ones in the European Convention on State Immunity.

The International Law Association's studies of State immunity resulted in 1994 in the *Revised Draft Articles for a Convention on State Immunity.*[64] In drafting those Articles, the Association had taken into consideration the works done by, among others, the International Law Commission and the Institute of International Law.[65] Being the latest in time among the materials referred to thus far, it may be of interest to mention the parts of the Revised Draft that relate to the principal points raised above. Art. I defines a foreign State as including the government, other State organs, and State agencies and instrumentalities that do not possess "legal personality distinct from the State". Art. II establishes the principle of a foreign State's immunity "from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority". Concisely put, the exceptions to immunity enumerated in Art. III comprise express and implied waiver, and a cause of action that relates to a commercial activity, a contract of employment as defined in the Article, an immovable property and other property interests in the forum State, patents and allied rights in the forum State, death or personal injury or damage to or loss of property as defined in the Article, and rights in property that under the terms of the Article are taken in violation of international law. The general similarities of these provisions to those of the European Convention on State Immunity are apparent.

It may be summed up in short that generally State/sovereign immunity is considered residual: Nearly all the materials referred to above lay down first the general rule of the entitlement of States and their different organs to immunity from the exercise of foreign jurisdiction for acts done in the exercise of sovereign authority—*jure imperii.*[66] To this general rule, they provide variously phrased and detailed exceptions that are taken not to relate to the proper exercise of sovereign authority.[67] This subject-matter (*ratione materiae*) delineation of jurisdictional immunity does not, however, affect the privileges and immunities due *ratione*

[63] See *ibid.*, p. 23 , para. (3) of the commentary on the Art.
[64] *Supra,* n. 54.
[65] *Ibid.*, p. 22.
[66] *Cf.* Lalive, *supra,* n. 1, pp. 285 *et seq.*, where the order would be reversed and jurisdictional immunity granted in cases of certain specified acts of public authority.
[67] *Cf.* Mann, *supra,* n. 6, p. 325, where, in regard to the UK Act, it is maintained that "the denial of immunity is so far-reaching that...the rules about proving exceptions should not be applicable".

personae to heads of State and to others protected under the diplomatic umbrella.[68] The immunity *ratione personae* would be coterminous with status.

1.3 The Act of State Doctrine

The act of State doctrine has occasioned a confused case law;[69] but it appears to have acquired an independent existence.

The doctrine's "original logical basis"[70] is deemed to be the principle of sovereign immunity. Sovereign immunity and act of State are allied in the effect they produce, and they overlap in certain situations. Both furnish valid grounds for the exclusion of, or abstention from, the exercise of foreign municipal jurisdiction over certain matters. In the case of sovereign immunity, the exclusion of foreign jurisdiction is based on the privileged status of the State, its organs, and other agents, or in due instance, on the ground of *acta jure imperii*. In the case of act of State, as implemented in particular by the US courts, the abstention from the exercise of jurisdiction would essentially be based on the acknowledgement of the subject matter in issue to be inappropriate for foreign consideration.[71] Where foreign States or their agents are defendants in a case concerning matters—acts of State—that entitle them to sovereign immunity, the two doctrines would overlap even though the exclusion of jurisdiction is effected on the ground of immunity alone. Where, however, the defendants in suits related to acts of State lack the status necessary for pleading sovereign immunity, the defence of act of State, normally

[68] See, eg, the Commentary on the ILC Draft Art. 3, "Privileges and Immunities not affected by the present articles", *supra,* n. 4, pp. 21-2.

[69] See, eg, A.-M. Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine", 92 *CLR*, 1992, p. 1928.

[70] M. Akehurst, "Jurisdiction in International Law", 46 *BYIL*, 1972-73, p. 245. In *Kirkpatrick* v. *Environmental Tectonics Corporation*, the US Supreme Court held that the "doctrine...merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid". — 29 *ILM*, 1990, p. 189. See also, eg,. Burley, *supra,* n. 69, p. 1928, n. 50. *Cf. First National City Bank,* v. *Banco Nacional de Cuba*, 11 *ILM*, 1972, p. 812, where the doctrines of act of State and sovereign immunity are said to have derived from *The Schooner Exchange* v. *M'Faddon*; Damiani, *supra,* n. 1, pp. 361-2.

[71] See, eg, *International Association of Machinists* v. *OPEC*, 4 *AILC* (2nd), p. 95, where, according to the US jurisprudence, "it is a prudential doctrine designed to avoid judicial action in sensitive areas". See, further, *DeRoburt* v. *Gannett*, 3 *AILC* (2nd), pp. 595-6.

resorted to in expropriation cases, would usually stand them in good stead.[72]

The act of State doctrine as such is prevalent in common law jurisdictions; it has been accorded certain qualifications in the US,[73] where, as stated in a case, the Supreme "Court's description of the jurisprudential foundation for...[the] doctrine has undergone some evolution over the years".[74] In civil law jurisdictions, on the other hand, it is principles of conflict of laws that generally appear to be resorted to in situations approximating the concept of act of State.[75]

The US act of State doctrine is said to be "related in spirit to the rules of international law that accord to foreign sovereigns large immunity from adjudication in domestic courts".[76] The doctrine received its classic judicial formulation in *Underhill* v. *Hernandes* where the US Supreme Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.[77]

In its judgment in *Banco Nacional de Cuba* v. *Sabbatino*,[78] the US Supreme Court gave clarifications[79] regarding the basis and ambit of the

[72] See, eg, *DeRoburt* v. *Garnett*, *supra,* n. 71, loc. cit.; *Luther* v. *Sagor*, 2 *BILC*, 1965, pp. 97 *et seq.*, where the English Court of Appeal did not wish to disturb title to goods covered by an act of State; P. Herzog, "La théorie de l'Act of State dans le droit des Etats-Unis", 71 *RCDIP*, 1982, pp. 637-8.

[73] The "doctrine may be known differently in other states". — 1 Oppenheim (9th), p. 368.

[74] *Kirkpatrick* v. *Environmental Tectonics Corporation, supra,* n. 70, p. 187.

[75] See, eg , J.-P. Fonteyne, "Acts of State", 10 *EPIL*, 1987, pp. 2-3. *Cf.* Akehurst, *supra,* n. 70, pp. 247-9.

[76] *Restatement (Third)*, *supra,* n. 7, § 443, Comment a. and Reporters' Notes, 10. *Cf.* M. Singer, "The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice", 75 *AJIL*, 1981, p. 296; P. Weil, "Le contrôle par les tribunaux nationaux de la licéité internationale des actes des États étrangers", 23 *AFDI*, 1977, pp. 17-8.

[77] 7 *AILC*, p. 195. The phraseology is said to have been borrowed from the English case of *Duke of Brunswick* v. *King of Hanover*. — Singer, *supra,* n. 76, p. 291.

[78] 7 *AILC*, p. 243.

[79] The Court indicated: "We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill*... While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence." — *Ibid.,* p. 264. See, further, *Republic of the Philippines* v. *Marcos*, 18 *AILC* (2nd), (9th Cir. en banc), pp. 129-30.

The *Sabbatino* judgment has been appraised to have transformed the act of State doctrine "from a conflicts rule, directing a court to apply a foreign law under specified conditions, to a doctrine of judicial restraint or abstention, requiring a court confronting a foreign act of state to refrain from adjudicating the validity of the act". — Burley, *supra,* n. 69, pp. 1935-6.

doctrine thus formulated. The Court held:

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.[80] ...
>
> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[81]

The consecration of the act of State doctrine in the terms of the *Sabbatino* judgment, however, raised the demand for a secured access to judicial remedies in expropriation cases, and occasioned what is known as the Second Hickenlooper Amendment. The Amendment provides, inter alia, that

> no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state...based upon...a confiscation or other taking ...by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection:...[82]

It is clarified in the Senate Foreign Relations Committee's Report that the amendment is intended

> to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.[83]

In *First National City Bank* v. *Banco Nacional de Cuba*[84] and *Alfred Dunhill* v. *The Republic of Cuba*,[85] the Supreme Court further reappraised the act of State doctrine and arrived at varied conclusions. *First*

[80] *Sabbatino, supra,* n. 78, p. 266.
[81] *Ibid.,* p. 271. *Cf.* the remarks of Herzog, *supra,* n. 72, pp. 624-6.
[82] 3 *ILM*, 1964, p. 1075.
[83] Quoted in Henkin, Pugh, Schachter, Smit, *supra,* n. 6, p. 193.
[84] *Supra,* n. 70.
[85] 24 *AILC*, p. 214.

National City Bank concerned a claim by Banco Nacional de Cuba for some $1.8 million and a counterclaim and setoff by City Bank for damages related to property expropriated in Cuba. Three Justices viewed the Court's precedents that established the act of State doctrine as justifying "its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government".[86] And having noted that "the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy",[87] the Court held the doctrine inapplicable to the circumstances of the case.

In *Dunhill* the Supreme Court grappled with the issue of whether Cuba's failure to return funds mistakenly paid by Alfred Dunhill for cigars sold by expropriated Cuban cigar businesses was an act of State. Four Justices were of the opinion that "the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity'".[88] They accordingly declined "to extend the act of state doctrine to acts committed by foreign sovereigns in the course of their purely commercial operations".[89]

The dissent by four Justices stated that there was an act of State where a sovereign power was exercised "either to act or to refrain from acting",[90] that the adoption of the restrictive theory of sovereign immunity did not necessarily mean "that there should be a commercial act exception to the act of state doctrine",[91] and concluded:

[86] *Supra,* n. 70, p. 814.

[87] *Ibid.,* p. 815. The dissenting Justices were, however, of the opinion that the case involved a political question, and that the "Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim. ... the reasoning of [*Sabbatino*] is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative." — P. 828. They also maintained: "It cannot be argued that by seeking relief in our courts on a claim that does not involve any act of state, respondent has waived the protection of the act of state doctrine in defense to petitioner's counterclaims." — P. 830.

[88] *Supra,* n. 85, p. 226.

[89] *Ibid.*

[90] *Ibid.,* p. 234. See *Restatement (Third), supra,* n. 7, § 443, Comment i., where it is explained: "The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts, such as occupation of an estate by the state's armed forces in application of state policy. An official pronouncement by a foreign government describing a certain act as governmental is ordinarily conclusive evidence of its official character."

[91] *Supra,* n. 85, p. 237.

> An affirmative judgment for the excess of a counterclaim over a foreign state's principal claim is indistinguishable in any important respect from an ordinary affirmative judgment.[92]

These judgments of the US Supreme Court bear witness to the intractability of the act of State doctrine[93] there where it is credited to have received its special and important development.[94]

In the United Kingdom, the act of State doctrine is described as "one of English municipal law...[which] denies an English court jurisdiction to inquire into the consequences of acts of the British Government which are inseparable from the extension of its sovereignty".[95] Although the doctrine is generally considered not to constitute a valid defence against British subjects, it has nonetheless been held to be outside "the jurisdiction and control of the English courts, even in proceedings brought by a British subject" where annexation of foreign territory resulting from the Crown's exercise of royal prerogative is in issue.[96] Regarding suits that relate to acts of foreign States, on the other hand, English courts have been described as assuming or declining jurisdiction on an *ad hoc* basis.[97]

In civil law jurisdictions, as Austria, Belgium, France, and The Netherlands, the act of State doctrine is applied but effect is generally denied to expropriation that is contrary to public policy; in certain of these jurisdictions, the doctrine is considered to be required by public international law, but not in others. Italian, German, and Swiss courts, too, deny effect to expropriation that is contrary to public policy.[98]

A doctrine bearing affinity with the act of State doctrine, but allotted a status of its own, is that of non-justiciability.[99] The act of State doctrine, which has been variously described as "developed by the Court on its

[92] *Ibid.*, p. 242. See Sinclair, *supra,* n. 2, p. 199, where the position of the dissenting Justices regarding the essential distinction between the doctrine of the act of State and that of sovereign immunity is deemed to merit a particular attention.

[93] See, eg, Herzog, *supra,* n. 72, pp. 624-32.

[94] See, eg, Weil, *supra,* n. 76, pp. 33-4.

[95] D.P. O'Connell, 1 *State Succession in Municipal Law and International Law*, 1967, p. 253.

[96] 1 Oppenheim (9th), p. 368, n. 15.

[97] Lewis, *supra,* n. 2, p. 4. *Cf.* Higgins, *supra,* n. 6, pp. 212-3, 217.

[98] See Akehurst, *supra,* n. 70, pp. 247-9. The act of State doctrine referred to here would be different from that applied in the US, where, as formulated in the *Restatement (Third), supra,* n. 7, § 443, constitutes the "taking by a foreign state of property *within its own territory*, or...other acts of a governmental character...*within its own territory and applicable there*". (Emphasis added) *Cf.* Fonteyne, *supra,* n. 75, p. 3.

[99] The term non-justiciability is considered as a "broadly equivalent language" to act of State. — Watts, *supra,* n. 2, p. 59.

own authority, as a principle of judicial restraint, essentially to avoid disrespect for foreign states",[100] has not definitely been classified as a rule of public or private international law.[101] The doctrine of non-justiciability, on the other hand, which has been described as concerned with "the *essential competence* of municipal courts"[102] has been grounded on the international law principle of non-intervention.[103] From the perspective of international law, the doctrine could in principle aptly preclude the exercise of domestic jurisdiction in due cases. But since the application of domestic law is normally responsive to varying domestic circumstances, and there is no guarantee that pertinent principles of international law would not be disregarded, the doctrine of non-justiciability might not, in effect, fare any better in the domestic context than the doctrine of act of State.

1.4 Head of State Immunity

It may be reiterated first that the term sovereign immunity attached properly to the personal sovereign—the head of State—during the era when his/her pretensions in the spirit of "l'Etat, c'est moi" were acknowledged.[104] As has been observed during the survey of the materials relating to State immunity, the present use of the term sovereign immunity is not confined to the immunity of the head of State: The term State is now generally taken to include the head of State, and the State's entitlement to immunity is extended to the status and official acts of its variously designated organs. It is then as the principal organ of his State that the head of State benefits from that immunity.[105] In this regard, it has been held by a US court that the "head-of-state immunity is primarily an attribute of state sovereignty, not an individual right".[106]

The head of State is also acknowledged to benefit from immunity *ratione personae*. Art. 7(5) of the Resolution of The Institute of International Law and Art. 3(2) of the ILC Draft, for instance, reserve the

[100] *Restatement (Third)*, *supra,* n. 7, § 443, Comment a.
[101] See, eg, 1 Oppenheim (9th), p. 369.
[102] *AIDI*, Vol. 62-I, 1987, p. 18. See also Art. 7(3) of the *Resolution*, *ibid.,* Vol. 64-II, 1992, p.401.
[103] *Ibid.,* Vol. 62-I, p. 18.
[104] See, eg, Watts, *supra,* n. 2, p. 24 , and re *jus repraesentationis omnimodae* as issuing from international law, p. 32.
[105] See, eg, the Harvard Draft Imm., *supra,* n. 1, p. 476; ILC Draft, *supra,* n. 4, p. 15 (8).
[106] *In Re Grand Jury Proceedings*, *Doe #700*, 10 *AILC* (2nd), p. 401.

privileges and immunities[107] accorded to heads of State.[108] The ILC explains that "[t]he reservation...refers exclusively to the private acts or personal immunities and privileges recognized and accorded in the practice of States, without any suggestion that their status should in any way be affected...The existing customary law is left untouched".[109]

The immunity *ratione personae* of heads of State, as that of other entitled officials mentioned above, would be coterminous with the duration

[107] Some seek to distinguish between privileges and immunities by assigning courtesy as the basis of the former and international law as the basis of the latter. See Arts. 34 and 36, Vienna Convention on Diplomatic Relations, 500 *UNTS*, p. 95; Daillier & Pellet, *supra,* n. 13, pp. 717-8; F. Przetacznik, *Protection of Officials of Foreign States according to International Law*, 1983, p. 10. The two words are, however, generally employed as one term.

[108] *Supra,* n. 53, and n. 4, respectively.

[109] *Supra,* n. 4, p. 22 (6). In regard to criminal proceedings, it is maintained that while the immunity of a head of State is absolute "at least as regards the ordinary domestic criminal law of other States, [it] has to be qualified in respect of certain international crimes, such as war crimes". — Watts, *supra,* n. 2, p. 54.

The UK Queen's Bench Division held in its judgment of 28 October 1998 in the *Pinochet* case (http://tap.ccta.gov.uk/courtser/judgments.nsf) that he was "charged not with personally torturing or murdering victims or causing their disappearance, but with using the power of the state of which he was head to that end."– (P. 14, para. 58). "[A] former head of state is clearly entitled to immunity in relation to criminal acts performed in the course of exercising public functions. One cannot therefore hold that any deviation from good democratic practice is outside the pale of immunity. If the former sovereign is immune from process in respect of some crimes, where does one draw the line?"– (P. 16, para. 63).

On appeal to the House of Lords, Lord Steyn, on the side of the majority, replied regarding the personal criminal responsibility of Pinochet: "The essential fragility of the claim to immunity is underlined by the insistence on behalf of General Pinochet that it is not alleged that he 'personally' committed any of the crimes. That means that he did not commit the crimes by his own hand. It is apparently conceded that if he personally tortured victims the position would be different. This distinction flies in the face of an elementary principle of law, shared by all civilized legal systems, that there is no distinction to be drawn between the man who strikes, and a man who orders another to strike." – (http://www.parliament...t/jd981125/pino09.htm , p. 6). Regarding the concern of the Queen's Bench as to where the line would be drawn, Lord Nicholls, on the side of the majority, replied: "[I]t hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognizes, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."— (*Ibid.,* / pino08, p. 6). The judgment acknowledged Pinochet's right to jurisdictional immunity had he still been a head of State. Although the judgment was set aside and replaced by the judgment of 24 March 1999 [www.parliament.the-stationery-off.../pa/ld199899/ldjudgmt/jd990324/], the crux of the quoted opinions was not disturbed.

of their office.[110] In this respect, it has been observed, for instance, by Sucharitkul that

> [s]overeigns and ambassadors are immune from suit on the ground that their personal liberties upon which the effective performance of their official functions depends will be impaired if they may be compelled to answer a

The judgment of 24 March denied Pinochet immunity only for an alleged act of torture and conspiracy to commit torture. The judgment clearly recognized the existence of a demarcation line between official acts that either enjoyed immunity or did not. Lord Browne-Wilkinson, for instance, indicated the jus cogens nature of the crime of torture and the universal jurisdiction that it brought forth and stated: "[I]f, as alleged, Senator Pinochet organised and authorised torture after 8 December 1988 [date of UK's ratification of the Torture Convention], he was not acting in any capacity which gives rise to immunity ratione materiae because such actions were contrary to international law, Chile had agreed to outlaw such conduct and Chile had agreed with the other parties to the Torture Convention that all signatory states should have jurisdiction to try official torture (as defined in the Convention) even if such torture were committed in Chile."—(*Ibid.*, /pino2, p. 6). Similarly, Lord Hope indicated that "once the machinery which [the Torture Convention] provides was put in place to enable jurisdiction over such crimes to be exercised in the courts of a foreign state, it was no longer open to any state which was a signatory to the Convention to invoke the immunity ratione materiae in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials or any other person acting in an official capacity".—(*Ibid.*, /pino5, p. 3).

The House of Lords' judgment of 24 March was, apparently due to the type of issues argued, narrower in the scope of its denial of immunity. Issues such as double criminality argued during the rehearing of the appeal and construed to relate to conduct that was "criminal under English law at the conduct date and not at the request [for extradition]date" (Browne-Wilkinson, *ibid.*, /pino1, p. 8), persuaded the Lords to restrict the scope of the denial of immunity to the alleged acts of torture and conspiracy to commit torture. The judgment stands nonetheless as an affirmation that State immunity ratione materiae is not absolute in character. It thus saves the concept of head of State immunity from an undue formalistic construction and from serving as a shield for those who use their positions to flout norms of human rights that the present world community has accepted as binding *erga omnes*.

But it should be noted that apart from the narrow base on which it has been made to stand the denial of immunity has not been asserted with a safe margin: Altogether six judges—three from the House of Lords and three from the Queen's Bench—did not share the same opinion. And it has been indicated that "even in the field of such high crimes as have achieved the status of jus cogens under customary international law there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts." (Lord Hope, *ibid.*, /pino4a, p. 9). Still, the House of Lords judgment is bound to have some impact on the future fate of the scope of head of State immunity in domestic and international jurisdictions.

[110] See, eg, *YILC*, 1985, Vol. II (Part One), p. 45 (124); the *Pinochet* case, where Lord Millett has succinctly stated in his speech that "[i]mmunity ratione personae is a status immunity. An individual who enjoys its protection does so because of his official status. It enures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national court of foreign states."—*Supra,* n. 109, /pino7 , p. 4.

suit before the local courts. With the termination of public functions ends the *raison d'être* for according immunities.[111]

It may be observed generally that head of State immunity *ratione personae* might involve a distinction between his public and private acts, and immunity *ratione materiae* would involve a distinction between *acta jure imperii* and *acta jure gestionis* or between other corresponding criteria.[112]

In closing this chapter, it may be indicated that the world community now appears to take sovereign or State immunity, when such is properly applicable, as the rule to which certain States attach exceptions that vary in substance and formulation. Those exceptions constitute the present scope of the restrictive doctrine of State immunity, which, in common with other exceptions, will need to be strictly construed whenever its interpretation becomes an issue. Moreover, as an exception that seeks to supplant the traditional rule, and as a theory that is reputed not to have yet mustered the adherence of a large number of States, the doctrine of restrictive State immunity appears to be no "more than a strong trend"[113] towards a rule of customary international law.

[111] *Supra,* n. 1, p. 27. See also, eg, Watts, *supra,* n. 2, p. 88.
[112] *Cf. ibid.,* p. 55, where it is indicated that "[t]he line between acts performed in a Head of State's official capacity and those performed in his personal capacity is far from sharp".
[113] *Ibid.,* p. 61.

Chapter 2 Criminal Jurisdiction

In contrast to the restriction on the exercise of foreign jurisdiction effected by the operation of sovereign immunity as discussed in the previous chapter, and insofar as it may constitute a necessary background for the present study, this chapter highlights the reach of States' criminal jurisdiction, and alludes to the corollary development of international criminal law. The chapter is divided into three sections: Underlying Principles, International Criminal Jurisdiction, and Constraints on the Exercise of Jurisdiction.

2.1 Underlying Principles

The principles that provide the bases for the exercise by States of criminal jurisdiction are usually categorized, apparently for the sake of convenience,[1] as those of territoriality, effects, active personality, passive personality, protected interest, and universality.[2]

The *principle of territoriality* provides the universally recognized basis for a State's exercise of criminal jurisdiction. In the absence of a valid obligation to the contrary, the principle manifests the exclusivity of the territorial sovereign's authority—prescriptive, adjudicatory, or enforcement—within the full scope of the term territory.[3]

Reference may here be made to the *Lotus* case where the Permanent Court of International Justice appraised the principle of territoriality in a context wider than that under this section. The case involved issues of one territorial sovereign's claim of exclusive jurisdiction over the acts of

[1] See 1 *Oppenheim* (9th), p. 457.

[2] See, eg, *Rivard* v. *United States*, 8 *AILC*, p. 478; D. Oehler, "Criminal Law - International", 9 *EPIL*, 1986, pp. 52-6; *Restatement (Third): The Foreign Relations Law of the United States*, 1987, § 402, Comment and Reporters' Notes. I. Brownlie suggests that, strictly, jurisdiction for crimes under international law is different from universal jurisdiction and that it should be helpful to keep the distinction for specific cases. See *Principles of Public International Law*, 4th ed., 1990, p. 305.

[3] *Cf.*, eg, Art. 3, Harvard Draft Convention on Jurisdiction with Respect to Crime, 29 *AJIL*, 1935 p. 439; Brownlie, *supra*, n. 2, p. 300; R.Y. Jennings, "General Course on Principles of International Law", 121 *RCADI*, 1967-II, p. 516; F.A. Mann, "The Doctrine of Jurisdiction in International Law", 111 *RCADI*, 1964-I, p. 87; Ch. Rousseau, *Droit international public*, Tome II, 1974, p. 77.

persons on a ship flying its flag and another territorial sovereign's claim of competence to punish offences against its territory. In regard to the attributes of the principle and the delineation of its contours, the Court held:

> Though it is true that in all systems of law the principle of territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty. [4]

The principle of territoriality might be characterized as having a subjective or objective aspect. Where a criminal act is put into motion in one jurisdiction and takes effect in another, both jurisdictions acquire competence over the act. The territory where the initiation of the act takes place is characterized as subjective territory, and the territory where the effect takes place is characterized as objective territory.[5] The *effects principle* is in such circumstances essentially concerned with the constituent elements of a criminal act. As stated in the *Lotus* case,

> [t]he offence for which [the defendant] appears to have been prosecuted was an act—of negligence or imprudence—having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much so that their separation renders the offence non-existent. [6]

In comparable situations where a number of States acquire jurisdiction over an offence, continental European law, for instance, is said to rely on the theory of ubiquity to establish the jurisdiction of any of the concerned States.[7]

The effects principle has, however, been extended by the US and

[4] Judgment No 9, 1927, *PCIJ*, *Series A*, 10, p. 20.

[5] See, eg, Jennings, *supra*, n. 3, p. 519.

[6] *Supra*, n. 4, p. 30. *Cf.* Art. 1, International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, 439 *UNTS*, p. 233, where the flag State is given an exclusive penal or disciplinary jurisdiction over the master of a ship and others thereon; Art. 11, Convention on the High Seas (1958), 450 *UNTS*, p. 82.

Some assign precedence of jurisdiction to the State where the final act of an offence, whose constitutive parts took place in different jurisdictions, was perpetrated. — P. Daillier & A. Pellet, *Droit international public*, 5e éd. 1994, p. 624.

[7] Oehler, *supra*, n. 2, p. 53.

others to cover cases that produce "economic effect in their territory, when the conduct was lawful where carried out".[8] Such manner of extending jurisdiction has not been free from serious controversy.

The *nationality or active personality principle* enables a State to exercise criminal jurisdiction over its nationals—natural and juristic persons—for those offences that it makes punishable regardless of where they take place. The principle would subject a national abroad to the jurisdictions of the territorial State and the State of nationality, and to the possibility of double jeopardy.[9] The principle is said to provide "a necessary criterion in such cases as the commission of criminal acts in locations such as Antarctica, where the 'territorial' criterion is inapplicable".[10]

The *passive personality principle* is the basis that is relied on by a State seeking to assume jurisdiction over acts alleged to constitute offences under its criminal law and committed in foreign jurisdictions against its nationals. Inasmuch as the principle seeks to give the victims' State of nationality the competence of punishing foreigners for offences fully committed and completed in other jurisdictions, it is much controverted.[11] Nonetheless, it has been accorded a measure of acknowledgement in contemporary State practice. The *Restatement (Third)* comments in this regard that

> [t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.[12]

[8] *Restatement (Third)*, *supra*, n. 2, § 402, Comment, *d.*

[9] See, eg, L. Sarkar, "The Proper Law of Crime in International Law", 11 *ICLQ*, 1962, pp. 457, 460. *Cf.* Mann, *supra*, n. 3, p. 90. The provision against double jeopardy in Art. 14 (7) of the International Covenant on Civil and Political Rights (999 *UNTS*, p. 171) would probably have some effect.

[10] Brownlie, *supra*, n. 2, p. 303.

[11] See, eg, the Dissenting Opinion of Moore in the *Lotus* case, *supra*, n. 4, p. 94; Brownlie, *supra*, n. 2, p. 303; Mann, *supra*, n. 3, pp. 91-2; Sarkar, *supra*, n. 9, p. 461.

[12] *Supra*, n. 2, § 402, Comment, *g*. It may be noted in this connection that, inasmuch as the nationals of a State constitute one of its principal components, the extension of its penal legislation to serious offences committed abroad against them, ie against one of its basic structural blocks, could be viewed as an aspect of the protective principle. It may further be noted that an act committed by a foreigner in a foreign territory against or in cooperation with a national of a given State, and not exactly coming within the stated restricted scope of the protective principle, could conceivably be viewed by that State as a serious act having insidious effects on the religious or moral fabric of its legal order that it seeks to protect by penal legislation. It might therefore be necessary to work out the functional limits of the principle for such and similar cases and properly acknowledge its relevance.

The *protective principle* is the ground that a State relies on to punish foreigners for acts wholly committed outside its jurisdiction, but directed against its security or other vital interests.[13] Some rest the principle on the notion of *raison d'état*,[14] others describe it "as a special application of the effects principle",[15] and still others suggest that it "should be recognised as comprising those aspects of the principle of passive nationality which merit general acceptation".[16]

In contradistinction to the foregoing principles, whose primary aim is the protection of the internal order of States, the *principle of universality* aims at the protection of the international order. The principle accordingly enables States to exercise criminal jurisdiction over persons who commit those customary international law offences that have become susceptible of universal jurisdiction. It has been pointed out that "[b]y its very nature this principle can apply only in a limited number of cases, but the existence of a treaty is not a prerequisite of its application. It is founded upon the accused's attack upon the international order as a whole."[17] The principle will be alluded to further in connection with the study under the next section. But it may be mentioned here as an instance that the crime of piracy was "from early times, condemned as punishable on a universal basis",[18] and the pirate was commonly characterized as *hostis humani generis*.[19]

In short, the exercise of criminal jurisdiction by States would be proper where there is subject matter (*ratione materiae*) and personal (*ratione personae*) jurisdiction based either on the different aspects of the principles of territoriality and nationality, or on the principle of universality.

Art. 229 of the Treaty of Versailles is an example of the application of the passive personality principle. The Article provides: "Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power." — *Documents pour servir à l'histoire du droit des gens*, Tome IV, 1923, K. Strupp, ed., p. 140.

[13] See, eg, Daillier & Pellet, *supra*, n. 6, p. 487.

[14] Oehler, *supra*, n. 2, p. 53.

[15] *Restatement (Third)*, *supra*, n. 2, § 402, Comment, *f.*

[16] Mann, *supra*, n. 3, p. 94.

[17] *Ibid.*, p. 95; see also Oehler, *supra*, n. 2, p. 53.

[18] G.I.A.D. Draper, "The Modern Pattern of War Criminality", 6 *IYHR*, 1976, p. 14, see also p. 22. *Cf.* Art. 14, Convention on the High Seas, *supra*, n. 6; Art. 100, *UNCLS*, UN Publication, Sales No. E.83.V.5.

[19] See, eg, the Dissenting Opinions of Finlay and Moore in the *Lotus* case, *supra*, n. 4, pp. 51 and 70 respectively; S. Glaser, *Droit international pénal conventionnel*, 1970, p. 153; the definition of the crime of piracy in Art. 15 and Art. 101 of the *Convention on the High Seas* and of the *UNCLS* respectively, *supra* ns. 6, 18. *Cf.* J.W.F. Sundberg, "The Crime of Piracy", in 1 *International Criminal Law*, M.C. Bassiouni ed., 1986, p. 454, regarding the possible justification for continuing to treat piracy as a separate crime.

2.2 International Criminal Jurisdiction

International criminal law is a young discipline. It owes its foothold in international law to the implementation of the international legal instruments that provided for the prosecution and punishment of the major war criminals of the Second World War. The discipline continues to develop. It draws from both customary international law and treaties. Glaser has described the discipline as comprising

> l'ensemble des règles juridiques, reconnues dans les relations internationales, qui ont pour but de protéger l'order juridique ou social international ("la paix sociale internationale") par la répression des acts qui y portent atteinte; ou, en d'autres termes, l'ensemble des règles établies pour réprimer les violations des préceptes du droit international public.[20]

Bassiouni has identified from four sources twenty-two categories of international crimes, ranging from aggression to bribery of foreign public officials, and has indicated "that there are no common or specific doctrinal foundations that constitute the legal basis for including a given act in the category of international crimes. The only basis which now exists is empirical or experiential."[21]

The present theoretical framework of international criminal law might well be unsatisfactory.[22] Nonetheless, the possibility for rewarding criminal ventures opened by the diversified growth of international intercourse and activities, and the pursuit of such ventures made more effective by advanced communication facilities that are globally available, have necessitated the continued growth of substantive and procedural rules that are subsumed under international criminal law.[23] In response to the needs created by the expanded international contacts and activities, therefore, the domain of international criminal law has come to incorporate far more offences than those, such as piracy, which it traditionally comprised.[24]

The London Agreement of 8 August 1945 for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal,[25] and the Charter of the Inter-

[20] *Supra*, n. 19, pp. 16-7.
[21] M.C. Bassiouni, "Characteristics of International Criminal Law Conventions", in *op. cit.* Bassiouni ed., *supra*, n. 19, p. 2. *Cf.* D.H. Derby, "A Framework for International Criminal Law", in *ibid.*, p. 38, where the sources are considered to be chaotic.
[22] See, eg, Derby, *supra*, n. 21, *loc. cit.*
[23] See, eg, G.O.W. Mueller and D.J. Besharov, "Evolution and Enforcement of International Criminal Law", in *op. cit.* , Bassiouni ed., *supra*, n. 19, pp. 60-1.
[24] Draper, *loc. cit.*, *supra*, n. 18; Derby, *supra*, n. 21, p. 35, n. 12.
[25] 82 *UNTS*, p. 279.

national Military Tribunal for the Far East[26] are the legal instruments that have given impetus to the development of international criminal law. In contrast to Art. 227 of the Treaty of Versailles, which had sought to charge William II of Germany "for the supreme offence against international morality and the sanctity of treaties",[27] those instruments have been given implemental effect: The International Military Tribunals established in accordance with the terms of the London Agreement, and of those of the Special Proclamation of 19 January 1946 by the Supreme Commander for the Allied Powers,[28] exercised international criminal jurisdiction in Nuremberg and Tokyo respectively.

Art. 6 of the Charter of the International Military Tribunal incorporated in the London Agreement provided for:

> *Crimes against peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> *War crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[29]

[26] 14 *DSB*, 1946, p. 361.

[27] *Supra*, n. 12. The Article had also sought to establish a special tribunal to "be composed of five judges, one appointed by each...the United States of America, Great Britain, France, Italy and Japan". William II was never charged. In other respects, the Allied Powers had wanted Germany to try 896 members of its forces for war crimes; but following Germany's protest, the number was reduced to 45, and only 12 out that number were tried and 6 convicted; 2 who were sentenced to a term of two-year imprisonment (the severest meted out in the cases) were enabled to escape. (See, eg, M.S. McDougal and F.P. Feliciano, *The International Law of War,* 1994, pp. 704-5.

[28] *Supra*, n. 26

[29] The provisions of Art. 5 of the Charter of the International Military Tribunal for the Far East are substantially similar. But war of aggression is qualified as "declared or undeclared", and war crimes are qualified by the term "conventional".

The principles of international law that the Charter and the judgment of the Nuremberg Tribunal recognized were unanimously affirmed by the UN General Assembly in resolution 95(I) of 11 December 1946.[30] International criminal law, incorporating, inter alia, a definitely established individual criminal responsibility that was impervious to official status, a categorized consolidation of international crimes, and an interpretation imparting a novel angle to the maxim *nullum crimen sine lege*,[31] was now on a firm launching pad.

Besides specificity and the definition of conduct that constitutes a crime, the subject of international criminal law – substantive and procedural[32] – gives rise to the question of an international criminal jurisdiction,[33] or a direct judicial process, as a complementary enforcement mechanism. The general State practice, however, relates to the indirect mode of enforcement, and the conventional trend favours the formula that provides for the duty to prosecute or extradite – *aut dedere aut judicare*.[34]

Where as an established right or duty every State could exercise criminal jurisdiction over specified matters of international concern, the jurisdiction would be one that is identifiable as universal.[35] The customary

[30] See UNGA Resol. 2391 (XXIII), 26 November 1968, and Annex about the imprescriptibility of war crimes and crimes against humanity.

[31] The Nuremberg Tribunal held the maxim to be "a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." 41 *AJIL*, 1947, p. 217.

[32] See, eg, Mueller and Besharov, *supra*, n. 23, pp. 60-1.

[33] *Infra*, p. 49.

[34] See, eg, Bassiouni, *supra*, n. 21, p. 3, where he indicates that he rephrased Grotius's maxim *aut dedere aut punire*, and pp. 7-8.

[35] *Cf.*, eg, *Attorney-General of the Government of Israel* v. *Eichmann*, 36 *ILR*, pp. 298, 304 (Supreme Court); *Affaire Klaus Barbie, 110 JDI (Clunet), 1983,* pp. 781-2, 785; *Demjanjuk* v. *Petrovsky*, 79 *ILR*, p. 545; Art. 10, Harvard Draft, *supra*, n. 3. T. Meron indicates that "the true meaning of universal jurisdiction is that international law *permits* any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim." (author's italics) — "International Criminalization of Internal Atrocities", 89 *AJIL*, 1995, p. 570. See also pp. 569 and 577 about crimes against humanity and universal jurisdiction; McDougal and Feliciano, *supra*, n. 27, pp. 718-721; Oehler, *supra*, n. 2, p. 53; *Restatement (Third)*, *supra*, n. 2, § 404, Comment, *a*.

international law crimes—notably, piracy[36] and war crimes[37]—have been made amenable to such jurisdiction. Genocide, too, which the parties to the Convention On The Prevention And Suppression Of The Crime Of Genocide[38] have confirmed in Art. I to be a crime under international law, is generally accepted to be amenable to universal jurisdiction as a principle of customary international law.[39] Under the terms of the Article, genocide could be "committed in time of peace or in time of war" on a certain category of persons.[40]

Torture has been considered an international crime that violates a *jus cogens* rule and has accordingly become amenable to universal jurisdiction.[40A] The Convention Against Torture[40B] provides in Art. 4(1) that

> [e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

Art. 5 puts every party to the Convention under the obligation of establishing

[36] *Supra*, n. 19; Art. 19 Convention on the High Seas, *supra*, n. 6; Art. 105 *UNCLS*, *supra*, n. 18.

[37] Some doubt whether there was "any truly universal jurisdiction over war criminals such as existed over piracy". — Draper, *supra*, n. 18, p. 22. But see, eg, UNGA Resol. 3074 (XXVIII), 3 December 1973, "Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity"; Glaser, *supra*, n. 19, p. 24; C. Lombois, *Droit pénal international*, 1979, p. 68; Y. Sandoz, "Penal Aspects of International Humanitarian Law", in *op. cit.*, Bassiouni ed., *supra*, n. 19, p. 228. The four Geneva Conventions of 1949, 75 *UNTS*, pp. 31 *et seq.*, which are viewed as giving expression to fundamental general principles of humanitarian law [see *Nicaragua* v. *United States of America*, Merits, *ICJ Reports*, 1986, para. 218], envisage universal jurisdiction in Articles 49, 50, 129 and 146 respectively. *Cf.* J.F. Murphy, "International Crimes", in 2 *United Nations Legal Order*, O. Schachter and C.C. Joyner eds., 1995, pp. 1012-3.

[38] 78 *UNTS*, p. 277.

[39] See, eg, *Restatement (Third)*, *supra*, n. 2, § 404, Reporters' Notes, 1. Universal jurisdiction is not, however, indicated by the language of Art. VI of the Convention, which provides: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Lombois remarks in this connection that "[l]e grave inconvénient de confier la répression aux systèmes internes aurait pu trouver une compensation — faible et théorique, il est vrai — dans l'utilization de la compétence universelle. On ne l'a même pas osé!" — *Supra*, n. 37, p 66. See also Murphy, *supra*, n. 37, p 1010. Nevertheless, the specific inclusion of the crime of genocide within the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda (Art. 4 and Art. 2 respectively) should now erase any hesitations about that crime's amenability to universal jurisdiction. — *Infra*, ns. 68 and 68A.

[40] Art. II of the Convention refers to "a national, ethnical, racial, or religious group, as such".

"jurisdiction over the offences referred to in article 4" when it has territorial or personal jurisdiction, and when an "alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to" the terms of the Convention. Since, however, the obligation to exercise jurisdiction or to extradite is based on the Convention, torture would not appear to be subject to universal jurisdiction in the full sense of that term.[40C]

In other instances of a mode of enforcement that has been guided by the prosecute or extradite formula (*aut dedere aut judicare*), the parties to the few conventions of the kind have agreed to exercise jurisdiction in regard to certain specified offences. Such jurisdiction would be "universal" only for the parties to the conventions. Non-signatories would be under no legal obligation in respect of the jurisdiction thus established as long as the offences which give rise to it are not generally acknowledged to be subject to universal jurisdiction. In regard to jurisdiction agreed under the prosecute or extradite formula, reference may be made to Art. VII of the Convention For The Suppression of Unlawful Seizure of Aircraft,[41] which provides:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

In other instruments, for instance, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,[42] the duty to prosecute or extradite is formulated differently but in substantially similar terms. It is provided in Art. 3(2) of the Convention that each party shall take measures "to estab-

[40A] See, eg, Lord Browne-Wilkinson's speech in the House of Lords judgment in the *Pinochet* case, http://www.parliament. the-stationery-off.../pa/ld199899/ldjudgmt/jd990324/pino1.htm , p. 10. He further stated that he had "no doubt that long before the Torture Convention of 1984 state torture was an international crime in the highest sense".—*Ibid.* Lord Hutton also held that "since the end of the second world war there has been a clear recognition by the international community that certain crimes are so grave and so inhuman that they constitute crimes against international law and that the international community is under a duty to bring to justice a person who commits such crimes. Torture has been recognised as such a crime."—*Ibid.*, /pino6 , p. 4.

[40B] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex UNGA Resol. 46 (XXXIX, 1984).

[40C] *Cf.* Lord Saville of Newdigate's speech in *supra*, n. 40A, .../pino7 , p. 2.

[41] 860 *UNTS*, p. 105. Art. 36 (2)(a)(iv), Single Convention on Narcotic Drugs 1961, 520 *UNTS*, p. 204, is essentially in like vein. See, eg, Murphy, *supra*, n. 37, pp. 1003-4.

[42] UNGA Resol. 3166 (XXVIII), 14 December 1973.

lish its jurisdiction over these crimes in cases where the alleged offender is present in its territory and it does not extradite him". Of like formulation is Art. 5(2) of the International Convention Against the Taking of Hostages.[43]

States have not generally shown the concern, interest, and willingness necessary for the proper implementation of their undertakings in regard to the enforcement of international criminal law. The indirect mode of enforcement has not, hence, proved satisfactory. In fact, the present status of international criminal law has been pithily depicted as "marked by a law enforcement crisis".[44] Remedy for the enforcement deficiency has been sought in an international criminal jurisdiction that would serve as a direct mode of enforcement; and the establishment of such jurisdiction has been advocated.[45]

It need be mentioned here again that the principal judicial bodies that had exercised international criminal jurisdiction were the two international military tribunals which sat in Nuremberg and Tokyo. As indicated earlier,[46] the Nuremberg Tribunal resulted from an international agreement, and the Tokyo Tribunal resulted from the Special Proclamation of the Supreme Commander of the Allied Powers. Although the *ad hoc* nature and the circumscribed competence[47] of the tribunals make them unsuitable precedents for a permanent and general international criminal court,[48] they are, nevertheless, regarded as having set international criminal law on a course of development.[49] The international tribunals established by the UN Security Council for trying specified crimes committed

[43] UNGA Resol. 34/146, 17 December 1979. See also Art. V of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, UNGA Resol. 3068 (XXVIII), 30 November 1973, which provides that an accused coming within its terms "may be tried by a competent tribunal of any State Party... which may acquire jurisdiction over [him] or by an international penal tribunal ...".

Re the taking of a soldier or policeman hostage in order to extract concession from his State being a form of terrorism and contrary to international law, see, A. Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair*, 1989, p. 6. This presumably is meant to put the particular offence under universal jurisdiction.

[44] Mueller and Besharov, *supra*, n. 23, p. 62.

[45] *Cf.* Glaser, *supra*, n. 19, pp. 37-40.

[46] *Supra*, p. 45.

[47] Eg, according to Art. 3 of the Charter of the International Military Tribunal, neither the Tribunal nor any of its members or alternates were susceptible of challenge.

[48] See, eg, J. Crawford, "The ILC Adopts a Statute for an International Criminal Court", 89 *AJIL*, 1995, p. 407.

[49] See, eg, Glaser, *supra*, n. 19, p. 41, where it is indicated that "la doctrine du droit international pénal dans le vrai sens du terme ne commence à se développer et à influencer la formation de celui-ci qu'après la seconde guerre mondiale, à partir de la création des Tribunaux militaires internationaux, et notamment des jugements qui'ils ont rendus."

in the Former Yugoslavia and in Rwanda, which we shall consider next, have perceptible jurisdictional affinities with the Nuremberg Tribunal. Reference by way of an illustration may be made to the limited scope and purpose of the tribunals, to the reliance on the Nuremberg Charter and the Judgment of the Tribunal to affirm the customary law status of war crimes, and to the proscription of crimes against humanity.[50]

The Security Council determined in resolution 808 (1993), 22 February 1993, that the situation in the former Yugoslavia constituted a threat to international peace and security, and decided in operative paragraph 1 to establish an international tribunal for the prosecution of persons responsible for violations of humanitarian law. Acting under Chapter VII of the UN Charter, the Security Council accordingly established the International Tribunal by resolution 827 (1993), 25 May 1993. It is provided in operative paragraph 2 of the resolution that the Tribunal is established

> for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace... .

The limited purpose for which the International Tribunal is established appears from the specific matters over which it is empowered to exercise jurisdiction according to the provisions of its Statute, which was adopted by the same resolution. In regard to subject matter jurisdiction, the International Tribunal has competence, under the terms of Articles 2 to 5 of its Statute, over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.

Art. 2 enumerates as grave breaches of the Geneva Conventions of 1949,

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

[50] See UN Doc. S/25704 and Add.1, paras. 12, 42, 47.

(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.[51]

The violations of the laws or customs of war enumerated in Art. 3 are not exhaustive;[52] the acts constituting the crime of genocide enumerated in Art. 4 match those proscribed in Articles II and III of the Genocide Convention;[53] and the crimes against humanity enumerated in Art. 5 come within the jurisdiction of the International Tribunal "when committed in armed conflict".[54] Compared to the enumerations of Art. 6 (c) of the Nuremberg Charter, those of Art. 5 of the Statute additionally specify and include imprisonment, torture, and rape, and leave intact the omnibus phrase "other inhumane acts".

In regard to personal jurisdiction, the International Tribunal's competence over all natural persons who are liable to prosecution under the relevant provisions of the Statute is affirmed in Art. 6. Individual responsibility, irrespective of position, is affirmed in Art. 7. Specifically, Art. 7(2) provides that the

> official position of any accused person, whether as head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility or mitigate punishment.

As our field of inquiry here is limited to subject matter and personal jurisdiction, it will not be necessary to consider the other provisions of the Statute of the International Tribunal, nor the progress of the Tribunal's work. But before proceeding with the same inquiry in regard to the International Tribunal for Rwanda, it may observed that the Tribunal for Former Yugoslavia has been assessed by some as "a reasoned response to...atrocities, and the Security Council's decisions in establishing it set

[51] *Cf.* Common Art. 3 of the Geneva Conventions of 1949, *supra*, n. 37. Despite some views to the contrary, the Appeals Chamber of the International Tribunal has held in *The Prosecutor v. Dusko Tadic* that "Article 2 of the Statute only applies to offences committed within the context of international armed conflicts". — 35 *ILM*, 1996, p. 60 para. 84.

[52] Art. 3 has been construed to cover serious violations 'of international humanitarian law other than the "grave breaches" of the Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4, and 5 overlap)', and occurring 'within an internal or an international armed conflict'. — The *Tadic* case, *supra*, n. 51, pp. 60-1, 71, paras. 87, 137 respectively.

[53] *Supra*, n. 38.

[54] Crimes against humanity have been held not to "require a connection to international armed conflict", and the term armed conflict figuring in the Article has been construed to be either internal or international. — The *Tadic* case, *supra*, n. 51, p. 72, paras. 141-2.

forth a responsible model for approaching violations of international humanitarian law in the future".[55]

In its resolution 955 (1994), 8 November 1994, the Security Council determined the situation in Rwanda continued to constitute a threat to international peace and security, and acting under Chapter VII of the Charter, established the International Tribunal for Rwanda and adopted its Statute. Operative paragraph 1 of the resolution states that the Tribunal is established

> for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994... .

In regard to subject matter jurisdiction, Articles 2 to 4 of the Statute bring within the competence of the International Tribunal the crime of genocide, crimes against humanity, and violations of the 1949 Geneva Conventions' common Art. 3 and of Additional Protocol II. The crime of genocide in Art. 2 and crimes against humanity in Art. 3 are of an almost identical formulation and enumeration as the corresponding provisions in Articles 4 and 5 of the Statute of the International Tribunal for the Former Yugoslavia, except for the context of crimes against humanity in the Rwanda Statute: Under the latter, crimes against humanity come within the jurisdiction of the Tribunal "when committed as part of a widespread or systematic attack".[56] Concerning crimes relating to the breaches of the Geneva Conventions of 1949,[57] the reference in the Yugoslavia Statute is to grave breaches of the Conventions, while the reference in the Rwanda Statute is to common Article 3 of the Conventions and of the Additional Protocol II. The violations which are enumerated in Art. 4 of the Rwanda Statute are:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

[55] J.C. O'Brien,"The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", 87 *AJIL*, 1993, p. 658.

[56] Meron feels that "[b]y making no allusion to the international or noninternational character of the conflict, the broad language of Article 3 of the Rwanda Statute...both strengthens the precedent set by the commentary to the Yugoslavia Statute and enhances the possibility of arguing in the future that crimes against humanity (in addition to genocide) can be committed even in peacetime". — *Supra*, n. 35, p. 557.

[57] *Cf. ibid.*, p. 561, regarding the basis of criminality and the basis of jurisdiction.

(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
(h) Threats to commit any of the foregoing acts.

It is noteworthy that the enumeration is not exhaustive, and that particular mention is made of threats to commit acts indictable under the Article.

In regard to personal jurisdiction, the Rwanda Statute, like the Statute of the former Yugoslavia, affirms in Articles 5 and 6 the individual responsibility of natural persons, and makes them amenable to the jurisdiction of the Tribunal irrespective of their official positions.

Before passing on to consider the jurisdictional provisions of the Statute of the International Criminal Court drafted by the International Law Commission, we may pause to cast a glance at the authority of the Security Council to establish the Tribunals. In establishing and empowering the Tribunals, the Security Council has purported to act under Chapter VII of the UN Charter. In the case of the Rwanda Tribunal, the Council had also Rwanda's request for the establishment of the Tribunal.[58] In the case of the Former Yugoslavia Tribunal, Bosnia Herzegovina, Croatia, and the Federal Republic of Yugoslavia have undertaken to "cooperate fully with all entities involved in implementation of [the] peace settlement...pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law".[59]

[58] Operative para. 1, UNSC Resol. 955 (1994), 8 November 1994.

[59] Art. IX, General Framework Agreement for Peace in Bosnia and Herzegovina, signed 14 December 1995, 35 *ILM*, 1996, p. 89. See also Art. XIII(4), Annex 6 of the Agreement signed between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska, *ibid.*, p. 130. It is provided there that "[a]ll competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to the organizations established in this Agreement;...the International Tribunal for the Former Yugoslavia; and any other organization authorized by the U.N. Security Council with a mandate concerning human rights or humanitarian law".

Chapter VII of the UN Charter concerns the duty and authority of the Security Council for the maintenance (or restoration, when breached) of international peace and security. Where the Council determines under Art. 39 of the Charter the existence of a threat to the peace, breach of the peace, or act of aggression, it can proceed to remove the threat or suppress the breach by taking or authorizing any appropriate non-armed-force or armed-force measures that are provided for in Articles 41 and 42 of the Charter. Before resorting either to such measures or to recommendations, the Council can, under the terms of Art. 40 of the Charter, "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable". Since these are the only enforcement options envisaged under Chapter VII and the Security Council has purported to act under that Chapter,[60] the establishment and empowerment of the International Tribunals would have to be justified as an enforcement measure.

The International Tribunals' jurisdiction, together with the necessary compulsory process, flows from the mandatory authority of the Security Council.[61] However, of the measures available to the Security Council under Chapter VII, neither the recommendations or the provisional measures indicated in Articles 39 and 40 respectively, nor the forcible measures contemplated in Art. 42 would constitute an apt basis for establishing and empowering the Tribunals. The only possible source of authority for the purpose would be Art. 41, which provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

[60] See, eg, Frowein in *The Charter of the United Nations: A Commentary*, B. Simma ed., 1995, pp. 617 *et seq.* The place of recommendations, which are non-binding in character, in the rank of enforcement measures, which are mandatory, would appear anomalous. Yet, the deliberate placing of recommendations in Chapter VII could be taken to import a deliberate gradation between Security Council recommendations. It would hardly appear feasible to conceive a Security Council recommendation under Chapter VII for the maintenance of international peace and security as capable of being ignored with impunity. Those who would ignore it as non-binding would hardly escape charges of aggravating the maintenance of the peace, and of consequently exposing themselves to enforcement measures. Further, besides giving an unassailable legal cover for State conduct consistent with its terms, a recommendation under Chapter VII could be combined with other enforcement measures in situations of various complexities.

[61] The UN Charter, Art. 25.

The means of enforcement under the Article have not been spelled out exhaustively; and the Yugoslavia Tribunal has accordingly held that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41".[62] Invested as it is with authority that would enable it to discharge promptly and effectively its primary responsibility for maintaining international peace and security, the Security Council is the principal peace enforcement organ of the UN; it can establish subsidiary organs to assist it in the performance of its functions.[63] The establishment of an international criminal jurisdiction with provisions that are globally mandatory might, however, tend to suggest a legislative exercise and a law enforcement process rather than one that is peace enforcement in nature. Nonetheless, certain aggregate factors would bear out the appropriateness of the Security Council's action in regard to the two International Tribunals.[64] Those factors are the consent of the parties immediately concerned to the Tribunals' judicial functions;[65] the absence of objection from UN Member States; the General Assembly's authority over the budgets of the Tribunals;[66] the absence of a readily available and authoritative alternative; the humanitarian concern that has agitated the conscience of the world community; and the overriding authority of the Security Council in the execution of enforcement measures.[67]

In the actual state of the world community, the indirect mode of enforcement of international criminal law based either on the prosecute

[62] The *Tadic* case, *supra*, n. 51, p. 45. *Cf.*, *op. cit.*, B. Simma ed., *supra*, n. 60, p. 626, where the measures ordered are said to constitute "[t]he most far-reaching use of Art. 41".

[63] UN Charter, Articles 24 and 29. See, *op. cit*, B. Simma ed., *supra*, n. 60, p. 486.

[64] See, eg, Daillier & Pellet, *supra*, n. 6, pp. 367, 634-5.

[65] Rwanda's consent is indicated in UNSC Resol. 955 (1994), 8 November 1994, operative para. 1; in the case of the Former Yugoslavia Tribunal, the consent of the concerned parties is established in Art. IX of the General Framework Agreement for Peace in Bosnia and Herzegovina, and Art. XIII(4), Annex 6, Agreement on Human Rights: 35 *ILM*, 1996, p. 89 and p. 130 respectively.

[66] See, eg, O'Brien, *supra*, n. 55, p. 643.

[67] Art. 2(7) of the UN Charter makes an exception to the principle of non-intervention where "the application of enforcement measures under Chapter VII" are concerned. Were it not for that saving clause, certain provisions of the Statutes of the Tribunals would have offended against the principle. For instance:

– "The International Tribunal shall have primacy over national courts". — Art. 9(2), Statute of the Former Yugoslavia Tribunal, and Art. 8(2), Statute of the Rwanda Tribunal. In regard to the propriety of the primacy clause, see the *Tadic* case, *supra*, n. 51, p. 52, paras. 58-9.

– "No persons shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal". — Art. 10(1), Statute of the Former Yugoslavia Tribunal, and Art. 9(1), Statute of the Rwanda Tribunal.

or extradite — *aut dedere aut judicare* — obligation or on customary international law is generally seen as more practicable than the direct mode of enforcement. This might be accounted for by the wide span of time between the establishment of the International Military Tribunals at the end of the Second World War and of the present International Tribunals for the Former Yugoslavia and Rwanda. It would appear that the latter Tribunals might not have been established had it not been for the magnitude of the perpetrated horrors and the fortuitous combination of other factors that provoked the political will of States into accepting the need for some concrete action. The *ad hoc* status of the Tribunals and their variously limited jurisdiction indicate the special motivations and circumstances that occasioned their establishment.

The indirect mode of enforcement is also reflected in the prevalent role assigned to municipal jurisdictions in the International Law Commission's Draft Statute for an International Criminal Court.[68] The International Law Commission's commentary on the Draft Statute[68A] indicates in this regard that the Court, which is to be engaged in the trial of persons accused of crimes of significant international concern, "is intended to operate in cases where there is no prospect of those persons being duly tried in national courts...[and to]...complement existing national jurisdictions and existing procedures for international judicial cooperation in

– "The penalty imposed...shall be limited to imprisonment". — *Ibid.*, Art. 24(1) and Art. 23(1) respectively.

– "States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber ". — *Ibid.*, Art. 29(2) and Art. 28(2) respectively.

Some, granting the possibility of the Security Council's powers to establish the Tribunals, have misgivings about the effect on the principle of legality of such establishment by executive resolution. — Crawford, *supra*, n. 48, p. 416. As to the analysis of the term "established by law", see the *Tadic* case, *supra*, n. 51, pp. 46-8, where the Appeals Chamber was satisfied "that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial" (para. 47).

[68] Report of the International Law Commission, *GAOR*, Forty-ninth Session, Suppl. No. 10 (A/49/10), pp. 43 *et seq.*

[68A] Although the Statute of the International Criminal Court has now been adopted and awaits ratification, acceptance, or approval, the text of our study relating to the draft provisions has been retained for comparative purposes; the adopted provisions that are relevant for our study are indicated hereunder in footnotes to which they relate.

The Statute of the International Criminal Court was adopted at Rome on 17 July 1998 by the UN Diplomatic Conference of Plenipotentiaries. 120 plenipotentiaries voted in favour, 7 voted against, and 21 abstained. (UN Doc. A/CONF.183/9, 17 July 1998 and Press Release, L/ROM/22, 17 July 1998). According to Art. 126(1), the Statute is to "enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations".

criminal matters".[69] The Court's Statute has been characterized as primarily adjectival and procedural and as one that neither defines new crimes nor codifies crimes under international law.[70]

Unlike the Former Yugoslavia and Rwanda Tribunals, the International Criminal Court has treaty as the basis of its establishment. A treaty, in comparison to a UN resolution, might normally be less susceptible to a ready amendment or revocation.[71] According to Art. 4 of its draft Statute, the Court is a permanent institution for the establishing parties, but "shall sit only when required to consider a case submitted to it".[72]

The draft Statute does not envisage the exercise of jurisdiction over crimes that are to be brought within the competence of the Court prior to the fulfilment of the preconditions laid down in Art. 21.[73] The Court's jurisdiction is to "be essentially consensual...[that] would not substitute for, as distinct from supplementing, national criminal trial systems".[74] However, as regards the crime of genocide, which is considered to stand

[69] The ILC Report, *supra*, n. 68, p. 44.

According to Art. 1 of the adopted Statute (*supra*, n. 68A), the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern...and shall be complementary to national criminal jurisdictions".

[70] The ILC Report, *supra*, n. 68, pp. 66, 71.

[71] See *ibid.*, p. 46; Crawford, *supra*, n. 48, p. 408.

[72] The ILC Report, *supra* n. 68, p. 49.

Art. 1 of the adopted Statute (*supra*, n. 68A) provides in part that the Court "shall be a permanent institution". The seat of the Court is to be established at The Hague, the Netherlands (Art. 3(1)); the judges of the Court are to be elected and to "be available to serve on [a full-time] basis from the commencement of their terms of office" (Art. 35(1)); and "[t]he judges composing the Presidency [are to] serve on a full-time basis as soon as they are elected." (Art. 35(2)).

[73] Art. 21 of the Draft Statute (*supra*, n. 68) provides that "1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) in case of genocide, a complaint is brought under article 25(1);

(b) in any other case, a complaint is brought under article 25(2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime...; and

(ii) by the State on the territory of which the act or omission in question occurred."

The adopted Statute (*supra*, n. 68A) provides in Art. 13: "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party...; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter...; or (c) The Prosecutor has initiated an investigation in respect of such a crime". The Court's jurisdiction would relate only to "crimes committed after the entry into force of [the] Statute" (Art. 11(1)); and a State party to the Statute would accept "the jurisdiction of the Court with respect to the crimes referred to in article 5". (Art. 12(1)).

[74] Crawford, *supra*, n. 48, p. 409.

"authoritatively defined in the Genocide Convention of 1948",[75] the Court is to be endowed with an inherent jurisdiction "by virtue solely of the States participating in the draft Statute, without any further requirement of the consent or acceptance by any particular State".[76] Furthermore, the Court can exercise jurisdiction where a matter coming under Art. 20 of its Statute is referred to it by the UN Security Council acting under Chapter VII of the Charter.[77] Otherwise, the acceptance by a State party to the Statute of "the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in [its] declaration"[78] is a prerequisite for the proper exercise of the Court's jurisdiction.

The crimes that would come under the jurisdiction of the Court are separated into two categories: those coming under general international law, and those coming under the treaties annexed to the Statute. A "considerable overlap" is admitted between the two categories.[79] The crime of genocide, the crime of aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity are those that come under the category of general international law;[80] the enumeration is not intended to be an exhaustive listing of crimes under that category.[81] The other category includes crimes which, according to Art. 20(e) of the Draft Statute, are "established under or pursuant to the treaty

[75] The ILC Report, *supra*, n. 68, p. 67.

[76] *Ibid.*, p. 68. See also p. 81.

The adopted Statute (*supra*, n. 68A) provides that it is "subject to ratification, acceptance or approval by signatory States". (Art. 125(2)).

[77] Art. 23(1) of the Draft Statute, *supra*, n. 68.

Art. 13(b) of the adopted Statute (*supra*, n. 73) is to the same effect.

[78] Art. 22(1) of the Draft Statute, *supra*, n. 68.

Art. 12(1) of the adopted Statute (*supra*, n. 68A) provides that "[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5." Although Art. 120 of the adopted Statute precludes the possibility of any reservations, Art. 124 provides that "a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [war crimes] when a crime is alleged to have been committed by its nationals or on its territory."

[79] The ILC Report, *supra*, n. 68, p. 71.

[80] *Ibid.*, Art. 20(a) - (d) of the Draft Statute. See also Crawford, *supra*, n. 48, p, 411.

Art. 5(1) of the adopted Statute (*supra*, n. 68A) provides: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." These crimes have been defined and enumerated in Articles 6, 7, and 8. Art. 123 provides for the review of the Statute. The "review may include, but is not limited to, the list of crimes contained in article 5." (Art. 123(1)).

[81] The ILC Report, *supra*, n. 68, p. 77.

provisions listed in the Annex". The grave breaches of the Geneva Conventions of 1949 and of Additional Protocol I and eight other types of crimes are enumerated in the Annex.[82]

The Draft Statute's specific inclusion of the crime of genocide, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity in the subject matter jurisdiction of the Court is admitted to have been guided by the Statute of the International Tribunal for the Former Yugoslavia.[83] In the Draft Statute and the Statutes of the International Tribunals for the Former Yugoslavia and Rwanda, the content of the crime of genocide is the same as that in the Genocide Convention. The Draft Statute's serious violations of the laws and customs applicable in armed conflict reflect the corresponding provisions in the Statutes of the said International Tribunals.[84] Similarly, the Draft Statute's crimes against humanity reflect the corresponding substantive provisions in the Statutes of the same International Tribunals as well as those in the Draft Code of Crimes against the Peace and Security of Mankind. The enumeration of specific unlawful acts has been viewed as "less crucial to the definition [of crimes against humanity] than the factors of scale and deliberate policy",[85] which constitute the distinctive characteristics of that category of crimes.

It may be said in conclusion that, as envisaged by the International Law Commission's Draft Statute, the International Criminal Court will be an institution which is neither *ad hoc* nor based on the command of the UN Security Council.[86] The Court will be of limited subject matter jurisdiction whose exercise will depend on the assent to that effect of the concerned parties.[87] Although envisaged to function within a limited jurisdictional scope, the establishment of the Court would constitute an advance in the enforcement of international criminal law. The Court might also obviate future *ad hoc* international criminal tribunals if it suc-

[82] *Ibid.*, pp. 141 *et seq.*

[83] *Ibid.*, p. 71.

[84] *Ibid.*, p. 73. The term "armed conflict" has been substituted for the term "war" figuring in the Statutes of the International Tribunals. — *Ibid.*, p. 74. This would be in line with the precepts of contemporary legal norms on the international use of force. But, irrespective of scale, so long as armed conflicts persist, and their physical and associated effects cannot be differentiated from those occurring in armed conflicts termed "war", the latter term is destined to remain in general usage. Giving the term "war" a legally varied meaning might then be unavoidable.

[85] *Ibid.*, p. 76.

[86] See, Murphy, *supra*, n. 37, pp. 1020-21, for some of the issues related to the establishment of an international criminal court.

[87] The requirement of the acceptance of jurisdiction is dispensed with where the Security Council, acting under Chapter VII of the UN Charter, refers a matter to the Court. — ILC Report, *supra*, n. 68, p. 85.

ceeds in generating sufficient confidence in its all-round performance.

2.3 Constraints on the Exercise of Jurisdiction

The principles that would validate an exercise of jurisdiction have been noted in the foregoing sections. This section deals with conduct that could affect the exercise of jurisdiction. The inquiry here is different from that discussed in the previous chapter with regard to non-exercise of jurisdiction following a determination of procedural immunity.

Judicial practice generally holds as immaterial the manner in which an accused person is brought within a given jurisdiction. Once the presence of an accused before a court is secured, personal jurisdiction is normally asserted irrespective of whether he was abducted by force or enticed by fraud from another or foreign jurisdiction, or taken from there after an irregular arrest or detention. The manner of effecting personal jurisdiction is carefully kept distinct from the basis of jurisdiction. It has accordingly been stated that "the manner in which a prisoner is brought into custody of the court cannot modify the *basis* of its jurisdiction to try him, for this rests solely on the substantive law of its own territory".[88]

It should, nevertheless, be observed that, in special instances, as when a person accused of a particular offence is extradited to a certain jurisdiction under the terms of an extradition treaty, the exercise of jurisdiction will be defective were he to be tried for an offence other than that for which he was extradited. The jurisdiction, in the circumstances, is contingent on the definite purpose for which the extradition treaty was implemented. The US Supreme Court, for example, has held after an extensive review of national and international opinions

> that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.[89]

> ...the jurisdiction of the court to try such an offence, if the party himself was properly within its jurisdiction, is not denied, but the facts relied upon go to

[88] J.E.S. Fawcett, "The Eichmann Case", 38 *BYIL*, 1962, p. 200.

[89] *United States* v. *Rauscher*, 15 *AILC*, p. 345. *Cf. United States* v. *Alvarez-Machain*, 31 *ILM*, 1992, p. 902, where the US Supreme Court distinguished *Rauscher* from *Alvarez-Machain*: the latter constituted a case of forcible abduction (at 903).

> show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial.[90]

Where, then, the basis of jurisdiction is not impaired by the non-observance of the principal purpose for which an extradition treaty was implemented, or by other causes that will be discussed later, a court can validly exercise its jurisdiction over a defendant in a criminal case. The assertion of personal jurisdiction that disregards the manner in which it was effected is reflected in and sustained by the maxim *male captus, bene detentus*. In this regard, and in line with other judicial opinions,[91] the US Supreme Court has held that

> for mere irregularities in the manner in which [an accused] may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.[92]

[90] *Rauscher, supra*, n. 89, p. 348. *Cf. United States* v. *Ferries,* in *Cases and Other Materials on International Law*, M.O. Hudson ed., 1929, p. 677, where it is stated that " if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial. Equally in both cases is there absence of jurisdiction."

In *Cook* v. *United States*, 5 *AILC*, p. 335, it has been stated that "[t]he objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority." *Cf.* E.D. Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law", 28 *AJIL*, 1934, pp. 231, 236, 241; Harvard Draft, *supra*, n. 3, pp. 624-6.

[91] It has been stated that "[t]here are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him". — *Ker* v. *Illinois*, 15 *AILC*, p. 359.

[92] *Ibid.*, p. 355. See, also, eg, *R* v. *Hartley*, 77 *ILR*, p. 333; *Ex parte Mackeson, ibid.*, p. 343; *Re Argoud*, 92 *JDI* (Clunet), 1965, p. 100, for the holding by the Cour de Cassation that "les conditions dans lesquelles un inculpé faisant l'objet d'une poursuite régulière et d'un titre légal d'arrestation a été appréhendé et livré à la justice...ne sont pas de nature, si déplorable qu'elles puissent apparaître, à entraîner par elles-mêmes la nullité de la poursuite,..."; F.A. Mann, *Further Studies in International* Law, 1990, pp. 22-3, where the decision is declared "unsatisfactory"; Fawcett, *supra*, n. 88, pp. 194-6; L. Henkin, R.C. Pugh, O. Schachter, H. Smit, *International Law*, 3rd ed., 1993, pp. 1110-1; P. O'Higgins, "Unlawful Seizure and Irregular Extradition", 36 *BYIL*, 1960, p. 319; F.A. Mann, "Reflections on the Prosecution of Persons Abducted in Breach of International Law", in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein ed., 1989, pp. 412, 414; F. Morgenstern, "Jurisdiction in Seizures Effected in Violation of International Law", 29 *BYIL*, 1952, p. 279; 1 *Oppenheim* (9th), p. 389; *Restatement, (Third), supra*, n. 2, § 432, Reporters Notes, 2; Rousseau, *supra*, n. 3, p. 79.

But some early cases did not uphold this jurisdictional rule;[93] and as shall be indicated later, the rule is now subjected to serious criticism.

Despite its categorical formulation and general application, a violation of law might in certain instances affect the maxim *male captus, bene detentus*. Focusing on the US judicial practice, which will be helpful for the purposes of the present study, we shall consider here violations of international law effected for purposes of exercising jurisdiction and the kind of consequences they are allowed to produce.

A certain violation of international law might concern customary international law or treaty, and involve State agents or private persons. A violation of international law in a particular inter-State context relates to a breach of an obligation owed by one State to another. The breach of the obligation might constitute an infringement of the territorial and/or personal authority of a target State; such an infringement might occur, for instance, when an act of abduction is carried out in the territory of one State by or on behalf of agents of another State, or when an exercise of acts of foreign public authority is undertaken in that territory. The consent of the territorial State would be absent in the particular instance.

The territory of a State is its sacredly viewed and steadfastly guarded domain; it is protected from unauthorized encroachments by an international law norm of *jus cogens* status.[94] Unless curtailed by a valid act, the territorial sovereign has the exclusive exercise of authority over the territory. Reference in this regard is usually made to the *Lotus* and *Corfu Channel* cases. The Permanent Court of International Justice has observed in the *Lotus* case that

> the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.[95]

And the International Court of Justice has observed in the *Corfu Channel* case that

> between independent States, respect for territorial sovereignty is an essential foundation of international relations.[96]

[93] See, eg, Daillier & Pellet, *supra*, n. 6, p. 450; Rousseau, *supra*, n. 3, p. 80.
[94] See, eg, B. Asrat, *Prohibition of Force Under the UN Charter. A Study of Art. 2(4)*, 1991, pp. 51, 148 *et seq.*
[95] *Supra*, n. 4, p. 18.
[96] (Merits), *ICJ Reports* 1949, p. 35.

Hot pursuit of an alleged offender[97] and other unauthorized or legally unjustified acts of self-help carried out in foreign territories violate, therefore, territorial sovereignty.

Violation of international law in one form or another is a constant occurrence.[98] The kind of effect that a State's violation of international law produces within its jurisdiction is normally governed by the status accorded to that law in the legal order of the violating State. In the US,[99] a distinction is drawn between customary international law and treaties: Specific mention of treaties as constituting the supreme law of the land is made in Article VI of the Constitution, and customary international law has been held by the Supreme Court to be

> part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction...For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations... .[100]

The controlling executive act that entails the inapplicability of international law has been construed in the *Garcia-Mir* case to embrace not only

[97] Hot pursuit on land does not appear to be accepted. See, eg, 1 *Oppenheim* (9th), p. 387; Daillier & Pellet, *supra*, n. 6, p. 450.

[98] This is largely attributable to the absence of an international law enforcement machinery that functions properly and effectively. This absence lends support to States' proclivity for taking the law into their own hands. Along related lines, Henkin indicates that "[i]n principle, every state has the power—I do not say the right—to violate international law and obligation and to suffer the consequences". — "The President and International Law", 80 *AJIL*, 1986, p. 931. It may be noted, however, that the violator of law will suffer consequences only if there are consequences to be suffered, which might not always be the case in the context of power-biassed international relations. *Cf. The Chinese Exclusion Case*, 1 *AILC*, p. 199.

[99] In other States, eg, France, see *Affaire Klaus Barbie*, *supra*, n. 35, p. 786, for the declaration of the Cour de Cassation to the effect that jurisdiction in France over crimes against humanity results from "traités internationaux régulièrement intégrés à l'order juridique interne et ayant une autorité supérieure à celle des lois en vertu de l'article 55 de la Constitution du 4 octobre 1958"; UK, see P. O'Higgins, *supra*, n. 92, p. 301, where the author states that "[t]he orthodox view is that treaties are not part of the law of England unless legislation has been enacted incorporating them. It seems therefore that British courts would probably not decline jurisdiction obtained in violation of a treaty". See, generally, A. Cassese, "Modern Constitutions and International law", 192 *RCADI*, 1985-III, pp. 369 *et seq.*

[100] *The Paquete Habana*, 1 *AILC*, p. 104. See also, eg, *Garcia-Mir* v. *Meese*, 6 *AILC (2nd)*, p. 402; Cassese, *supra*, n. 99, p. 354; M. Glennon, "Can the President do no Wrong?", 80 *AJIL*, 1986, p. 923; V.P. Nanda, "International Human Rights and International Criminal Law and Procedure: Judicial Remedies in United States Courts for Breaches of Internationally Protected Human Rights", in *International Criminal Law - A Guide to U.S Practice and Procedure*, V.P. Nanda & M.C. Bassiouni eds., 1987, p. 500.

the acts of the President but also those of his cabinet officers.[101]

US treaties produce effect where they are self-executing and they have not been superseded by a later legislation. In the words of the Supreme Court,

> a treaty is placed on the same footing, and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other...if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.[102]

Under the law of the US, therefore, the Constitution has supremacy over both customary and conventional international law.[103] Such legal supremacy signifies the requirement as well as the validity of giving effect within the domestic jurisdiction to a violation of international law that is not unconstitutional. Where effect is sought to be given to proper domestic acts that violate customary international law or treaty provisions, the exercise of domestic jurisdiction would not appear to be constrained,[104] nor the overriding domestic acts invalidated, by the interna-

[101] *Supra*, n. 100, p. 403. Contra, Henkin, *supra*, n. 98, pp. 936-7. But J.J. Paust contends, still further and more basically, that "the predominant trends in decision (however few) support the primacy of customary international law in the case of an unavoidable clash with a federal statute"; — "The President *Is* Bound by International Law ", 81 *AJIL*, 1987, p. 389 — and that "the President simply has no authority or constitutional power to violate a treaty or law". — *Ibid.*, p. 387.

[102] *Whitney* v. *Robertson*, *op. cit.*, Hudson ed., *supra*, n. 90, pp. 961-2. To the same effect, see, eg, *The Chinese Exclusion Case*, *supra*, n. 98, pp.197-8; *Reid* v. *Covert*, 8 *AILC*, p. 259.

[103] See, eg, *Reid* v. *Covert*, *supra*, n. 102, p. 258. As to the place of customary international law in the United States law, Henkin thinks that "[i]n the end....the courts will probably conclude that customary law, being equal to treaties in international law, has the same status as treaties in the domestic legal hierarchy as well". — *Op. cit.*, *supra*, n. 98, p. 933. The distinction between the domestic consequences resulting from breaches of the two sources of international law has been criticized, for example in the Harvard Draft, *supra*, n. 3, p. 631, where it is stated: "It is believed that the distinction made in United States law between arrests in violation of treaty and arrests in violation of customary international law is arbitrary and unsound, prompted by a shortsighted desire to prosecute the person of whom custody has been illegally obtained...".

[104] Intent to violate international law is not, however, presumed lightly. — See, eg, *The Chinese Exclusion Case*, *supra*, n. 98, p. 198; *Lauritzen* v. *Larsen*, 5 *AILC*, p. 180; *Restatement (Third)*, *supra*, n. 2, § 402, Comment, *i.* Such non-presumption of intent appears to be a generally accepted principle of construction. — See, eg, T. Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law", 235 *RCADI*, 1992-IV, p. 343; Cassese, *supra*, n. 99, pp. 398 *et seq.*, for the non-presumption of intent to violate international law and four other devices of interpretation; Henkin, Pugh, Schachter, Smit, *supra*, n. 92, p. 225.

tional wrong and the responsibility that the violation of the international obligation would entail.[105]

Passing on to certain instances of international law violations that have jurisdictional relevance, we shall take a closer look at particular acts of abduction and unlawful seizure of persons in foreign territories. Carrying out such acts without the consent, however manifested, of the territorial sovereign constitutes an infringement of the territorial and personal authority of the sovereign, and offends against the principle of exclusivity referred to earlier.[106] The decision to exercise or decline jurisdiction in these events would ordinarily be motivated by such factors as the official or private status of the person committing the violation, the existence of a competent protest against the violation, and the type of international law involved in the violation.

Where foreign government agents obtain custody of a person by violating customary international law, protest by the wronged State against the violation and demand for reparation should normally cause the violating State to either make a satisfactory reparation or refrain from exercising its adjudicative jurisdiction. This would also be the case if the violated law related to a treaty that, for example, in the US judicial practice is not considered to be self-executing.[107] In other respects, were a person to be brought before a certain US jurisdiction in violation of individual rights acknowledged under self-executing treaties, he could have ground for objecting to the exercise of the jurisdiction.

As an illustration, reference may be made to the US case of *Ker v. Illinois*,[108] where domestic jurisdiction was exercised despite the forcible abduction of the defendant from Peru, which had an extradition treaty with the US. In upholding the exercise of jurisdiction, the Supreme Court explained:

[105] See, eg, *Restatement (Third)*, *supra*, n. 2, § 115, Comments, *a.*and *b. Cf.*, eg, *Diggs v. Schultz*, 11 *ILM*, 1972, p. 1258.

[106] *Supra*, p. 40.

[107] The US law is characterized as comprising international law and international agreements: See, eg, *Restatement (Third)*, *supra*, n. 2, § 111 and the Comment. International law is defined as comprising "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*..." – *Ibid.*, § 101. As to the federal law status of customary international law, see, *ibid.*, § 111, Reporters' Notes 3. As regards the effect of protest by a wronged State on the exercise of jurisdiction, see, *ibid.*, § 432, Comment, *c.* and Reporters' Notes, 3.

[108] *Supra*, n. 91, p. 352.

> The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection.[109]

The kidnapping of the defendant Ker by one Julian has been characterized as an unauthorized act of a private individual that did not constitute a breach of the extradition treaty by the US; besides, Peru was found not to have protested about the US failure to implement the treaty.[110] Such characterization of the kidnapping would imply breach of an extradition treaty where acts of abduction were perpetrated in the territory of a party to the treaty by agents of the other party's government. But the US Supreme Court found the forcible abduction of a Mexican national from Mexico, authorized by the US government,[111] not to violate the treaty of extradition between the two States, and held the *Ker* v. *Illinois* case to be applicable.[112] In what from the perspective of international law could be viewed as an unhappy approach to treaty interpretation, the Court reasoned that

> [t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.[113]

This reasoning would hardly appear to augur well for ordered international relations that require the good-faith observance of legal obliga-

[109] *Ibid.*, p. 359. *Cf.* Dickinson, *supra*, n. 90, p. 238; C. Fairman, "*Ker* v. *Illinois* Revisited", 47 *AJIL*, 1953, p. 679.

[110] The Supreme Court has explained in its judgment that "although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." — *Ker*, *supra*, n. 91, pp. 357-8. *Cf. United States* v. *Verdugo-Urquidez* (Ninth Circuit), 90 *ILR*, p. 674.

[111] *Alvarez-Machain*, *supra*, n. 89, p. 903.

[112] *Ibid.*, pp. 908-9.

[113] *Ibid.*, p. 905.

tions[114] that issue from different sources of international law. It would neither appear to help bridle the law enforcers' expedient laxity in the observance of contemporary standards of international conduct that have been progressively developed and adhered to as salutary tools of peaceful international relations.[115] The breach of certain legal rules deliberately committed by officials to facilitate the enforcement of certain others

[114] See, eg, Art. 31(1) and Art. 60(3)(b), Vienna Convention on the Law of Treaties. — 1155 *UNTS*, p. 331. Art. 31(1) provides for the good faith interpretation of a treaty "in light of its object and purpose"; and Art. 60(3)(b) provides for the termination or suspension of a treaty where there occurs a material breach of a treaty consisting of a "violation of a provision essential to the accomplishment of the object or purpose of the treaty". It would appear that the overriding purpose of the US-Mexican extradition treaty was "to cooperate more closely in the fight against crime", (Second preambular para. of the treaty: *Limits to National Jurisdiction*, Mexican Secretaria de Relaciones Exteriores, 1992). To deliberately ignore, then, the process mutually agreed on for fighting crimes of common concern, and resort to unlawful acts that breached the territorial integrity and personal authority of a party to the treaty, was to manifestly disregard the purpose and object for which rights and obligations were specified in a legal instrument. Where the object and purpose of a treaty was frustrated by breaches relating to other aspects of international law, the relevance of the latter to the legal appraisal of a result obtained in disregard of the treaty could not be validly argued away.— *Cf.*, eg, *Nicaragua* v. *USA*, (Merits), *supra*, n. 37, paras. 275, 280.

In other respects, the Court's dictum in *Alvarez-Machain* to the effect that "[t]he general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abduction" (at 908), could not advance the principle of construction that militates against the presumption of an intention to violate international obligations. The judgment's affirmation of jurisdiction obtained by the unlawful breach of international law relating to a matter within the scope of the treaty would have the effect of disenabling the treaty from being a legal obstacle to a contemplated violation of international law. This would be so irrespective of whether the Court did or, as Halberstam contends, "did not hold...that the Treaty permits abduction, that abduction is legal, or that the United States had a right to kidnap criminal suspects abroad", (M. Halberstam, "In Defense of the Supreme Court Decision in *Alvarez-Machain*", 86 *AJIL*, 1992, p. 736), and of the fact that the terms of the particular extradition treaty were not directly at issue. Such an outcome would hardly be conducive to the desired expansion of rule-based international cooperation for the purpose of bringing offenders to justice: for the purpose of lawfully combating unlawfulness. A State's highest judicial organ, in the circumstances, would have been expected to incline more towards giving better meaning and effect to legality in international relations.

[115] The Inter-American Juridical Committee has declared the Supreme Court's judgment in *Alvarez-Machain* to be contrary to international law. The Committee was particularly of the opinion that interpreting the extradition treaty as being no " impediment to the abduction of persons" failed "to consider the precept by which treaties must be interpreted in conformity with their purpose and aim and in relation to the applicable rules and principles of international law". And the Committee underscored the obvious consequences of the Court's judgment by observing that "international juridical order would be irreversibly damaged by any state that attributes to itself the power to violate with impunity the territorial sovereignty of another state". — Opinion of the Inter-American Juridical Committee, 15 August 1992, in *Limits to National Jurisdiction*, Vol. II, Mexico's Secretaria de Relaciones Exteriores, 1993, p. 34.

attracts, therefore, reprobation that would not appear unreasonable.[116]

Moreover, the Supreme Court apparently did not find it necessary to distinguish between, and attach any particular significance to, a violation of international law brought about by officials and private individuals; the Mexican protests also appeared to have been of no avail. This would require further consideration of the rights involved in cases of abduction carried out on foreign territories.

Abductions on foreign territories could be perpetrated by the use of force or fraud[117] with or without the consent of the territorial sovereign. Abductions carried out in instances where the consent of the territorial sovereign is absent involve at least two distinct rights: the violated rights of the State and those of the individual. The consent of the territorial sovereign to the abduction could estop that State from protesting against the breach of its sovereignty, but it will not repair the violation of the individual's rights. Apart from the individual's right to damages that the abduction might entail, he could challenge any jurisdiction obtained over him as a result of that act where his standing to plead the violation of his rights is duly acknowledged.[118]

A State's right of protest against the unlawful violation of its territorial sovereignty caused by an act of abduction is beyond dispute, and part of the normal mode of reparation is the return of the victim of abduction;[119] but the remedial effect of the protest is not uniform.[120] As occurs sometimes, the wronged State might obtain satisfaction by other means than

[116] *Cf.* the persuasive explanation and conclusion of the Dissenting Opinion in *Alvarez-Machain, supra,* n. 89, pp. 910, 915-8; 78 *AJIL*, 1984, p. 208, where, in his petition to the Florida Probation and Parole Commission concerning one Sidney L. Jaffe, a kidnapped Canadian citizen, the US Secretary of State indicated: "As no good reason appears why the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty."

[117] See, eg, 72 *RGDIP*, 1968, pp. 149 *et seq.* re the abduction of South Koreans from the Federal Republic of Germany; *ibid.*, pp. 188 *et seq.*, for the allegation of fraud in effecting the return of South Koreans from France to South Korea; Mann (Reflections), *supra*, n. 92, p. 408.

[118] *Cf.* Mann (Reflections...), *supra*, n. 92, p. 409.

[119] See, eg, *ibid.*, p. 411; L. Preuss, "Kidnapping of Fugitives From Justice on Foreign Territory", 29 *AJIL*, 1935, pp. 505-7.

[120] See, eg, *Restatement (Third)*, *supra*, n. 2, § 432, Comment, *c*; the case of Argoud, *supra*, n. 92, p. 100; the case of the South Korean citizens abducted from Germany, *supra*, n. 117, p. 151; *Alvarez-Machain*, *supra*, n. 89, p. 903; the case of Arnold Nobel, 68 *RGDIP*, 1964, pp. 202-3, 820; Daillier & Pellet, *supra*, n. 6, p. 451.

the return of the victim of abduction.[121]

In respect of the victim person, the individual is generally denied the right of challenging the exercise of jurisdiction on account of the violation of certain international law rules:[122] It is for States and not individuals to protest against violations of international law; and such right of protest is within the discretion of States. But the violation of rights specifically acknowledged to the individual under a particular source of international law could entitle him to object in due cases to an exercise of jurisdiction. Such could occur, for instance, where rights deriving from self-executing treaties under US law[123] were violated; jurisdiction

[121] See, eg, operative para. 2 of UNSC Resol. 138 (1960), 23 June 1960, which requested Israel, in regard to the Eichmann incident, "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law", and the joint communiqué of Argentina and Israel announcing the decision of the two States "to regard as closed the incident that arose out of the action taken by Israeli nationals which infringed fundamental rights of the State of Argentina". — Henkin, Pugh, Schachter, Smit, *supra*, n. 92, p. 1085.

[122] The victims in such cases are sometimes counselled that the way to redress their grievances is to sue those who have unlawfully violated their rights. — See, eg, *Ker*, *supra*, n. 91, p. 359; O'Higgins, *supra*, n. 92, p. 319.

[123] See, eg, *Chew Heong* v. *United States*, 10 *AILC*, p. 319, where it is stated: "A treaty that operates of itself without the aid of legislation is equivalent to an act of Congress, and while in force constitutes a part of the supreme law of the land." And it has been held that "[w]hen it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action,...". — *Commonwealth* v. *Hawes*, 16 *AILC*, p. 442. Whether a treaty is or is not self-executing is a question for domestic courts to decide. — See, eg, Buergenthal, *supra*, n. 104, p. 317. In many States that are classified as monist a treaty may override a prior legislation or be superseded by it, (*ibid.*, pp. 341 *et seq.*) and most of these States distinguish between self-executing and non-self-executing treaties. — *Ibid.*, p. 382. See, further, *Restatement (Third)*, *supra*, n. 2, § 111, Reporters' Notes, 5; Henkin, Pugh, Schachter, Smit, *supra*, n. 92, pp. 216-7, where the Hague Convention Respecting the Laws and Customs of War on Land (1907), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), the Geneva Convention Relative to the Treatment of Prisoners of War (1949), the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance (1971), etc, are given as examples of treaties held to be non-self-executing under US law, and the Convention for the Unification of Certain Rules Relating to International Transportation by Air (1929), and the Treaty on the Execution of Penal Sentences (1976) are given as examples of treaties held to be self-executing under the same law.

It has been suggested that "certain rules of custom are, in effect, self-executing". — F.L. Kirgis Jr., "Federal Statutes, Executive Orders and 'Self Executing Custom' ", 81 *AJIL*, 1987, p. 372. *Cf.*, however, *Diggs* v. *Richardson*, 27 *AILC*, p. 222, where UN resolutions are held to be non-enforceable in the absence of implementing legislation; *Frolova* v. *USSR*, 2 *AILC (2nd)*, p. 540, where Arts. 55 and 56 of the UN Charter are held not to "create rights enforceable by private litigants in American courts"; *Haitian Refugee Center, Inc* v. *Gracey*, 4 *AILC (2nd)*, pp. 566-7, where it is indicated that the Protocol Relating to the Status of Refugees (606 *UNTS*, p. 267) is not self-executing.

exercised despite the violation would make the exercise irregular.

In other respects, in US law again, the exercise of domestic jurisdiction is declined where an individual is subjected to abuses that manifestly violate his rights to due process.[124] It has accordingly been held in the *Toscanino* case that

> when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.
>
> ...we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.[125]

Although due process is acknowledged not to be a static concept,[126] the courts have not construed the *Toscanino* rule with a commensurate latitude.[127] *Toscanino*, therefore, does not appear to have found judicial favour in other cases of abduction and seizure of individuals effected in violation of international law.[128] The jurisdictional maxim *male captus, bene detentus* still holds sway.

Nevertheless, that maxim does not now govern universally. Its apparent imperviousness to the manner in which a person is brought before a certain jurisdiction has been discarded in a South African case. It has been held there that

> [w]hen the state is a party to a dispute, as for example in criminal cases, it must come to court with "clean hands". When the state itself is involved in an abduction across international borders, as in the present case, its hands are not clean.[129]

The trial judge's statement "...that even if the applicant...was captured in violation of public international law, such seizure by the South African

[124] See also *Restatement (Third)*, *supra, n. 2,* § 703, Comment, *c*, about remedies that would be available for individuals under international agreements, and § 906, about setting up a violation of international law obligation as a defence. Amendment V of the US Constitution: "No person shall be...deprived of life, liberty, or property without due process of law...".

[125] *United States* v. *Toscanino*, 21 *AILC*, p. 95.

[126] *Rodriguez-Fernandez* v. *Wilkinson*, 1 *AILC (2nd)*, p. 65.

[127] See, eg, *United States* v. *Gengler*, 30 *AILC*, p. 443; *United States* v. *Yunis* (No 3), 88 *ILR*, p. 182; *United States* v. *Noriega*, 746 F. Supp. 1506, pp. 1530 *et seq.*

[128] See, eg, A.F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, Continued", 84 *AJIL*, 1990, p. 472.

[129] *State* v. *Ebrahim*, 31 *ILM*, 1992, p. 896.

State...would not impair the Court's jurisdiction"[130] was held to be wrong, and the conviction and sentence were set aside. This amounts to a judicial affirmation that the domestic application of *male captus, bene detentus* is not an imperative requirement. Declining the exercise of jurisdiction where custody of a defendant is the fruits of serious breaches of fundamental international law norms would merely be an implementation of the principle *ex injuria jus non oritur.*[131] The effect would essentially be similar even where jurisdiction is upheld in line with the *male captus, bene detentus* practice, but, because of unlawful acts committed in procuring his custody, the accused is discharged either in the exercise of statutory discretion or under "the inherent jurisdiction of the Court to prevent abuse of its own process".[132]

Furthermore, with human rights now better entrenched in the normative sphere of the world community, and with the improvement of the individual's right of access to bodies set up to look into complaints of human rights violations,[133] the maxim *male captus, bene detentus*, which suited other times governed by other norms, is under pressure to give in to the exigencies of contemporary aspirations for better standards of

[130] *Ibid.*, p. 899.

[131] See, eg, Mann (Reflections...), *supra*, n. 92, p. 414; Morgenstern, *supra*, n. 92, p. 266. Mann indicates a "change of direction" in the German judicial practice: In an appeal against the sentence of imprisonment imposed by a lower court on a person unlawfully induced to enter German territory from The Netherlands, and pending the request by the latter for the restitution of the person, the Federal Supreme Court is reported to have acknowledged that "the Dutch right of restitution...'could preclude the exercise of German jurisdiction'". ((Reflections...), p. 421, n. 72.

[132] *R* v. *Hartley*, *supra*, n. 92, p. 334. See, also, *Ex Parte Mackeson*, *supra*, n. 92, pp. 344-5.

[133] See, eg, *Celiberti de Casariego* v. *Uruguay*, 68 *ILR*, p. 41. The UN Human Rights Committee found *inter alia* that Celberti de Casariego, a citizen of Uruguay, was arrested in Brazil "by Uruguayan agents with the connivance of two Brazilian police officials...[and] was forceably abducted into Uruguayan territory and kept in detention". — (p. 45). The Human Rights Committee accordingly held *inter alia* that " the act of abduction into Uruguayan territory constituted an arbitrary arrest and detention", which revealed the violation of Art. 9(1) of the International Covenant on Civil and Political Rights. [The Art. provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...". — 999 *UNTS*, p. 171. Art. 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms — 213 *UNTS*, p. 221 — is to the same effect.] The violation entailed the obligation of providing the victim "with effective remedies, including her immediate release, permission to leave the country and compensation for the violations which she has suffered, and to take steps to ensure that similar violations do not occur in the future". — (p. 46). See, further, eg, V. Coussirat-Coustère et P.-M. Eisemann, "L'enlèvement de personnes privées et le droit international", 76 *RGDIP*, 1972, p. 399; L. Henkin, "International Law: Politics, Values and Functions", 216 *RCADI*, 1989-IV, p. 310.

legality.[134]

The maxim *male captus, bene detentus* has been described as wedded to international law[135] and as a "well-established customary international law".[136] Since, however, this jurisdictional maxim affects neither the international responsibility incurred by the State that violates international law nor the due right of redress of the wronged State, classifying it as customary international law would be misleading. The general domestic practice that upholds the maxim could be acknowledged to possess a definite domestic value, but it could not be so characterized as to make it appear capable of superseding the customary international law principles of sovereignty and responsibility. The protest of the wronged State against the violation of its territorial sovereignty might not defeat the domestic application of the maxim, but it would clearly negate the maxim's customary international law status.[137]

In closing, reference may be made to Art. 16 of the *Harvard Draft*,[138] which provides:

> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

This draft, admitted to be "in part of the nature of legislation",[139] has not been adopted. But properly reformulated to reflect the consequences that flow from violations of human rights norms of contemporary international law, its suitability for the fulfilment of contemporary aspirations of legality is apparent.

[134] See, eg, Halberstam, *supra*, n. 114, p. 746; Henkin, *supra*, n. 133, pp. 310-1, where it is rightly indicated that the maxim "encourages invasions of foreign territory and gross violation of human rights", and where it is emphatically asserted : "It cries for re-examination and rejection."

[135] Henkin, *supra*, n. 133, p. 310.

[136] Halberstam, *supra*, n. 114, p. 740.

[137] In his observations on Halberstam's views on the subject, Henkin has maintained that, in his "opinion, *male captus, bene detentus* is not the law when the state whose territory is violated protests the abduction and demands the victim's return". — Correspondence, 87 *AJIL*, 1993, p. 100.

[138] *Supra*, n. 3.

[139] *Ibid.*, p. 624. The draft is otherwise based on the generally accepted principle of specialty. Under that principle, an extradited person is triable only for the offence for which he is extradited, and for no other offence that he may be alleged to have committed prior to his extradition. — *Ibid.*, pp. 625, 627. See also, eg, the *Eichmann* case (District Court), *supra*, n. 35, p. 65.

PART II

USA AND PANAMA: RELATIONAL DIMENSIONS ESSENTIAL FOR THE STUDY

Chapter 3 Weighted Relationship

Part II comprises those peculiar features in the US-Panama relations that have a bearing on the present study. This chapter deals with certain historical matters and chapter 4 discusses the 1989 US invasion of Panama.

Panama, as an isthmian land of Central America providing the shortest distance between the Atlantic and the Pacific oceans, was fated to fall prey to the covetous mercantile and military designs of mightier States far and near.[1] Eventually harnessed to the transit enterprise which caused commerce, banking and tourism to flourish, Panama's economy came to be dominated by international services,[2] and its political ethos became largely attuned to the pervading interest in, and influence of, such services.[3] The nascence and entrenchment of symbiotically operating politics and economy in the State of Panama have been fully assisted by the US hegemonic drive and the entrepreneurial knack of its businessmen. The confluence of US interests and the desire of the Panamanians for secession from Colombia, attempted some 33 times since 1830, matured on 3 November 1903 when the presence of two US navy ships deterred Colombia from reacting against the revolt in the province and its imminent declaration of independence.[4] That naval presence, which for all practical purposes amounted to an act of an arbiter, was followed on 6 November by the US recognition of the State of Panama. Thus began a relationship between the US and Panama that soon developed into one that was of a very special kind. The special relationship was of such a character that it has been invariably observed that "[n]o other country in the region...has been so thoroughly dominated by the United States—so much so that it has often taken the character of a U.S. protectorate".[5]

In seeking to essentially comprehend the extent and depth of the lopsided relationship between the two States, and the consequential expecta-

[1] *Cf.*, eg, T. Barry, *Panama: A Country Guide*, 1990, p. 1; N. Padelford, *The Panama Canal in Peace and War*, 1943, pp. 32-3; P. Ryan, *The Panama Canal Controversy*, 1977, pp. 5-8; A. Zimbalist and J. Weeks, *Panama at the Crossroads*, 1991, pp. 21-2.

[2] See, eg, Zimbalist and Weeks, *supra*, n. 1, pp. 47 *et seq.*; *The CIA World Factbook, 1995*, (Panama), p. 5.

[3] *Cf.* Zimbalist and Weeks, *supra*, n. 1, pp. 4-15.

[4] See, eg, J. Weeks and P. Gunson, *Panama, Made in the USA*, 1991, pp. 22-3; Ryan, *supra*, n. 1, pp. 10-1.

[5] Barry, *supra*, n. 1, p. 1.

tion of a certain habit of conduct as well as the corollary effects on Panamanian politics and economy, this chapter will deal with matters pertinent to the present study under four sections: The Panama Canal Treaties; The Political Landscape; The Economy; The US Economic Sanctions.

3.1 The Panama Canal Treaties

A fortnight after declaring its independence, Panama became a party to a treaty with the US on 18 November 1903. The treaty, designated Isthmian Canal Convention,[6] was signed by John Hay, the US Secretary of State, and Philippe Bunau Varilla, the plenipotentiary of Panama and a French national. The treaty, which some derided as one "no Panamanian signed" or "even read...before it was signed",[7] contained stipulations that placed on Panama's sovereignty encumbrances of a nature bound—as borne out by later events[8]—to be potentially irreconcilable with any future nationalistic aspirations that demanded recognition and redress.

The treaty's most fundamental sections, apparently fashioned by Varilla,[9] provided for far-reaching constraints on the sovereignty of Panama.[10] Those sections authorized US intervention in Panama and created an exclusive US jurisdiction within Panamanian jurisdiction. Concerning US intervention, Art. I laconically stated that "[t]he United States guarantees and will maintain the independence of the Republic of Panama". The Article was seconded by the implemental sanction provided in Art. 136 of Panama's 1904 Constitution, which shall be referred to later.[11]

[6] *Treaties and Other International Agreements of the United States of America, 1776-1949*, Vol. 10, C.I. Bevans ed., p. 663.

[7] Zimbalist and Weeks, *supra*, n. 1, p. 12. But every Panamanian town council is reported to have agreed to the terms of the treaty. — Ryan, *supra*, n. 1, p. 13.

[8] The "flag riots" are reported to have caused the deaths of 21 Panamanians and four US soldiers. — Weeks and Gunson, *supra*, n. 4 , pp. 34-6.

[9] Varilla was conducting the affairs of Panama from Room 1162 of the Waldorf Astoria in New York, and is reported to have referred to the room as "the cradle of the Panama Republic". — *Ibid.*, p. 22. The foreign factor that dominated the creation of the State of Panama has prompted some to state categorically that "it is the curse of the Panamanian nation that it can take no pride in its formal creation and that its founding fathers could be justifiably branded as agents of a foreign power". — Zimbalist and Weeks, *supra*, n. 1, p. 136.

[10] The US Secretary of State Hay is reported to have declared that the treaty was "very satisfactory, vastly advantageous to the US and we must confess...not so advantageous to Panama". — *Ibid.*, p. 24.

[11] Infra, p. 82; Barry, *supra*, n. 1, p. 5.

Other provisions that related to intervention were those of the second and third paragraphs of Art. VII, which established in their relevant parts that

> in case the Government of Panama is unable or fails in its duty to enforce...compliance by the cities of Panama and Colón with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.
>
> The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colón and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.

Concerning the creation of an exclusive US jurisdiction within Panama, a grant in perpetuity of a zone which comprised an area that was ten miles in width and extended from the Caribbean Sea to the Pacific Ocean, but did not include the cities of Panama and Colón with their adjacent harbours, was established under the terms of Art. II for the purpose of the "construction, maintenance, operation, sanitation and protection" of a ship canal. A grant of other parts of Panamanian territory "which may be necessary and convenient" for the same purpose was also established under the Article. The US authority accompanying the grant was set out in Art. III, which prescribed:

> The Republic of Panama grants to the United States all the rights, power and authority within the zone...which the United States would possess and exercise if it were the sovereign of the territory...to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

The full surrender of Panamanian sovereignty the Article signified was further stressed by Art. XXIII, which asserted the US right to use its police and armed forces or to establish fortifications for the protection of matters put under its jurisdiction.

The entire exclusion of the exercise of Panamanian sovereignty from the areas granted to the US[12] brought about the anomalous situation of a foreign jurisdiction within a national jurisdiction[13] and the inevitable socio-political complications.[14]

The obligations that Panama had assumed under the terms of the 1903 treaty and that to all appearances had onerously affected the plenitude of its sovereignty were partially attenuated by the US-Panama treaties of

[12] See *supra*, ch. 2, p. 40, the notion of exclusivity as flowing from the principle of territoriality.

1936[15] and 1955:[16] The US guarantee and undertaking in regard to the maintenance of Panama's independence laid down in Art. I of the 1903 treaty was superseded;[17] the US renounced the right to certain Panamanian territory granted to it under Art. II of the treaty;[18] the provision in Art. VII of the same treaty relating to the US right to acquire property "by the exercise of the right of eminent domain" was deleted; other provisions in the same Article concerning the US right and authority to enforce US-prescribed sanitary ordinances in the cities of Panama and Colón, and to maintain public order in the said cities and the adjacent harbours and territories, when in each situation Panama was deemed unable to perform the task, were abrogated.[19]

Despite the changes introduced by the amending treaties, the Canal Zone remained a US enclave outside Panamanian sovereignty: Its governor was invariably a US general, and it had its own courts and police force.[20] It served as the headquarters of the Southern Command (Southcom), which reportedly coordinated "all United States military and intelligence activities in Latin America, supervise[d] the military assistance programmes, and the military advisory missions resident in each coun-

[13] Or a country within a country where the American system prevailed. — J. Pearce, *Under the Eagle*, 1982, p. 113; Weeks and Gunson, *supra*, n. 4, pp. 26-7, quotation from J. Morris, 'An Imperial Specimen' (1975), relating to the contrasting scenes between the Canal Zone and the surrounding Panamanian area. See also, eg, Ryan, *supra*, n. 1, pp. 15-8. Titular sovereignty, for whatever it was worth, remained with Panama. — Padelford, *supra*, n 1, p. 50.

[14] See, eg, J. Dinges, *Our Man in Panama*, 1990, p. 87 about racial segregation and other forms of discrimination; pp. 76-7 about the flag incident during which 18 Panamanians are said to have died (see *supra*, n. 8, for a slightly different figures); Weeks and Gunson, *supra*, n. 4, pp. 34-5, quotation from W. Krehm, *Democracies and Tyrannies in the Caribbean*, 1948, relating to segregated currency. *Cf.* Padelford, *supra*, n. 1, p. 80, where it is claimed that but for the Canal "Panama would be today the backward, malaria province which it was in 1900"; Ryan, *supra*, n. 1, p. 17 re the clash between the US aspiration for greatness and its democratic ideals.

[15] *LNTS*, Vol. CC, p. 17.

[16] 243 *UNTS*, p. 211.

[17] Art. I of the 1936 treaty, *supra*, n. 15. *Cf.* Art. X of the same treaty where "an international conflagration or the existence of any threat of aggression which would endanger the security of the Republic of Panama or the neutrality or security of the Panama Canal" will bring forth the preventive and defensive measures of the US and Panama. And "measures...which may affect the territory under the jurisdiction of the other Government, will be the subject of consultation between the two Governments." By the exchange of the notes of 1 February 1939, the condition of consultation was understood not to prevent the US from taking action in case of emergency. *Ibid.*, pp. 57-9.

[18] *Ibid.*, Art. II.

[19] *Ibid.*, Art. VI; Art. IV of the 1955 treaty, *supra*, n. 16.

[20] Weeks and Gunson, *supra*, n. 4, p. 34; Pearce, *supra*, n. 13, p. 113.

try".[21] Moreover, it afforded a convenient location for conducting other activities that did not properly fall within the scope of the treaty grant. Such, for example, was the School of the Americas, also known as the School of Coups,[22] set up and operated "for the indoctrination and acculturation of Latin American military officers, many of whom became some of the more infamous dictators in the hemisphere, which prompted the nickname 'School of the Tyrants'".[23]

With changing times and the rising tide of Panamanian nationalism, however, the status of the Canal Zone was doggedly challenged until the US found it necessary to agree to certain fundamental adjustments and establish new bases for changed legal relations. New arrangements were formalized in the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal of 7 September 1977 — the Carter-Torrijos Treaties.[24] It will be appropriate to indicate the gist of the treaties' principal provisions that are of interest to the present jurisdictional study.

Under the terms of the Panama Canal Treaty, the treaties of 1903, 1936, and 1955 referred to above, and provisions in other instruments between the US and Panama that concerned the Panama Canal, were to be terminated or superseded; plenary jurisdiction over the Canal Zone, now called the former Canal Zone, was to be restored to Panama; the rights that Panama had granted to the US for regulating "the transit of ships through the Panama Canal" were to be terminated "at noon, Panama time, December 31, 1999"; the Canal's overall management and operation was to come under the Panama Canal Commission to be supervised by a Board composed of five US nationals and four Panamanians; a national of the US was to be the Administrator of the Panama Canal Commission until 31 December 1989, and a Panamanian was to be the Administrator from 1 January 1990; the primary responsibility for the protection and defence of the Canal during the currency of the treaty was to fall on the US; and the US was to ensure respect for the principle of non-intervention.[25]

Regarding the principle of non-intervention, the US attached a reservation to the effect that any action it took "to assure that the Panama Canal shall remain open, neutral, secure, and accessible...shall not have

[21] Pearce, *supra*, n. 13, p. 57.
[22] *Ibid.*, pp. 58-9.
[23] Zimbalist and Weeks, *supra*, n. 1, p. 142.
[24] 16 *ILM*, 1977, pp. 1022 *et seq.* and pp. 1040 *et seq.* respectively. In force 1 Oct. 1979. — 78 *DSB*, 1978, August, p. 61.
[25] See Articles I(1), XI(1), I(2), II(2), II(3), II(3)(c), IV(2), and V.

as its purpose or be interpreted as a right of intervention in the internal affairs" of Panama.[26] The reservation correlated with the pertinent US amendment incorporated in the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.

Under the terms of Art. I of the latter treaty, Panama declared the permanent neutrality of the Canal, and under the terms of Art. IV the regime of neutrality was to be maintained by the US and Panama. The US amendment made it clear that the defence of the Canal's regime of neutrality could be undertaken unilaterally, which would not mean, nor should "be interpreted as...a right of intervention of the United States in the internal affairs of Panama".[27] Similarly, under the US Conditions attaching to the Treaty, it was asserted that in case of the closure of the Canal or interference with its operation, either party could independently take measures, "including the use of military force in the Republic of Panama", to rectify the situation.[28]

In the Protocol of Exchange of Instruments of Ratification signed by Carter and Torrijos, Panama made its agreement to the exchange of the instruments subject to its understanding that both parties were bound to fulfil in good faith their international obligations, such as those that came under the terms of Art. 1(2) and Art. 2(4) of the UN Charter, and Art. 18 and Art. 20 of the OAS Charter.[29] Panama further circumscribed its understanding of the permissible scope of the US resort to unilateral measures by underscoring its expectation that those measures would be "effected in a manner consistent with the principles of mutual respect and cooperation."[30]

The Carter-Torrijos Treaties of 1977 gave, on the one hand, the foreign jurisdiction within a national jurisdiction that the Canal Zone[31] constituted a programmed demise. But, on the other hand, the pertinent amendments, reservations, conditions, and understandings that were incorporated in the treaties, and that authorized the unilateral resort to military measures, meant that the right of intervention of the US in Panama would indefinitely outlive the life span of the Panama Canal Treaty.[32]

[26] 17 *ILM*, 1978, pp. 820-1.
[27] *Ibid.*, p. 828.
[28] *Ibid.*, p. 829. See, further, p. 832, where Art. IV of the Treaty was understood to mean that either party could "take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action".
[29] *Ibid.*, p. 819.
[30] *Ibid.*, pp. 819-20.
[31] It is referred to in the treaties as the former Canal Zone. It came to be called the Canal area after 1979. — Barry, *supra*, n. 1, p. 97.
[32] *Cf.* Pearce, *supra*, n. 13, p. 116; Zimbalist and Weeks, *supra*, n. 1, p. 52.

Every time the US resorts to an international measure of force in Panama under colour of treaty right, it will have to demonstrate the compatibility of the measure with its declaration that such action "shall never be directed against the territorial integrity or political independence of Panama".[33] Further and more fundamentally, even in the absence of such declaration, the US will bear the onus of demonstrating the legality of every international measure of force that it undertakes as a treaty right in Panama.[34] Where the measures lack legal justification, they will constitute an unlawful intervention and impinge on the territorial integrity and political independence of Panama.[35] In this regard, Panama's specific reference to Art. 2(4) of the UN Charter and Articles 18 and 20 of the OAS Charter in the exchange of the treaties' ratification instruments is particularly significant. The reference to those fundamental provisions of international law is in effect Panama's assertion of its right to be shielded at any material time by the law on the non-use of force in international relations.

Appraised for its bearing on the legal regulation of international peace and security, the US forcible intervention in Panama authorized under the terms of the ratified Canal treaties, might be a potential source of misunderstandings and conflicts between the signatory States. Such authorization might also erode and enfeeble the stringent scruple with which every State is expected to abstain from the unlawful resort to force on the international plane. The indulgence of the contemporary world community's leading State in a treaty practice, formally and materially valid, but fraught with conflict-prone possibilities, is unfortunate. It would constitute an unhappy precedent for many others who are ever inclined, if not determined, to thwart the effectiveness of the normative constraints that seek to better assure international peace and security. As the US invasion of Panama in 1989, which shall be the subject of the next chapter, was to bear out, the allegedly treaty-authorized unilateral intervention in Panama bode ill as a precedent for the proper governance of the international law norm on the use of force.

Whether the Panama Canal Treaties of 1977 have satisfactorily restored Panama's territorial sovereignty and secured its political independence would be observable from the nature of the treaties' implementation. An interventionary attitude fostered by unequal treaty terms

[33] 17 *ILM*, 1978, p. 828.

[34] The obligation would attach to any State that resorts to force on the international plane. See B. Asrat, *Prohibition of Force Under the UN Charter. A Study of Art. 2(4)*, 1991, pp. 230, 241.

[35] See, eg, *ibid.*, pp. 149 *et seq.*

and hardened by practice has informed the history of the US relations with Panama. Flowing from inequality of size, wealth, might, skill, and other inter-State relational factors, intervention can become a habit that manifests perseverance despite fundamentally altered legal conditions espoused by the contemporary world community and given expression in international legal rules.

3.2 The Political Landscape

When Panama declared its independence from Colombia with the decisive assistance of the timely and designed presence of the US warships, it did not possess the means essential for properly maintaining a sovereign status. Its potential for an armed force soon after its independence, for instance, was optimally estimated not to exceed six hundred men.[36] That meagre defensive capability exposed the menacingly precarious nature of the new State's continued existence. In such circumstances, the interplay of mutual interests and lack of other feasible options appeared to have dictated that the US guarantee the existence of Panama as a State and that Panama surrender the exercise of its sovereignty over a portion of its territory.[37] As noted earlier, an arrangement was accordingly formalized in the 1903 treaty and put into effect in the course of the years that preceded the entry into force of the 1936 treaty. The arrangement has been characterized in different terms and contexts to have merely changed the status of Panama from one of a province of Colombia to that of a protectorate of the US.[38] However appropriate that characterization might appear, it should not be disregarded that it was the Panamanians themselves who were better positioned to assess which of the two status best served their immediate and prospective needs and aspirations.

In any event, regarding the legal elements that bear on Panama's status, reference may be made to its 1904 Constitution. As mentioned earlier, Art. 136 of the Constitution strengthened the responsibility that the US had undertaken in the 1903 treaty to guarantee and maintain the independence of Panama. The Article provided:

> The Government of the United States of America may intervene in any part

[36] Weeks and Gunson, *supra*, n. 4, p. 23, citing D. McCullough, *The Path Between the Seas*, 1977.
[37] *Supra*, p. 76.
[38] See, eg, Zimbalist and Weeks, *supra*, n. 1, p. 10; Padelford, *supra*, n. 1, p. 75; Barry, *supra*, n. 1, p. 1.

> of the Republic of Panama to re-establish public peace and constitutional order in the event of their being disturbed, provided that nation shall, by public treaty, assume or have assumed the obligation of guaranteeing the independence and sovereignty of this Republic.[39]

This extraordinary constitutional authorization of foreign intervention was given added momentum by the unreserved willingness with which Panama's rulers sought, and acquiesced in, its implementation, and by the nonexistence of a Panamanian army.

Since the US had pressured Panama in 1904 to abolish its public force, the new State was without a national army and remained so for ten years.[40] Some consider that the disbanding of the Panamanian army was intended to make Panama fully amenable to the will of the US.[41] But with respect to Panama's rulers, the constitution-authorized US military intervention would appear to have obviated the expenses needed for maintaining a national army, which might also have become a breeding ground of competitors for political power.[42] Hence, with strong legal authorization and with no Panamanian army to assume an influential role in internal power disputes, the US was able to pursue freely the policy that it saw fit for Panama, and to assume the role of an arbiter of internal power entitlements and equilibrium. Prompted by the need for serving the dovetailed interests of the US and Panama's rulers, and resorted to as often as required, the interventionary functions undertaken by the US would appear to have strengthened its habit of intervention; the rulers would appear to have cultivated a habit of expectation of such intervention; these habits would appear to have unavoidably led to the factual subjugation of Panama.[43]

Those who, in the prevailing circumstances of the country, spoke and acted on behalf of Panama and the Panamanians were by all accounts the merchants. Benefiting from the location of Panama as an advantageous trade route, the merchants had prospered over a period of time; they

[39] Padelford, *supra*, n. 1, p. 62. The Article was omitted in the 1940 amendment of the Constitution. — *Ibid.*, p. 63.

[40] See, eg, Zimbalist and Weeks, *supra*, n. 1, p. 11.

[41] See, eg, Weeks and Gunson, *supra*, n. 4, p. 25.

[42] Zimbalist and Weeks, *supra*, n. 1, p. 11.

[43] See, eg, Padelford, *supra*, n. 1, p. 61, n. 54, where Buchanan, the US Minister to Panama, writing to Hay, the Secretary of State, on 5 Jan. 1904, is said to have argued: "I feel each day more strongly convinced that our own interests here will be so wrapped up with the internal order or disorder that will exist here that we should certainly put ourselves in a position wherein we can make order and constitutional government here a certainty." See, further, eg, Barry, *supra*, n. 1, pp. 5, 101-2, 108; Zimbalist and Weeks, *supra*, n. 1, p. 12; Weeks and Gunson, *supra*, n. 4, p. 26.

eventually became an urban class that coalesced itself as the dominant wealth and political power elite.[44] It was this elite class that opted for aligning its interests with those of the US and provided the rather drastic constitutional means for guaranteeing the respect of those rights. It was also the same class that was the base and source of some twenty plus families that composed the oligarchy which manipulated Panama's politics. The oligarchy operated through different factions of the Liberal Party[45] whose rallying concerns appeared to have been issues of personalities rather than political platforms.[46]

The oligarchy's undisputed dominance of the Panamanian political scene was now and again contested by Arnulfo Arias Madrid, a leader of note. He gave plausible voice to the bulging nationalistic sentiments that were kept aflame by the continued incongruity of the status of the Canal with Panama's sovereignty, and succeeded in creating a predominantly non-oligarchic power base. Still, although he enjoyed popular support and served three times as the State's president, he was unfailingly denied sufficient period of tenure that might have helped him extricate power from the grip of the oligarchy: Each time he was installed in the office of the presidency, he was removed, it is said, "by changing alliances of the traditional political elite, the National Guard, and the U.S. embassy".[47] He was removed by the National Police in 1941 and 1951 on others' account, and by the National Guard on its own account. Thus, what Arias sought to achieve was by turn of events accomplished by those who deposed him.[48]

3.2.1 The Military

The military coup of 11 October 1968[49] that toppled Arias, who at the time had been in office for only a few days, cleared the stage for Omar Torrijos Herrera, another leader of note, and for the dominance of Panama's politics by the military. Torrijos was a graduate of the Salvadorian military academy; he is reputed to have been principally concerned with satisfying the popular national demand for the return of the Canal area to the fold of Panama's sovereignty.[50] In this, he was eventually successful within the limits indicated earlier in regard to the 1977 Canal Treaties.[51]

[44] See, eg , Weeks and Gunson, *supra*, n. 4, pp. 18-9.
[45] What was known as the Conservative Party was disbanded in 1912. — Barry, *supra*, n. 1, p. 8.
[46] See, eg, *ibid.*, p. 7; Weeks and Gunson, *supra*, n. 4, p. 26.
[47] Barry, *supra*, n. 1, p. 8. See also, eg, Weeks and Gunson, *supra*, n. 4, pp. 28-9.
[48] See, eg, Zimbalist and Weeks, *supra*, n. 1, p. 14.

His position became more secure following the coup that was attempted against him in 1969[52] but was foiled by Manuel Noriega and other loyal officers. The event was also a windfall that opened opportune vistas for Noriega to indulge his ambitious resource.[53] Torrijos was made head of government in accordance with the provisions of the 1972 Constitution; the title of Maximum Leader was bestowed on him. Under his regime, legislation on strict banking secrecy induced the establishment of the International Financial Centre and the eventual increase of the number of banks from 12 to some 130, entailing, as commonly acknowledged, a large flow of illicit money into Panama.[54] Also under his regime, the Colón Free Trade Zone saw spectacular growth,[55] and the National Guard "became an autonomous political force".[56] Torrijos wielded legislative and executive power and ruled Panama until his death in an aeroplane accident in 1981.[57]

Panama's military,[58] the springboard and power base of Torrijos, and later of Noriega, dominated directly and indirectly the political life of the country from 1968 until the death knell of the Panama Defence Forces

[49] The military coup hardly seemed to have evoked more than nominal US displeasure. The Department of State's statement of 13 Nov. 1968 explaining the reasons for the resumption of diplomatic relations with the military government stated that "we have given careful consideration to the publicly declared intention of the Panamanian Government to hold elections, to return to constitutional government, to respect human rights, and to observe Panama's international obligations. ... We have also noted...the firm intention of the Government to restore full constitutional rights promptly and to hold free elections." — 59 *DSB*, 1968, p. 573. However, the expectation of the prompt restoration of democracy that was based on the pronouncements of the same persons who had set aside and replaced the democratic process was frustrated by the length of the military rule. It took sixteen years to hold a national election. In the meantime, "with the blessing and assistance of the U.S., Torrijos was expanding the manpower and capabilities of his National Guard", and his continued exercise of State authority had a legitimizing effect for his regime. — F. Kempe, *Divorcing the Dictator*, 1990. p. 88. It could, in the circumstances, be understandable why some thought fit to state that "the Johnson administration applauded the military coup". — Weeks and Gunson, *supra*, n. 4, p. 29. See also Zimbalist and Weeks, *supra*, n. 1, pp. 30-1.

[50] His oft-quoted utterance in this regard is: "I don't want to be in the history books; I want to be in the Canal." — J. Dinges, *supra*, n. 14, p. 78.

[51] *Supra*, p. 79.

[52] Allegedly, the attempted coup was supported by the CIA. — See, eg, Weeks and Gunson, *supra*, n. 4, p 31; Zimbalist and Weeks, *supra*, n. 1, p. 31.

[53] See, eg, *ibid.*, respectively, pp. 46-7; p. 138.

[54] See, eg, Kempe, *supra*, n. 49, p. 74.

[55] See, eg, Weeks and Gunson, *supra*, n. 4, p. 33. Banking and other economic facilities afforded by Panama will be discussed later under Section 3.3, The Economy.

[56] Barry, *supra*, n. 1, p. 13.

[57] *Ibid.*, pp. 12-4.

[58] See, generally, eg, *ibid.*, pp. 11-6; Weeks and Gunson, *supra*, n. 4, pp. 39-44.

(PDF) was sounded by the US invasion of 1989. During the Torrijos years, the National Guard became the most important political institution in Panama, and its new status was given a secure place in the 1972 Constitution where it was provided that "the three governmental branches are obligated to act in harmonious collaboration with the public forces".[59]

The origins of Panama's military have been traced to a battalion of Colombian troops and some gunships; these constituted the core of the country's armed force at its independence. As mentioned earlier,[60] this force was abolished in 1904; it was replaced by a police force, which in turn was disarmed later. Afterwards, the US was left with the sole authority for maintaining Panama's internal order and national defence; that authority lasted until the end of 1936 and gave credence to the de facto protectorate status of the country. Armed again during the Second World War, the National Police steadily grew in influence and strength, and in 1953 became the National Guard.

By 1968, the National Guard had become a force of some 6,000 persons capable of ousting a civilian government and fending well for itself. By 1978, it had some 15,000 members of whom more than 5,000 were trained at the School of the Americas in the Canal Zone. In 1983, the PDF was established under the command of Noriega. The PDF incorporated the National Guard, the navy, the air force, the police, the Canal Defence Force, the traffic department, and the immigration service. The plan of the new organization is said to have been worked out by Michael Harari, a former Israeli Mossad agent who was serving Noriega as an adviser.[61] Thus brought under one command, the arms bearers of the public sector were poised to facilitate their commander's dictatorial exercise of power and his illegal enterprises.

The PDF, as the National Guard before it, has been characterized as a thoroughly corrupt organization.[62] Also, like the National Guard, the

[59] Barry, *supra*, n. 1, p. 13.

[60] *Supra*, p. 83.

[61] See, eg, Kempe, *supra*, n. 49, p. 119.

[62] As regards the National Guard, Torrijo's style of rule is said to have "allowed corruption to spread within the ranks of his military...like jungle fire". — Kempe, *supra*, n. 49, p. 73. It has also been said that the "leadership corps enriched themselves with favors and bribes offered by the private sector. The extensive network of state enterprises that was developed during the Torrijos regime also offered a new source of wealth for ambitious officers. The Transit Corporation and Colón Free Zone were especially lucrative targets for National Guard corruption. Because of their involvement in gambling, prostitution, and the vice business, National Guard officers have been called the 'mafia chiefs' of Panama." — Barry, *supra*, n. 1, p. 13. See *ibid.*, p. 32; Zimbalist and Weeks, *supra*, n. 1, p. 67, about the corruption of the PDF. The latter has also been described as "the axel around which the wheel of corruption turns". — Weeks and Gunson, *supra*, n. 4, p. 43.

PDF was a servile instrument of Noriega's iniquity and corruption—traits that were generally considered to defy bounds and scruples.

Still, the PDF was an organ of the State. Although it was much soiled, and used its power against hapless persons in a notorious contempt of basic human rights norms, it was there, and needed to be there, for purposes of internal order and national defence. The necessary functions that the PDF performed were partly and starkly demonstrated by the breakdown of law and order experienced in certain quarters of Panama City and Colón following the US invasion of Panama and the disbanding of the Force.[63]

It may be remarked by way of generally rounding off the foregoing paragraphs that until 1987 Panama's military, including the police, owed much of its training and other assistance to the US.[64] Panama's military also received surplus US military equipment and participated in annual joint military manoeuvres with the US. In such circumstances, the US military influence must have left a definite mark on Panama's military. It was the force that it had thus helped train and equip that the US set out to destroy in 1989.

3.2.1.1 Noriega, the Military Officer

Panama's military made Manuel Noriega who he was, but he became the cause of its undoing. Noriega rose to the pinnacle of Panamanian power by dint of hard work and a ruthless pursuit of objectives. Much like other depraved dictators, he was noted to be markedly contemptuous of law and morality that stood in his path. Apparently immune from normal feelings of remorse, he manipulated with single-minded resourcefulness all available means and opportunities that mollified the hunger for wealth and power which prodded and propelled him. He accordingly succeeded in mobilizing effectively his innate and acquired characteristics to serve himself and all others who met his price. His manifest personal cruelty and harsh employment of the public forces against his adversaries did not, as will be observed later, repel others, particularly the US, from buying his services and consequently pampering his venality.

Moreover, like his type of dictator, Noriega's greed for wealth was probably as unremitting as his insatiable and perverse mania for power. Indiscriminate in the sale of his services, he is reported, for instance, to have "received payments from at least ten intelligence agencies in the

[63] See, eg, Weeks and Gunson, *supra*, n. 4, p. 10, re the large-scale looting.
[64] Barry, *supra*, n. 1, pp. 30, 113-4.

world...including Cuba, Nicaragua, Israel, Taiwan, France, England, and the United States".[65] And aware, as he instinctively seemed to have been, of the fate that awaited fallen dictators tenaciously chased by those bent on retribution, he struggled to keep his doom at bay by futilely seeking to cling to power.[66]

Manuel Noriega's first contact with the US intelligence apparently began when he was at the Peruvian Military Academy. Popular story, on the other hand, would have him in the CIA pay for spying on leftist high school students while he was still at the Instituto Nacional.[67] Nevertheless, he has been evaluated by a US intelligence agent as a "perfect find: smart, devious, amoral, resourceful and reliable."[68] For a small monthly reward, then, that he continued to receive in recognition of his satisfactory service, he informed on leftist students and instructors at the Peruvian Military Academy.

Even if considered a pittance, the regular amount he received for the intelligence services he rendered to the hemisphere's mightiest State must have given him a sense of importance and caressed his ego. At the same time, informing on cadets and officers whose social background and general bearing he seemed to resent must have satisfied his vengefulness. The social background of his own family was humble. The result of a liaison between an alcoholic father and a mestizo domestic, he was reared in the poor quarters of Panama City. His appearance was mocked; he was unlucky with the women he wanted to attract; and he lacked the means for fulfilling his early ambition of studying medicine. The unhappy combination of these and other related factors would seem to have bred in him a deep well of pent-up resentment against all who seemed to have what he lacked.[69]

Noriega returned to Panama from Peru having opened the military and intelligence avenues that would lead him to fame and infamy. He joined

[65] Kempe, *supra*, n. 49, p. 119. See also Barry, *supra*, n. 1, p. 98.

[66] The 100-day stay of the Shah of Iran in Panama seemed to have given Noriega, who was responsible for the Shah's security, a good opportunity for learning from the deposed monarch's situation. Noriega is said to have seen "that there was little life after dictatorship". — Kempe, *supra*, n. 49, p. 105. But, characteristically, that insight did not deter him from financially exploiting the hapless and ailing Shah; it did not seem to have influenced his conduct either: he neither mended his way nor was ready to acquit himself honourably on his day of reckoning. See *ibid.*, pp. 101-8.

[67] Kempe, *supra*, n. 49, p. 50. *Cf.* Weeks and Gunson, *supra*, n. 4, p. 45

[68] Kempe, *supra*, n. 49, p. 48.

[69] Noriega was born in Panama City on 11 Februay 1934. His father appeared to have been a modestly-paid accountant. His mother died when he was probably four or five years old. He was raised by his godmother. See, generally, Kempe, *supra*, n. 49, pp. 37 *et seq.*, 84; Dinges, supra, n. 14, pp. 31 *et seq.*

the National Guard in 1962 following the persuasive prompting of Torrijos, who became his protector. Once he got a taste of power, he began to unfold the traits and contrivances that were to carry him along his chosen path to dictatorship.

The beating and rape of a female prostitute that he was alleged to have committed while he was at the Peruvian Military Academy in Lima was not, apparently, a passing trait. He was reportedly accused on other occasions of the same order of crimes, but saved from punishment by Torrijos in one case, and by his increased authority in another.[70] His trait of cruelty manifested itself, for instance, in the so-called sexual torture of prisoners reportedly perpetrated under his supervision,[71] in the exposure of prisoners to the sun "until their skin began to bubble",[72] and in the merciless and bloody attack on peaceful demonstrators.[73]

Noriega's accelerated promotion from his position as chief of the transit police department to the head of the military intelligence (G-2), and the corresponding growth of his power and influence, appeared to have owed a lot to the files that he studiously kept on the activities and private lives of friends and foes. Even Torrijos did not seem to have been spared from Noriega's blackmailing enterprise.[74] Secure in the knowledge of the damaging potential of the secret files, and controlling or manipulating other intelligence activities, Noriega became as much a fearsome threat to prospective victims as an indispensable official to Torrijos.[75] The widened and firm domestic power base that went with his growing stature made him also a worthwhile agent for foreign intelligence services, and remarkably facilitated his activities that related to drugs and guns.

Deftly utilizing, hence, the effective means under his control, and ever after the enhancement of his wealth and power, Noriega proceeded to consolidate his domestic power base and diversify his foreign clientele and external illegal activities.

After he became the commander of the National Guard in 1983, Noriega brought all the significant armed elements in Panama under the PDF, which began to operate as the country's army and police force.[76] This

[70] Kempe, *supra*, n. 49, pp. 47-8, 56-7, 64.

[71] Coke bottles and splintered sticks were reportedly used to rape the prisoners, and "Noriega supervised, watching silently as the prisoners screamed". —*Ibid.*, p. 59.

[72] *Ibid.*, p. 64.

[73] *Ibid.*, pp. 358-60.

[74] *Ibid.*, pp. 62, 72. Noriega is reported to have instructed his officers that "Every one in Panama has something to hide...What I want to know, in every case, is what that something is." — *Ibid.*, p. 75.

[75] *Ibid.*, p. 89.

[76] *Supra*, p. 86; Barry, *supra*, n. 1, pp. 7, 30-2; Weeks and Gunson, *supra*, n. 4, pp. 9, 41.

structuring enabled him to better impose his will, avoid a rival force, and harness the public forces to the unchecked service of his unlawful activities. As Delvalle was reported to have ruefully admitted to Bush, no crack appeared in Noriega's hold on the military.[77] The patent tampering with the 1984 election was the first principal achievement of the newly structured public forces.[78] Nevertheless, the US had assisted in training and equipping the PDF;[79] the US had also blessed the reportedly fraudulent election of Barletta.[80]

Regarding Noriega's remunerative services to foreign intelligence establishments, it was the US, as indicated earlier,[81] that initially gave him a taste for that class of activity, and later paid and groomed him more as he progressively increased in influence. He got his official link with the US intelligence when Torrijos assigned to him the task of supervising the intelligence-gathering operation established in 1964 and 1965 with the help of the US 470th Military Intelligence Brigade. Keeping his position of chief of the transit police, he now came on the payroll of a US intelligence service. US officers trained him in intelligence, counterintelligence, and psychological operations.[82] The US helped with funds and the training of intelligence officers when, as chief of military intelligence—the G-2—Noriega expanded the boundaries of his intelligence undertakings.[83] Noriega is reported to have served at one and the same time as "the liaison for the CIA, the FBI, Customs, and several military intelligence agencies".[84] By 1976, the CIA was paying $110,000 annually for its liaison relationship with the G-2; by 1981, it was $185,000; and by other estimates, the payment could have been as high as $200,000 annually.[85] Although the payments were not reported to have been made to Noriega, he would not appear to have relinquished full control over them. It has also been reported that the annual payments were "put into a private account at the Bank for Credit and Commerce International...that only [he] controlled".[86]

Even though Noriega had received some training in intelligence and police work in Israel and Taiwan,[87] he was mostly a US product in

[77] Kempe, *supra*, n. 49, p. 348.
[78] *Ibid.*, pp. 123-5.
[79] *Supra*, p. 87.
[80] *Infra*, p. 95.
[81] *Supra*, p. 88.
[82] Kempe, *supra*, n. 49, pp. 57-8.
[83] *Ibid.*, p. 82.
[84] *Ibid.*, p. 83.
[85] *Ibid.*, pp. 90, 162, 224.
[86] *Ibid.*, p. 224.

respect of intelligence schooling. But steadfast loyalty must have been a subject that his training either cynically neglected to emphasize or dramatically failed to vivify, for the student soon outsmarted his teacher: Much to the chagrin of the US authorities, Noriega successfully infiltrated the US military's intelligence-gathering operation in Panama;[88] he also profitably accommodated all, irrespective of political alignment and ideological persuasion, who met whatever he required in return; the US seemed to have been aware of his latter feat.[89]

If Noriega showed a notable ability to simultaneously serve a number of foreign intelligence agencies with dissimilar concerns, his involvement in enterprises related to drugs and guns did not appear less spectacular. Having had the public forces and certain government services reorganized under the PDF and his effective command, he was positioned to do whatever he pleased with relative ease and impunity. As succinctly put in one study, he thus

> ensured that he had control over all the agencies responsible for drug enforcement — customs, immigration, and port and airport authorities. He also took control of the National Bank of Panama and the Attorney-General's office. In doing so he turned the country's public institutions into branches of a criminal enterprise: not only could he determine who could break the law, he could also offer almost unlimited money-laundering facilities.[90]

His deformed ingenuity flourished unhindered in the propitious milieu that he created for satisfying his ambition. While getting paid by Escobar's[91] Medellín cartel for his part in its drug trafficking,[92] he had the PDF raid the cartel's cocaine factory at Darién.[93] At the same time, he

[87] *Ibia.*, p. 58.

[88] *Ibia.*, pp. 28, 91-2, re the case of the US sergeants—dubbed the Singing Sergeants—on Noriega's payroll.

[89] *Ibia.*, p. 119.

[90] Weeks and Gunson, *supra*, n. 4, p. 52.

[91] Pablo Escobar Gaviria is said to have rocketed from "a small-time thief of head-stones from graveyards in Medellín, Colombia" to being, by the mid-1980s, "one of the world's ten richest men". — Kempe, *supra*, n. 49, p. 183.

[92] See, eg, Dinges, *supra*, n. 14, pp. 133-4, 150.

[93] See *ibid.*, pp. 290-1, regarding the reported Castro mediation between Noriega and the cartel "that resulted in the release of twenty-three prisoners and the return of $5 million in protection money". See also Weeks and Gunson, *supra*, n. 4, p. 54. But see C.J. Johns and P.W. Johnson, *State Crime, the Media, and the Invasion of Panama*, 1994, pp. 101-2, where doubt has been expressed about the mediation and the credibility of the testimony of José Blandón. *Cf.* S. Albert, *The Case Against the General*, 1993, p. 263, where, according to the testimony of Luis del Cid at Noriega's trial, the trip to Cuba was part of a planned itinerary that included Israel, France, and the US.

had some drug traffickers arrested, certain of whom he released for the right price,[94] and turned over others to the US Drug Enforcement Administration (DEA).[95] The appreciative DEA repeatedly sent him letters that praised his cooperation,[96] and the International Police Organization (Interpol), presented him "with its medal of honour for his contribution to the struggle against terrorism and drug trafficking".[97]

Noriega was also engaged in "providing phony passports and visas to Asians and Cubans for entry into the United States", which reportedly generated an amount of more than $130 million in 1989 alone.[98] In regard to money laundering, another source of income, Noriega, according to one account, was receiving by mid-1980s some $10 million a month for providing a safe passage for tainted monies from the airport to a bank in the banking centre.[99] The total laundering done in Panama during that period has been estimated to exceed the sum of $10 billion a year.[100]

Noriega's extracurricular and other activities and shady enterprises had not, however, escaped the notice of the US authorities: His well-known disposition of serving parties with different or incompatible interests had earlier earned him "the rent-a-colonel" epithet.[101] Reportedly, the DEA, and the Bureau of Narcotics and Dangerous Drugs (BNDD) before it, had knowledge of his involvement in drug trafficking.[102] His gunrunning enterprise had him almost arrested and indicted in Miami, Florida, in 1979 and 1980.[103] And Seymour Hersh's article charging

[94] $235,000, by one account. — Kempe, *supra*, n. 49, p. 94.

[95] J. Lawn, administrator of the DEA, is reported to have testified in 1988 before the Senate Foreign Relations Committee's Subcommittee on Terrorism, Narcotics and International Operations in the following terms: "Since 1980, the government of Panama has granted every request by United States authorities to board Panamanian-registered vessels on the high seas. Panamanian authorities have also been very cooperative in expelling directly to the United States those United States fugitives caught in Panama." — Albert, *supra*, n. 93, p. 36. See also *ibid.*, pp, 360-2, and, eg, Dinges, *supra*, n. 14, pp. 288-9.

[96] In his letter of 8 May 1986, eg, Lawn, the administrator of the DEA, has communicated to Noriega: "I would like to take this opportunity to reiterate my deep appreciation for the vigorous anti-drug-trafficking policy that you have adopted, which is reflected in the numerous expulsions from Panama of accused traffickers, the large seizures of cocaine and precursor chemicals that have occurred in Panama, and the eradication of marijuana cultivations in Panamanian territory." — Albert, *supra*, n. 93, p. 36.

[97] Weeks and Gunson, *supra*, n. 4, pp. 52-3.

[98] Zimbalist and Weeks, *supra*, n. 1, p. 76.

[99] *Ibid.*, p. 77.

[100] *Ibid.*, p. 78.

[101] See, eg, *ibid.*, p. 74; Kempe, *supra*, n. 49, p. 158.

[102] See, eg, Kempe, *supra*, n. 49, pp. 76 *et se.*; Dinges, *supra*, n. 14, pp. 58 *et seq.*; Weeks and Gunson, *supra*, n. 4, p. 50.

Noriega with various illegal activities was published on the front page of the 12 June 1986 issue of the New York Times.[104]

Although Noriega's certain operations flagrantly breached US laws or conflicted with the agenda of his US principals and paymasters, the wily agent had for a long time managed to avoid their punitive measures. Apparently, the US must have sufficiently valued his services, whatever their magnitude,[105] to overlook his calculated aberrations. In this respect, it has been observed in a report of the US Senate—the Kerry Subcommittee report—that

> Noriega recognized that so long as he helped the United States with its highest diplomatic priorities, as Torrijos had done with the Panama Canal, the United States would have to overlook activities of his that affected lesser U.S. priorities. In the mid-1980s, this meant that our government did nothing regarding Noriega's drug business and substantial criminal involvement because the first priority was the Contra war.[106]

Bureaucratic interests also appeared to have obstructed a determined action against Noriega and his illegal activities. It has been indicated, for instance, that "the DEA (like other US agencies) was turning a blind eye to evidence of massive law-breaking in order to take advantage of selective co-operation by the criminals themselves...[and]...to beef up their arrest and seizure statistics".[107]

With inbred and/or cultivated readiness to trample on common scruples about law and morality, Noriega had cunningly applied his disciplined and self-serving diligence to his sundry undertakings and succeeded in leaving far behind his low social status. Making the most of the opportunities offered by his new stature, too, he had applied his modus operandi with greater effect to his official and underworld affairs. He must have observed enough from his dealings with intelligence agencies, underworld elements, and underground political organizations to reconfirm himself in his chosen vocation and disdainfully ignore charges of corruption, duplicity, and cruelty; he must have scoffed at those charges as twisted sanctimoniousness.

As the product and agent of its intelligence and law-enforcement

[103] See, eg, Kempe, *supra*, n. 49, pp. 95-101.

[104] Many of the charges, reportedly, were not new. See *ibid.*, pp. 177-8.

[105] Kempe indicates that Noriega played "a game that had become familiar to him: he was offering American intelligence a minimum of help and extracting from it maximum protection." — *Ibid.*, p. 158.

[106] Zirnbalist and Weeks, *supra*, n. 1, p. 75. The report related to the Subcommittee's hearings on terrorism, narcotics, and international operations.

[107] Weeks and Gunson, *supra*, n. 4, p. 53.

establishments, the US well knew Noriega and was suitably placed to anticipate his course of conduct. In other respects, the US could not have failed to realize that the continued dealings of some of its agencies with Noriega helped prop him up in office.[108] When the Bush administration, therefore, chose to castigate the long-time US agent and product,[109] the self-righteous pronouncements and other justifications advanced for the purpose did not display the convincing power they were intended to bear. The US measures eventually unleashed against Noriega and the Panamanian State appeared, in the circumstances, to have both settled a score with an errant agent and inflicted an unacknowledged self-flagellation. As the US was in a position to discourage Noriega's illegal activities before they became entrenched, its failure to do so would make it share in the punishment it meted out.

3.2.2 The Elections

Arnulfo Arias, elected president in 1968, had been in office for eleven days when he was ousted by the National Guard. The bloodless coup had at one stroke replaced the democratic process and preempted the purge of the military that it was feared Arias would carry out. The installation of the military government and its eventual embedment in Panama's politics had also the effect of removing the political dominance of the traditional elite. The US reaction to the coup had not generally appeared too hostile.[110]

The military, constituted as the National Guard and later as the PDF, had been the ruling force in Panama under the respective dictatorships of Torrijos and Noriega. After formally making itself a permanent political institution[111] and spreading its tentacles far and wide, the PDF was willing to test its political acceptability in the democratic election set for 1984. It had persuaded Nicholás Ardito Barletta, who was vice-president at the World Bank, to run against Arias, the veteran political magnet. However fairly each of these candidates might personally have sought to contest the election that came after sixteen years, its outcome was thoroughly discredited by the PDF's violent, high-handed, and corrupting interference in the electoral process.[112] Despite its possession of proof that convincingly showed the irregularity of the election,[113] the US chose

[108] See, eg, Zimbalist and Weeks, *supra*, n. 1, p. 138.
[109] Noriega is reported to have begun serving US intelligence during the Eisenhower administration. — Dinges, *supra*, n. 14, p. 33.
[110] *Supra*, n. 49.
[111] *Supra*, p. 86.

to back Barletta: Reagan received Barletta after the election and sent Shultz, his Secretary of State, to attend the inaugural ceremonies of the president-elect. The declaration of Shultz that in "Honduras and Panama, military rulers have been replaced by civilian governments",[114] amounted to an endorsement of the very questionable election outcome.

All the endorsement that Barletta received did not, however, help him last long in office. After the gruesome incident concerning the severe beating and beheading of Hugo Spadafora — the most outspoken critic of Noriega — by persons generally believed to be members of the PDF, Barletta was forced to resign in September 1985; he was replaced by his vice-president, Eric Arturo Delvalle.[115] The Panamanian exercise of democracy that surfaced after sixteen years, and was stigmatized as grossly fraudulent, was thus mocked again by the continued effect given to its irregular outcome.

Delvalle was "a multimillionaire with interests in sugar, race horses, and television".[116] His wholehearted acceptance of the presidency,[117]

[112] Barletta is reported to have been convinced that he had won the election. But according to Roberto Díaz Herrera, Noriega's chief of staff, who had the immediate charge of ensuring Barletta's election, the result was manifestly fraudulent. Barletta was said to have won by an arbitrary margin of 1,713 votes. — Kempe, *supra*, n. 49, pp. 123-5. See the account of the fraudulent process in R.M. Koster and G.S. Borbón, *In the Time of the Tyrants*, 1990, pp. 304 *et seq.*

[113] Koster and Borbón charge in this regard that "[t]he United States of America, democracy's supposed champion, knew with particular clarity and thus shamed and betrayed itself egregiously". — *Supra*, n. 112, p. 309. See also Kempe, *supra*, n. 49, p. 125; Dinges, *supra*, n. 14, pp. 194 *et seq.*

[114] 85 *DSB*, 1985, June, p. 16.

[115] 87 *DSB*, 1987, September, p. 82, where Elliott Abrams, the US Assistant Secretary for Inter-American Affairs, is reported to have described Barletta as "inexperienced in politics"; Kempe, *supra*, n. 49, pp. 171 *et seq.* Barletta is reported to have left the door open for his reinstatement by using the term "separate" rather than "resign" when formulating the manner of his removal from office. — Dinges, *supra*, n. 14, p. 231. Although the particular formulation would have constitutionally kept the door open for his reinstatement within ninety days, he apparently failed to arouse the helpful interest and support of the US. Because of the reported part he played in the US assistance to the Contras of Nicaragua, the status quo Noriega created by having Barletta dismissed seemed to have been preferred to championing the latter's claim to the presidency. — Kempe, *supra*, n. 49, p. 156.

Barletta's fall from Noriega's favour was reportedly due to his suggestion "that Spadafora's murder should be investigated by an agency independent of the PDF". But critics were quick to point out that such belated awakening to righteousness was insufficient to make "up for all his previous work on behalf of the tyrants". — Koster and Borbón, *supra*, n. 112, p. 328. See *ibid.*, pp. 27-31 for an informed reconstruction of the chilling torture and savage murder of Spadafora.

[116] Barry, *supra*, n. 1, p. 10.

[117] It is reported that "Delvalle's desire for the presidency had been congenital". — Kempe, *supra*, n. 49, p. 260.

irregularly bestowed on him by Noriega, had well revealed his practical indifference to democracy and made him ineligible to pose as its legitimate standard-bearer. Yet, it was precisely that function of a standard-bearer for Panamanian democracy that the US single-mindedly chose to assign to him later. We shall revert in due course to the US-appointed role of Delvalle.

Delvalle did not fare well as a president. Caught in the whirlwind of public revulsion at the atrocious crimes and criminal enterprises of the Noriega establishment vengefully alleged by Diaz Herrera, the chief of staff of the PDF,[118] and unable to take any effective measures, Delvalle clung to his nominal position, suspected by Noriega, hated by the opposition, and held in contempt by his own business peers.[119] The indictment of Noriega in Florida in February 1988 and the pressure exerted by the US ultimately goaded Delvalle into taking a timid move against the person on whom his tenuous hold of office depended. His secretly videotaped edict purporting to dismiss Noriega as the commander of the PDF was broadcast to the nation at 5 p.m. on 25 February 1988.[120] The edict found full favour with the US; but nine hours later, at 2 a.m. on the 26th, Noriega's hastily convened National Assembly determined that Delvalle's edict disregarded "the legal procedure demanded by the Constitution and the Organic Law regulating the Defense Forces", and unanimously decided to dismiss him and his vice-president, Roderick Esquivel.[121] However the status of the National Assembly could be judged, a particular legislation, designated Law 20, apparently did not empower the president to dismiss Noriega or another incumbent commander of the PDF.[122] The validity of Delvalle's edict of dismissal would then have to be appraised in the light of Law 20, as his own dismissal by the National Assembly would have to be appraised in the light of the Constitution. In both cases, even if unpalatable to outsiders, the interpretation of the law was an internal matter.[123] A foreign act which over-

[118] See, eg, *ibid.*, pp. 207 *et seq.*; Dinges, *supra*, n. 14, pp. 261 *et seq.* Herrera himself was thoroughly immersed in and contaminated by the pervading illegal activities and corruption of the rulers and their accomplices.

[119] See, eg, Dinges, *supra*, n. 14, p. 296; Kempe, *supra*, n. 49, pp.258, 260-1.

[120] It is reported to have been taped at the Papal Nuncio's residence. — Kempe, *supra*, n. 49, p. 262.

[121] *Ibid.*, pp. 263-4; Dinges, *supra*, n. 14, p. 296.

[122] Kempe, *supra*, n. 49, p. 120; Weeks and Gunson, *supra*, n. 4, pp. 41-2.

[123] Along the same line, C. Maechling Jr. indicates that Delvalle's dismissal and Solis Palma's appointment was such "a patently and exclusively internal matter that its legality in international law seems unchallengeable". — "Washington's Illegal Invasion", 79 *Foreign Policy*, 1990, p. 119.

rode a domestic interpretation of a given law was an illicit intervention where it could not be properly justified.

As concerns Delvalle's replacement, the cabinet, which through his instrumentality was mostly pro-Noriega,[124] appointed Solis Palma as the minister in charge of the presidency. Delvalle, who reportedly had held a pro-Noriega rally the day after Barletta was ousted,[125] now went into hiding; but the US continued to recognize him as the de jure president and enlisted his services to promote its policy on Panama.[126] Others, however, were neither willing to toe the US line nor to condone its effects. It was to Palma and not to Delvalle, for instance, that the West German ambassador presented his credentials on 14 June 1988.[127]

Palma proceeded to while away Delvalle's remaining term of office; and the election of 7 May 1989 took place as scheduled. The offices of president and vice-presidents were contested by the pro-Noriega Coalición de Liberación Nacional (COLINA) candidates—Carlos Duque, Ramón Sieiro, and Aqulino Boyd—and the candidates of the Alianza Democrática de Oposición Cívica (ADOC)—Guillermo Endara, Ricardo Arias Calderón, and Guillermo (Billy) Ford. The election, which was monitored by more than 400 foreign observers, was generally considered to have been decisively won by the opposition. The wide margin of their victory seemed to have far exceeded the opposition's expectations; it seemed also to have signified a thorough disgust with the government rather than a special endorsement of the opposition candidates' personality or programmes. In another perspective, the remarkable rejection of Noriega's candidates by a margin of 3 to 1, achieved despite massive electoral fraud and intimidation brazenly perpetrated by the agents of the régime, made the rejection all the more dramatic.[128]

Noriega did not concede defeat. But heartened by their success, the opposition candidates gathered some stamina and managed a public demonstration to gain respect for their victory. Their unaccustomed audacity was, however, nipped in the bud by the brute violence of the

[124] Dinges, *supra*, n. 14, p. 256.

[125] Kempe, *supra*, n. 49, p. 260.

[126] The US Embassy and the Southern Command were reportedly instructed "to avoid contacts with the Noriega government". — R. Wedgwood, "The Use of Armed Force in International Affairs: Self-Defence and the Panama Invasion", 29 *CJTL*, 1991, p. 614. But Panama continued to be represented at the UN and the OAS by ambassadors of the Noriega-backed government. — Maechling, *supra*, n. 123, p. 119. Regarding Delvalle, Noriega is reported to have told the Papal Nuncio "that he had no respect for a man whose place in history was as a puppet, first to him and then to the Americans". — Kempe, *supra*, n. 49, p. 347.

[127] Zimbalist and Weeks, *supra*, n. 1, p. 149.

notorious Dignity Battalions:[129] Bearing the physical injuries that were ruthlessly inflicted on them, the demonstrators were soon obliged to disperse in some confused haste.[130] Their physical injuries were, nevertheless, their badges of honour.

After having transgressed in a coarsely undisguised manner the proper bounds of electoral procedures, Noriega and his accomplices would not bow to the will of the voters. With characteristic dictatorial unscrupulousness, Noriega simply had the election annulled.[131] A covert $10 million reportedly authorized by President Bush for clandestine radio broadcast and opposition campaign funds, and the arrival in Panama of 2,000 US troops, would appear to have served as a timely excuse for the annulment,[132] or, in other respects, as a plausible reason for assuaging any troubled feelings created by the annulment.

Having annulled the election, and being neither repentant nor otherwise equipped to minimize his isolation and deflect the international opprobrium that he had earned, Noriega followed his foolhardy path. Upon the expiry of Palma's caretaker tenure on 31 August 1989, Noriega carried further the rapid turnover of presidents witnessed during his dictatorship and had his old friend Francisco Rodriguez inaugurated president on 1 September. The inauguration was boycotted by "most of the diplomatic corps".[133] Nonetheless, the installation of Rodriguez marked the termination of Delvalle's fictitious term and removed the pretext of the US for continuing to recognize him as president. Rodriguez held his office until Noriega was named maximum leader by the National Assembly on 15 December 1989. The buttresses that sustained Noriega had by then appreciably caved in, and his new status lasted only a few days.

[128] It is reported, eg, that "[c]ounting duplicate registrations, dead people, and illegal immigrants from China, over one hundred thousand fake voters were stuck onto the rolls. ... all day long on election day *guardias* were trucked from table to table, so they might vote as often as they pleased....Opposition offices were bombed and machine-gunned. Opposition candidates were threatened. Opposition supporters were systematically intimidated." — Koster and Borbón, *supra*, n. 112, p. 363. See, further, *ibid.*, pp. 364 *et seq.*; Kempe, *supra*, n. 49, pp. 351 *et seq.*; Weeks and Gunson, *supra*, n. 4, pp. 79 *et seq.*; Zimbalist and Weeks, *supra*, n. 1, pp. 152 *et seq.*

[129] The Dignity Battalions are said to have comprised "a motley collection of psychopaths, criminals, and unemployed toughs from the barrios...[and] soldiers from Noriega's Special Forces". At the time of the confrontation with the demonstrators, "[s]ome carried two-by-fours pierced with rusty nails, and rubber hoses bent from misuse. Other[s] wielded steel reinforcing rods". — Kempe, *supra*, n. 49, p. 357. See also Koster and Borbón, *supra*, n. 112, p. 362.

[130] See, eg, Weeks and Gunson, *supra*, n. 4, pp. 80-1.

[131] See, eg, Dinges, *supra*, n. 14, p. 304; Koster and Borbón, *supra*, n. 112, p. 367.

[132] See, eg, Weeks and Gunson, *supra*, n. 4, p. 80; Kempe, *supra*, n. 49, p. 356.

[133] Weeks and Gunson, *supra*, n. 4, p. 85.

Those aspects of Panama's elections discussed in the foregoing paragraphs will suffice for the purposes of our study. In closing, it may be indicated generally that the election of 1984 was significant only in transforming the mode of the military rule from one that was direct to one that became indirect but continued as omnipresent as before.[134] Giving effect to that election, which by and large was decried as fraudulent, meant for all practical purposes the negation of participatory and responsible government. The conspicuous participation of the US in the person of its Secretary of State at the inauguration of Barletta signified an unreserved and warm endorsement of the faulted election and the indirect military rule that followed undisguised. When Noriega, as commander of the military whose indirect rule had thus been implicitly sanctioned, had Barletta coerced out of office, and the US continued an unperturbed relationship with Delvalle and his government, the US was endorsing again the fraudulent election and the accompanying indirect military rule. Noriega could not have failed to note duly that particular US attitude in the register of his conniving strategy. But when he met Delvalle's weak attempt to dismiss him with his National Assembly's decision that stripped Delvalle of authority, the US balked. Lawrence Eagleburger, Deputy Secretary of State, declared to the Permanent Council of the Organization of American States on 31 August 1989 that

> [a]fter the assembly's February 26 action, the United States immediately stated that it supported civilian constitutional rule in Panama. We have continued since then to recognize President Delvalle as Panama's lawful president. Because his removal was illegal under Panama's constitution, President Delvalle will continue to exercise the powers of the President of Panama until his term expires at midnight tonight.[135]

By adamantly refusing to acknowledge Delvalle's dismissal, the US reversed its implicit recognition of the indirect military rule and in effect arrogated to itself the authority of reviewing the decision of Panama's National Assembly. But jurisdictional competence over decisions of a foreign State organ cannot be assumed at will and exercised without some valid title. The disregard of the National Assembly's decision by the US amounted, hence, to an unauthorized review of the competence of a foreign State organ and bore, as a result, the hallmark of an unjustified intervention in Panama's internal affairs. By taking that course of action,

[134] The US has officially noted the pervasiveness of the PDF's involvement in the government. — See 87 *DSB*, 1987, March, p. 86.

[135] L. Eagleburger, "The Case Against Panama's Noriega", Current Policy No. 1222, United States Department of State, Bureau of Public Affairs, p. 5.

the US succumbed once more to its habit of intervention in Panamanian affairs.

Further, the gross irregularities that attended the 1989 election were essentially a repetition of the 1984 fraudulent practices that went tangibly uncensured. Compounded by spiralling desperation that unleashed a patently heavy-handed action, which is a distinctive feature of military dictatorships in distress or otherwise, the irregularities and brutalities occasioned by the 1989 election were, however, more spectacular.

If blames were to be apportioned in regard to the derailed elections, the US could hardly escape some degree of responsibility for its contributory role as indicated in the foregoing paragraphs.

3.3 The Economy

The direct and catalytic properties of a country's economic factors would usually account for a significant portion of its socio-political complexion. In the case of Panama, its geographical location had made its economy predominantly trade oriented and given rise to a merchant class that monopolized political power. Starting in the sixteenth century when Panama was under the Spanish crown, trade continued to flourish until the eighteenth century and reportedly made Panama City and the Atlantic port of Portobelo "the richest towns in the New World".[136] After the destruction of Portobelo, there followed a spell of decline of over one hundred years. Trade picked up again in the middle of the nineteenth century with the coming into operation of the Panama Railroad Company's trans-isthmian railway. The economic significance of that railway was replaced in 1869 by the first trans-North American railway. With the opening of the Panama Canal in 1914, the country's traditional transit business was assured a dominating role in the national economy.[137]

There was also a rural elite that had cattle ranches and agricultural estates. But its economic and political influence was traditionally peripheral to the sway of the merchants.[138]

The Panama Canal, fully owned and operated by the US until the Carter-Torrijos treaties of 1977 came into force, deepened the transit ori-

[136] Zimbalist and Weeks, *supra*, n. 1, p. 21. Before its destruction by the British fleet in 1739, Portobelo was "one of the three mainland ports in the Americas permitted by royal charter to carry on trade with Spain". — *Ibid., loc. cit.* This underscores the transit-trade orientation that in the circumstances also got an early sanction.

[137] See *ibid.*, pp. 21-2, 47.

[138] See *ibid.*, pp. 3, 101; Barry, *supra*, n. 1, p. 36.

entation of Panama's economy and gave impetus to international service operations.[139] The Canal became a dominant factor that bore directly and indirectly on the economy.[140] It has been accounted that "[a]bout 5 percent of all ocean-going trade passes through the canal, with over 70 percent of it originating in or destined for the United States".[141] And such industries as exist in the country are said to have started and grown as result of the needs created in the Canal Zone.[142]

The lion's share of the economic activities and returns taken up by the service sector was apparently due to the readily available practical amenities and legislated facilities that together helped make operations suitable and profitable. In addition to the obvious advantages of Panama's geographical location, the use of the US dollar as the country's currency, easy incorporation law, attractive banking secrecy law, various tax exemptions, and a good number of skilled and bilingual individuals in the labour force, have been identified as the principal amenities and facilities that attracted the service sector.[143] The agricultural sector too derived benefit from those of the amenities and facilities that were particularly conducive to the export of its products.[144]

Special mention may be made of the Colón Free Zone and the international banking or financial centre for their important role in the service sector. As free zones went, the Colón Free Zone came second to Hong Kong. It reportedly accommodated in 1988 over 1600 companies—mostly from Japan, Taiwan, USA, Hong Kong, and South Korea—that were engaged in warehousing, export, and processing activities. Japan and the so-called newly industrialized Asian countries used the Zone for their Latin American activities and reexports to the US. The companies operating in the Zone did not pay Panamanian import and export taxes and enjoyed certain other tax exemptions.[145] The facilities of the Zone

[139] See Zimbalist and Weeks, *supra*, n. 1, p. 28, for the services' high percentage share of the GDP, tabulated for the years 1950-1988. See also *supra*, pp. 76-9, about the treaty provisions relating to Panama's surrender and restoration of its sovereignty in the Canal Zone.

[140] Eg, before the 1970s, the Canal is said to have supplied the economic base for some 33 per cent of the labour force, 33 per cent of the GDP, and about 45 per cent of the foreign exchange earnings. — Zimbalist and Weeks, *supra*, n. 1, p. 26. Barry attributes over 8 per cent of the national product as deriving from the operations of the Canal. — *Supra*, n. 1, p. 52.

[141] *Ibid.*, p. 51.

[142] Zimbalist and Weeks, *supra*, n. 1, p. 26.

[143] *Cf. ibid.*, pp. 32, 66.

[144] Bananas, sugar, and coffee constituted the principal agroexports; bananas accounted for most of the foreign exchange earned by the sector; and of primary products, seafood came second to bananas in earning foreign exchange. — See *ibid.*, p. 116.

[145] See, generally, *ibid.*, pp. 66-8; Barry, *supra*, n. 1, p. 49.

appeared to have also enticed the contraband trade, which the PDF allegedly conducted in an undisguised manner during the 1980s.[146]

As regards banking, the 1970 law did away with "reserve regulations and exchange restrictions for offshore accounts" and provided for banking secrecy, numbered accounts, and tax exemption.[147] That law, together with the convenience afforded by the free circulation of the US dollar, and the simple incorporation procedures and other advantages existing in Panama, opened the way for a spectacular proliferation of banks. In the 1980s, the international banking or financial centre comprised 120 banks with assets that reportedly peaked $49 billion in 1982.[148] The easy flow of the US dollar in and out of Panama, and the protected anonymity of bank depositors, inevitably drew international money launderers to the services of the centre, augmenting consequently the banks' assets with proceeds of unlawful activities.[149] But, as we shall observe under the next section, the profusion of the US dollar[150] and its use as legal tender in Panama made the country singularly vulnerable to the US economic sanctions.

3.4 The US Economic Sanctions

It emerges from what has been noted above in various places that money flowed into Noriega's coffers from some ten intelligence establishments of different States, the Medellín Cartel, money laundering, gunrunning, contraband trade in the Colón Free Zone, sale of fake passports and visas to Asians and Cubans seeking to enter into the US, and other comparatively minor or incidental sources. Insatiably thus gorging himself with the fruits of his services, Noriega must have been flushed with confidence in his impartially and productively applied craftiness. Secure, at the same time, in his dictatorial control of the State apparatus, he must have also entertained some illusion of invincibility. His abundantly inflated ego must have consequently benumbed whatever perceptiveness he may

[146] Zimbalist and Weeks, *supra*, n. 1, p. 67.
[147] *Ibid.*, p. 33.
[148] *Ibid.*, pp. 71-2. *Cf.* Barry, *supra*, n. 1, pp. 49-50.
[149] It has been estimated that the yearly money laundering through Panama in the mid-1980s exceeded $10 billion. — Zimbalist and Weeks, *supra*, n. 1, p. 78.
[150] Proceeds from the trans-isthmian pipeline and ship registering services constitute other important sources of income for Panama's economy. The pipeline, whose contribution to the economy has now declined, had reportedly brought in over $150 million in 1983; and the ship registering service, which is second to Liberia, reportedly brought in annually well over $40 million. — *Ibid.*, pp. 61 *et seq.*

have possessed and ultimately rewarded him with obduracy, desperation, and abysmal ignominy.[151]

The US, which must bear its due share in making Noriega—its erstwhile agent—a notorious public figure, was getting increasingly uncomfortable with his intractability and embarrassed at his commonly alleged illegal activities. Grave matters of public knowledge and concern that could no longer be ignored or glossed over were whittling away the US administration's entrenched sense of his indispensable usefulness. The prospect of the agent's continued hold on power now began in earnest to look ominous. He was eventually to be persuaded, pressured, or forced out of office.

We shall here concern ourselves with the non-violent sanctions that the US chose to impose on Panama in order to cause the removal of Noriega from his position of authority. We shall accordingly identify the imposed measures and note the effects they produced.

The economic sanctions were set in motion, according to some, in July 1987, with the suspension of the US economic aid to Panama;[152] but others considered the "economic war" to have began in January, 1986, "when the National Security Council...recommended that Economic Support Funds...scheduled for Panama be transferred to Guatemala".[153] In any case, the tightening process of the sanctions continued in 1987 with the cancellation by the World Bank in November of a planned $50 million loan, the suspension by the US in December of Panama's sugar quota, and the instruction to "all U.S. directors of multilateral agencies to vote against proposed loans and aid to Panama".[154] By the end of 1987, the US had, in addition, cut off military aid to Panama.[155] These measures were much milder than those that followed in 1988.

Noriega's drug-related indictments in Tampa and Miami, Florida, on 4 February 1988 unleashed a force that accelerated events and aggravated the sanctions. One who despite himself was constrained to act was Delvalle.[156] As touched on earlier, persuaded by the US, most probably with an assurance of his continued recognition as president, he ventured to

[151] See *supra* pp. 87-92.

[152] *Panama: State Department Notes*, U.S. Dept. of State, 1995, p. 5, where it is indicated that the US "froze economic and military assistance to Panama in the summer of 1987 in response to the political crisis and an attack on the U.S. embassy"; Zimbalist and Weeks, *supra*, n. 1, p. 146.

[153] Barry, *supra*, n. 1, p. 39.

[154] Zimbalist and Weeks, *supra*, n. 1, p. 146.

[155] 87 *DSB*, 1987, October, p. 13, where Shultz confirmed the freeze on economic and military assistance; Barry, *supra*, n. 1, pp. 39-40; Weeks and Gunson, *supra*, n. 4, p. 72.

[156] *Supra*, p. 96.

announce the dismissal of Noriega; but, as expected, he was himself put out of office shortly afterwards.[157] The event, which the Reagan administration must have anticipated, fitted well the stringent and expeditious enforcement of its sanctions. Delvalle's role in the scheme of the sanctions became apparent when the administration single-mindedly opted to clothe him with the status of a president, and established at a stroke the basis that served for freezing and diverting Panama's monies and dues.[158] The recognition of Delvalle's presidential status, which was maintained in utter disregard of the factual and legal situation obtaining in Panama, constituted in the circumstances a technique that was entirely designed to sacrifice substance to phantom form.

The sanctions sought to dry up Panama's money supply by stopping or significantly reducing the transfer of US dollars to that State. Accordingly, the deposits of the Banco Nacional de Panamá in New York banks were frozen, and payments due to the Panamanian State were diverted to an escrow account for Delvalle's government. Reagan announced on 11 March 1988:

> I have directed that actions be taken to suspend trade preferences available to Panama...Moreover because we recognize President Delvalle as the lawful head of government in Panama, I have directed that all departments and agencies inventory all sources of funds due or payable to the Republic of Panama from the U.S. Government for purposes of determining those that should be placed in escrow for the Delvalle government on behalf of the Panamanian people. In that light, I have directed that certain payments due to Panama from the Panama Canal Commission be placed in escrow immediately.[159]

In addition, Panamanian-registered ships were to be banned from using the US ports as of 1 February 1990, but the invasion obviated the implementation of the ban.[160] Still, the intended ban would be a factor in demonstrating the willingness of the US to cast far and wide its net of sanctions without, however, declaring the double-edged knife of total trade embargo.

[157] Delvalle reportedly had a secret meeting with Abrams, Reagan's Assistant Secretary of State, in Miami a week after the indictment. — Kempe, *supra*, n. 49, p. 261-2.

[158] Eagleburger had declared to the OAS Permanent Council that "[t]he measures we have taken have been coordinated with President Delvalle to demonstrate solidarity with the efforts of the Panamanian people to oppose what was in effect a military coup. The measures have included...freezing Panamanian Government assets in the United States and banning payments to the Noriega/Solis regime of funds by U.S. citizens and companies." — *Supra*, n. 135, p. 5. As to the consistency of the US position regarding "military coups", especially one that enabled Delvalle to become President, see *supra* p. 95.

[159] 87 *DSB*, 1987, May, p. 71. See also Zimbalist and Weeks, *supra*, n. 1, p. 146.

These measures and those taken previously had the desired effect of substantially reducing the flow of the US dollar into Panama and scaring away capital.[161] The ensuing rapid erosion of deposits necessitated the closure of the banks. With the banks closed and the US dollar in short supply, the sanctions markedly destabilized Panama's service-oriented economy and bit hard into the lives of its inhabitants.[162] But Noriega's dictatorial power and lifestyle remained unaffected.[163] When the government failed to pay its public employees in March, dock workers and other sections of organized labour went on a nationwide strike. Still, the government was able to weather the crisis by finding other sources of payment. The economy, by one account, "managed to stagger along — supported by the diversity of the commercial and services sector, the wages paid to 12,000 employees of U.S. government agencies, steady income from the Colón Free Zone, and the largely unaffected agricultural sector".[164]

The economic effects of the sanctions were attenuated to some degree by aid that came from certain countries, the financial stranglehold was gradually loosened, and the reopening of the banks was made possible in May [165] Nonetheless, the economy was badly damaged; the private sec-

[160] Weeks and Gunson, *supra*, n. 4, p. 74. Re the presidential directive banning Panamanian flag ships from US ports after 31 January 1990, see the White House press statement of 30 November 1989 in *George Bush, Public Papers of the Presidents of the United States, 1989*, Book II, 1990, p. 1614.

[161] A flight of more than $23 billion capital is reported to have occurred between March 1988 and May 1989. — Maechling, *supra*, n. 123, p. 117.

[162] See, eg, Abram's statement of 10 March 1988, where he announced that Delvalle's "directions to...institutions not to send funds from U.S.-based Government of Panama accounts to Panama and his initiation of action in U.S. courts to freeze Panamanian Government accounts have caused a severe shortage of cash in the Panamanian economy...Pensioners and retirees received government annuity checks on March 4 but were initial y unable to cash them due to bank closings...More government paydays will materialize as the month progresses. In the absence of new cash infusions from some source, the fiscal and financial crisis will only worsen." — 88 *DSB*, 1988, May, p. 70.

[163] As reportedly remarked by one Panamanian, the money that Noriega paid "to his soldiers [did not] depend much on economic activity". — Weeks and Gunson, *supra*, n. 4, p. 76. The sanctions, then, would not have appreciably affected the pay of the soldiers nor their loyalty to Noriega.

[164] Barry, *supra*, n. 1, p. 41. According to Zimbalist and Weeks, "[t]he cash surplus generated by money-laundering activities was probably an important liquidity cushion for Panama after the United States froze the accounts of the NBP". — *Supra*, n. 1, p. 78.

[165] Aid reportedly came from Mexico, Western Europe, and Taiwan, among others. And withdrawals from banks were restricted. — *Ibid.*, p. 149.

tor, including Delvalle's business concerns,[166] was ruined; open unemployment by June 1988 was up to more than 20 per cent, and the condition of the poor was exacerbated.[167] The sanctions, in the reported words of one US official, "'ruined a healthy capitalist economy, weakened a pro-American middle class and created the conditions for the growth of communist influence in Panama' ".[168] And they "made a political point largely at the expense of the Panamanian people". [169]

Yet, Eagleburger, for instance, told the Permanent Council of the OAS:

> These are not "sanctions" in the sense of a generalized trade embargo or other measures targeted at the economy of the country. Rather, they are basically a prohibition on U.S. citizens making payments to the illegal Noriega regime.[170]

But the effects produced by the measures belied the correctness of the statement. Where the US resorted to economic measures that had a predictable effect on Panama's national economy, and maintained such measures despite the damage attending them, the national economy became an unavoidable, if not purposefully designated, target. Further, as the measures were privative and constraining, it would be difficult to free them from the scope of sanctions.

In other respects, although wreaking havoc in Panama, the sanctions failed in their immediate objective of instigating the hoped-for rebellion that would have dislodged Noriega. The US then undertook negotiations with Noriega to have him vacate his post while it still maintained its sanctions. Armacost, Under Secretary of State, explained the steps that were contemplated for resolving the impasse:

> The arrangements that were discussed in great detail involved the unfolding of the scenario. And the elements of that scenario would have been that, immediately upon the suspension of the International Emergency Economic

[166] Delvalle, as the US-recognized president of a government-in-exile, reportedly received $750,000 a month for his operations. — Weeks and Gunson, *supra*, n. 4, p. 72. He was dubbed "the underground president". — Kempe, *supra*, n. 49, p. 346. Allegations of embezzlement were levelled at him. — Zimbalist and Weeks, *supra*, n. 1, p. 146.

[167] Regarding the plight of Panamanians, the OAS Mission Appointed by the Twenty-First Meeting of Consultation of Ministers of Foreign Affairs indicated in its Report that they were "suffering the grave effects of the economic sanctions imposed upon their country by the Government of the United States". — OEA/Ser.F/II.21, Doc. 40/89, 19 July 1989, p. 10. See also Zimbalist and Weeks, *supra*, n. 1, p. 149.

[168] Weeks and Gunson, *supra*, n. 4, p. 74. See also Dinges, *supra*, n. 14, p. 300; Kempe, *supra*, n. 49, 419.

[169] Johns and Johnson, *supra*, n. 93, p. 12.

[170] *Supra*, n. 135, p. 5.

> Powers Act (EEPA) sanctions on our part, it was anticipated that Gen. Noriega would make a speech in which he would make a number of declarations, among them an announcement of his intent to step down from the Panamanian Defense Forces as commander on August 12 and a call upon the Panamanian legislature to immediately pass legislation which would confine the term of any commander of the PDF to 5 years retroactive to August 12, 1983. In short, his tenure would have been terminated on August 12 as a result of a change in the law.[171]

Granting the propriety of negotiations for bringing to an end Noriega's dictatorial authority, it may be noted in passing that the foregoing plan for interdependent acts by the US, Noriega, and the Panamanian legislature, could be taken as an acknowledgement of the need for legislation to terminate his commandership of the PDF. It would then appear difficult to reconcile this acknowledged legal requirement with the endorsement by the US of Delvalle's attempted dismissal of Noriega that the Panamanian National Assembly censured as legally unauthorized.[172]

The bilateral negotiations failed in the end. The attempt by the OAS to effect a solution to the crisis in Panama also failed.[173] Noriega, though more isolated,[174] was still defiant and unvanquished. Having flexed its economic and political muscles without attaining its prime objective, the US seemed unprepared to countenance defeat and refrain from the forcible resolution of the impasse. This US attitude would be in line with its habit of intervention in Panama, and its response to the demands of hegemonic assertiveness and credibility.[175]

The US economic sanctions against Panama were primarily intended to force change in that State's internal political order. As noted above, the gravity of their effects was such that they far exceeded what may have been considered a tolerable inter-State pressure. Hence, unless they were legally defensible, they constituted an unlawful intervention in Panama's

[171] 88 *DSB*, 1988, August, p. 89.

[172] See *supra* p. 96.

[173] The Twenty-First Meeting of Consultation of Minister of Foreign Affairs decided at its session of 14 December 1992 "to close that Meeting because it had already served the purposes for which it was called". — Final Act, OEA/Ser.F/II.21, Doc. 83/92, 17 December 1992, p. 7.

[174] The OAS Meeting of Consultation of Ministers of Foreign Affairs, for example, identified Noriega personally as the author of "the grave events and the abuses...in the crisis and electoral process in Panama".— Preambular paragraph 3, Resolution I, OEA/Ser.F/II.21, Doc. 8/89 rev. 2, 17 May 1989.

[175] See *supra*, p. 83. However, in the interest of maintaining the right perspective, it should be observed that given similar circumstances and the possibility of ignoring with impunity international condemnations, other States also might not abstain from interventional self-help.

internal affairs: They would constitute an unlawful intervention where they were not properly authorized by a duly competent international organ, or where they did not come within the scope of licit non-forcible reprisals or countermeasures.

In order to make the applicability of countermeasures licit, a State must have been in breach of an obligation that was *erga omnes*, or of one that it owed to the party seeking resort to the measures; and to keep the countermeasures licit, the means employed had to be proportional to what was properly sought to be redressed.[176] In the case of the Panamanian State, no default in some legal obligations it owed to the US had been made a particular ground for complaint. It is hardly conceivable that the drug-trafficking and money laundering rife in Panama, and the destruction of democracy and good government wrought by Noriega and his establishment would invest the US with a unilateral right of resorting to extensively damaging and punitive measures against that State. Since the sanctions were neither duly authorized nor legally justified as proper countermeasures, they constituted coercive measures that sought to impose the will of the US on the political integrity[177] of the Panamanian State. Such imposition is not, however, envisaged by the legal parity that exists under contemporary international law between the political independence of Panama and that of the US: The sovereign equality of States is a principle of international law that is enshrined in Art. 2(1) of the UN Charter; its breach occasioned by the US sanctions would also be a breach of the principle of non-intervention, which is a fundamental and universally binding principle under the United Nations legal order.[178]

But it has been contended on behalf of the US that

[176] See, eg, Asrat, *supra*, n. 34, pp. 33 (n. 66), 132, 136, 185; O. Schachter, "The UN Legal Order: An Overview", in 1 *United Nations Legal Order*, O. Schachter and C.C. Joyner eds., 1995, pp. 21-2.

[177] See, eg, Asrat, *supra*, n. 34, pp. 158 *et seq.*, about political independence in its internal manifestations. In regard to political integrity, see *Nicaragua v. USA* (Merits), *ICJ Reports* 1986, para. 202, where the ICJ has stated that "international law requires political integrity also to be respected".

[178] See, eg, *Nicaragua* v. *USA*, *supra*, n. 177, *loc. cit.* As one of the contemporary norms that provide the legal basis for the maintenance of international peace and security, which is under the overriding direction and control of the UN, the principle of non-intervention constitutes a fundamental part of the UN legal order. And that legal order continues in effect so long as the UN Charter continues in force. The degree of effectiveness with which the Charter is implemented will, of course, reflect on the factual status of the UN legal order. *Cf.* Schachter, *supra*, n. 176, p. 25.

> [t]here are times when good principles force us to defend bad men. Some argue that this is the case with Noriega and Panama. *They argue as if the principle of nonintervention requires us to accept whatever Noriega does.*
>
> *But nonintervention was never meant to protect individual criminals.* It was never meant to promote intervention by drug traffickers in our societies against our families and children. It was never meant to prevent peaceful and diplomatic action by sovereign states in support of democracy.[179] (Italics supplied)

Leaving aside the different rhetoric nuances of intervention appearing in the passage to buttress the position of the speaker, the italicized sentences could have a bearing on our consideration of non-intervention. The principle of non-intervention neither requires an unregulated acceptance of the doings of individuals, nor would it be unavailable, in due cases, for the protection of individual criminals. The principle exists with rules that guide the determination of the legal nature of an intervention.

The principle of non-intervention, which does not find an express provision in the UN Charter, is nonetheless a confirmed principle of customary international law that comes under the purview of the Charter.[180] On regional level, the OAS Charter gives the principle a textual expression in Art. 18, which provides:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against it political, economic, and cultural elements. [181]

The OAS Charter thus seeks to curtail the loopholes and make the prohibition of intervention comprehensive.

In sum, the comprehensive terms of the prohibition of intervention did not dissuade the US from seeking to unlawfully coerce a change of gov-

[179] Eagleburger, *supra*, n. 135, p. 6.

[180] See, eg, *Nicaragua* v. *USA*, *supra*, n. 177, para. 205.

[181] 119 *UNTS*, p. 3 (Charter) and 721 *UNTS*, p. 324 (Protocol, 1967); the Integrated Text (including the amendments of 1985, 1992 and 1993) in 33 *ILM*, 1994, p. 981. As provided in Art. III(2) of the Charter, Members of the Organization of African Unity are under an obligation to adhere to the principle of "non-interference in the internal affairs of States". — 479 *UNTS*, p. 70. *Cf.* Art. V, Panama Canal Treaty of 1977, where US employees of the Panama Canal Commission and their dependents as well as designated contractors are prohibited "from any intervention in the internal affairs of ...Panama". The US has undertaken in the same Article to ensure the prohibition of intervention. The undertaking would be denied full significance if it did not cover the official action of the US itself.

ernment in Panama. The US choice of economic weapons for engaging in a contest of wills with Noriega[182] was unfortunate: It was insensitive to the resulting heavy and crippling fallout on the well-being of Panama and its inhabitants; the fallout could not have been unforeseen. Ascribing the reason of the sanctions partly to Congressional pressure[183] would make their undertaking even more insensitive to the inevitable fallout: The sanctions and their extensive damaging consequences would then have been desired by the collective will of the US citizens as expressed by a certain margin of their representatives. Such factors and various others noted above at different junctures would juxtapose the US and Panama in a relationship that was markedly weighted towards the US.

[182] Statements of US officials have clearly indicated the personalized nature of the contest. Eg, Eagleburger, declared Noriega to be the problem and identified "Noriega's greed, personal ambition, and selfishness" as "the origin, core, and sustenance of Panama's crisis." He then posed the rhetorical question "which...deserves to be purged, to be driven from our midst?" and replied: "For the United States...the answer is clear."... "*Noriega No!*" (Eagleburger's italics) — *Supra*, n. 135, p. 6. The Secretary of State, too, replying to the question as to what should be done about Noriega, let it be known "that there will not be any normalization of relations between Panama and the United States as long as Gen. Noriega remains in power", and indicated further: "It's no secret we would like to see him leave power, and we intend to continue the diplomatic...[and]...economic pressure...and we do not rule out using any and all means that might be suitable or appropriate". — 89 *DSB*, 1989, December, p. 19.

[183] Weeks and Gunson, *supra*, n. 4, pp. 73-4.

Chapter 4 The US Invasion of Panama

The US Secretary of State, Baker, had declared on 23 October 1989 his government's policy on the kind of means that could be used to effect the removal of Noriega from power. He had indicated that

> we intend to continue the diplomatic pressure that we have been exercising through the Organization of American States and otherwise. We intend to continue the economic pressure that we have been utilizing through our economic sanctions, and we do not rule out using any and all means that might be suitable or appropriate under the circumstances.[1]

This chapter will be concerned with the analysis of the means that were not ruled out in the pursuit of the US objective of expeditiously removing Noriega from office. Inasmuch as the analysis will handle interrelated topics and materials, some degree of repetitiveness will be unavoidable. The chapter is divided into four sections: Precursors, Proffered Justifications, Other Features of the Invasion, and Conclusion.

4.1 Precursors

The US economic sanctions against Panama considered in the previous chapter[2] were to all appearances devoid of valid legal justifications. Designed as they were to impel the ousting of Noriega by exposing the Panamanians to harsh privations that could breed insurrection, the sanctions unjustifiably breached the principle of non-intervention in the internal affairs of States. Further, since the sanctions did not appear to have satisfied the criteria of legitimate countermeasures, they also constituted an unjustified use of unilateral coercion in international relations. In practical terms, the sanctions failed in their allotted objective of bringing down Noriega, but succeeded in direly damaging Panama's economy. Noriega and the forces under his command remained unaffected by the pervasive economic crisis as to maintain the dictatorial régime in a

[1] 89 *DSB*, 1989, December, p. 19.
[2] *Supra*, pp. 102 *et seq.*

functioning order. The failure of the sanctions to attain their designated goal meant the failure of the policy for the implementation of which they were instituted. That failure of policy meant an unpalatable stalemate which the US was unwilling to countenance: notwithstanding international legal norms to the contrary, it had to be resolved by force.[3]

Although the sanctions failed to bring about Noriega's downfall, they were nevertheless effective in predisposing the Panamanians to the forthcoming US military invasion of their country. The severe economic hardships that the sanctions had inflicted on Panama appeared to have generally made the Panamanians ready and willing to welcome the US military invasion as the only hope of relief from their straitened circumstances. The Panamanians were not, therefore, inclined to offer any resistance to the invaders. The absence of any serious resistance meant in the event a significant reduction in the overall cost of the invasion and a public relations factor that served to drape with a mantle of tolerability and defensibility an action that was patently illegal. Viewed as having contributed to minimize if not completely neutralize any noteworthy opposition to the US invasion, and as having consequently softened, so to say, the ground for the relative ease of the military operations, the sanctions would also constitute a part of the military planning and action.[4]

At the same time as the economic sanctions were progressively softening the ground for an invasion, the US took certain concrete steps that strengthened the preparation of that event. Following the Dignity Battalions' savage attack on the members of the Civic Crusade who were engaged in a public demonstration,[5] and ostensibly to give better protection to some 40,000 US citizens living in Panama, the Bush administration increased the force at the Southern Command by some 2,000 army and marine reinforcements.[6] In an apparent move to give the augmented force a new commander, Frederick Woerner Jr., who was the command-

[3] The first post-UN Charter judicial expression of the prohibition of force in international relations is found in the oft-quoted passage of the ICJ Judgment in the *Corfu Channel* case, where it stands stated: "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."— (Merits), *ICJ Reports* 1949, p. 35.

[4] Re the softening role of the sanctions, *cf.*, eg, C.J. Johns and P.W. Johnson, *State Crime, the Media, and the Invasion of Panama*, 1994, pp. 10-1; A. Zimbalist and J. Weeks, *Panama at the Crossroads*, 1991, pp. 153-4.

[5] *Supra*, ch. 3, pp. 97-8.

[6] See, eg, F. Kempe, *Divorcing the Dictator*, 1990, p. 362.

ing general at Southern Command, and who did not seem sufficiently enthusiastic about the Bush administration's policy of force in Panama, was replaced in July 1989 by Maxwell Thurman, a reputed military disciplinarian.[7] Upon assuming his new command, Thurman was reportedly told by the chairman of the Joint Chiefs of Staff of the impending invasion of Panama.[8]

Other notable precursors of the invasion were the indictments of Noriega on 4 February 1988 in Tampa and Miami, Florida, and made public on 5 February.[9] The Miami indictment, graver and more extensive than that of Tampa, charged Noriega with twelve counts of various grades of drug-related offences; the Tampa indictment charged Noriega with three counts of marijuana smuggling.[10] The indictments probably came to see the light of day by default. The Reagan administration did not appear to have worked out an overriding foreign policy formula for effectively dealing with the Noriega issue; and the political cost of interfering with the normal course of the indictments appeared to have posed an appreciable concern. Even if some seemed anxious about their possible effect on foreign policy options,[11] the indictments were quickly and smoothly cleared with the administration.[12] It was, however, revealed later that Reagan had not directly approved the indictments.[13]

Once the indictments were announced, the Reagan administration apparently lost no time in capitalizing on them. They were used as an additional leverage for cajoling Delvalle into dismissing Noriega.[14] They constituted a factor in the US rationale for the continued recognition of

[7] *Ibid.*, p. 11.

[8] Johns and Johnson, *supra*, n. 4, p. 23.

[9] Reportedly, the indictments had not been sealed; some have taken this fact as indicative of the US prosecutors' small hope of getting Noriega. — S. Albert, *The Case Against the General*, 1993, p. 50.

[10] See, eg, *ibid.*, pp. 49, 111.

[11] Eg, the National Security Council's legal adviser, Rostow, had reportedly asked: '"What business was it of a U.S. attorney to be making foreign policy"?' — *Ibid.*, p. 44.

[12] *Ibid.*, pp. 44-5.

[13] *Ibid.*, p. 52. Reagan's non-involvement in the course the indictments took had reportedly prompted Byrd, the Senate Majority Leader, to observe that it was '"another example of the hands-off president [whose] people [didn't] see the necessity of checking with him".' — *Ibid.*

[14] Officialdom and the media thenceforth began using terms that put Noriega in a very bad light. As Johns and Johnson indicate, he was given the tag of an "indicted narcotics dealer", a "narcoterrorist", a "thug", "a poisoner of American children". — *Supra*, n. 4, pp. 77 *et seq.* And as Kempe indicates, "[i]n one judicial stroke, carried out in Florida...Noriega became untouchable. He had become a political symbol, a stereotype easy to hate and impossible to accommodate: a drug-dealing dictator." — *Supra*, n. 6, p. 421.

Delvalle as head of State, which was maintained despite his complete alienation from Panama's factual and non-fictitious legal authority.[15]

A few weeks after being made public, the indictments were also used as a bargaining chip in the negotiations that took place between representatives of the Reagan administration and Noriega.[16] In what could pass for a plea bargain, the administration even appeared ready to sacrifice altogether the indictments to induce the resignation of Noriega. On this score, Reagan had reportedly said that '"[i]f we can use it to get him out of power, that's the best use of it"'.[17]

The US administration's willingness to enter into direct negotiations with Noriega for drawing out mutually agreeable terms for his resignation underscored the personalized nature of its policy on Panama: That policy was a result of the administration's deliberate failure to differentiate between the State and the person wielding authority behind the government.[18] In this regard, the administration's attitude towards Noriega might not appear to be fully congruous. When seeking to oust a person who, without being invested with the office of a chief executive or its equivalent, had influence over governmental functions, the administration ignored the distinction between the State and that person, despite the significance of formal attributes in international law and relations. On the other hand, it impliedly asserted the same distinction when it refused to recognize the legality of the government that exercised authority in Panama, a State that it recognized.

Nevertheless, the bargaining-chip role assigned to the indictments in the negotiations undertaken to effect Noriega's resignation failed to subdue his ultimate defiance of the US.[19] When, then, the US elected to remove him by force from his position of authority, the indictments were

[15] See *supra*, ch. 3, p. 96, for the manner in which Delvalle was dismissed following his timid attempt to remove Noriega from his post, and the role that the US had him play in its scheme of sanctions against Panama.

[16] See, eg, Albert, *supra*, n. 9, pp. 54 *et seq.*

[17] *Ibid.*, p. 56.

[18] Panamanian opposition leaders were reportedly critical of the negotiations, claiming that it was for Panamanians and not for the US administration to negotiate the terms of Noriega's resignation. — *Ibid.*, p. 55. But they seemed to have been oblivious of the same personalized policy which was manifestly behind the economic sanctions that the administration imposed on Panama to force Noriega out of office, and to which they had not objected.

[19] It might well be that the indictments had "strengthened [Noriega's] resolve, gave him more reason than ever to hang on to power, as having otherwise to fear extradition...[and goaded him to] do as his instincts and pathologies urged him." — R.M. Koster and G.S. Borbón, *In the Time of the Tyrants*, 1990, pp. 355-6.

fitted into the block of reasons proffered by Bush to justify his decision to invade Panama.

The misgivings that some might have had about the effect of the indictments on the unhindered choice of instruments of policy were not, after all, confirmed by the events that unfolded. Far from feeling constrained by the indictments, the US administrations under Reagan and Bush had made use of them in the pursuit of their single objective against Noriega.

Ever since the US forcibly imposed its will on Panama and Noriega, and subjected the latter to its penal process, its officials have sought to justify the exercise of the domestic adjudicative jurisdiction as nothing other than a proper process of law enforcement. The claim relating to the lawfulness of the exercise of domestic jurisdiction will constitute the burden of the next chapter. We shall consider here under the following sections the reasons advanced by the US in support of its use of force against Panama.

4.2 Proffered Justifications

The personalized foreign policy that the Reagan and Bush administrations chose to pursue in respect of Panama appeared unconstrained by the norms of international conduct that the US ardently advocated otherwise. As indicated above, by suitably ignoring the line of demarcation between the Panamanian State and the general who commanded the PDF, what in effect was an intervention in internal affairs was alleged not to offend against the principle of nonintervention. Noriega's survival of the US economic sanctions that disastrously affected Panama manifested both the failure of the personalized policy and the interventionary nature of the sanctions. Rather than being deterred by that failure, the Bush administration further advanced the personalized Panamanian policy by engaging in graver breaches of fundamental legal norms of international conduct.[20] Such intransigence would appear to reflect a lingering hankering for intervention in Panama, which, as noted earlier, was a formed US habit.[21]

[20] Bush's news conference of 21 December 1989 gave a glimpse of the obsessively personalized Panamanian policy of his administration. Asked at the conference whether it was "really worth it to send people to their death for this, to get Noriega", Bush replied, "every human life is precious. And yet I have to answer: Yes, it has been worth it." — *George Bush, Book II, 1989, Public Papers of the Presidents of the United States*, 1990, p. 1729.

[21] See *supra*, ch. 3, pp. 83, 107.

In what may be taken as an out-of-proper-context and dangerous construction of the notion of nonintervention, apparently contrived to justify the economic sanctions and the eventual course of action that came to be decreed against Panama on account of Noriega, the US State Department declared that "nonintervention was never meant to protect individual criminals".[22] And so, much to the general dismay of the world community,[23] the Bush administration committed the US to military action in

[22] 89 *DSB*, 1989, November, p. 74. It hardly needs mentioning, however, that if the principle of nonintervention were to be unilaterally discarded on a unilaterally-fashioned pretext of apprehending criminals, its integrity as a principle would be compromised, and its value for rule-based inter-State relations negated. There are, of course, exceptions to the principle; but the Department's statement does not seem to come within them. By way of relevant analogy, reference may be made to the Corfu Channel Judgment where the ICJ has denied the legality of UK's forcible intervention in Albanian waters to recover certain *corpora delicti*. — *Supra*, n. 3, pp. 34-5. See, eg, B. Asrat, *Prohibition of Force Under the UN Charter. A Study of Art. 2(4)*, 1991, pp. 150-1.

There are others who seek to justify intervention on grounds of human rights. A. D'Amato, for example, argues that where governments become tyrannical, "intervention from outside is not only legally justified but morally required". — "The Invasion of Panama was a Lawful Response to Tyranny", 84, *AJIL*, 1990, p. 519. A case could be made for intervention under the authority of the UN. But it would not appear that the stage of development reached by contemporary international law could accommodate unilateral intervention in the context in which it was argued to be justified. Further, seeking to put the US military invasion of Panama in a human rights perspective would merely make human rights a tool in the hands of States—particularly, powerful States—to be employed, manipulated or ignored to suit policy considerations. That would be a great disservice to human rights. Had the US invasion been viewed as a genuine humanitarian intervention, it would hardly have been met with general disfavour. It need be remarked further that not only the Noriega régime, but the US, too, was blameable for human rights violations in Panama: misery, death, injury, homelessness, scar on the national psyche had attended the US economic sanctions and military invasion. (See *infra*, Section 4.3.2.) It would, therefore, appear that far from having a "positive implication for the development of human rights" (D'Amato, p. 516), the invasion had merely contributed to undermining the commonly accepted legal bases of international peace and security, which are essential for safeguarding and protecting human rights.

[23] See UNGA Resol. 44/240, 29 December 1989. A Security Council draft resolution that censured the invasion was supported by ten members and opposed by four others; one member abstained. As three of the four negative votes were cast by permanent members of the Council (France, the UK, and the US), the draft resolution was not adopted. — S/PV.2902, 23 December 1989, pp. 18-20. The draft resolution, sponsored by Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal, and Yugoslavia, reaffirmed "the sovereign and inalienable right of Panama to determine freely its social, economic and political system and to develop its international relation without any form of foreign intervention...", recalled the terms of Art. 2 (4) of the UN Charter, and strongly deplored in operative para. 1 the US military intervention, characterized as "a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States". It demanded in operative para. 2 "the immediate cessation of the intervention and the withdrawal of the United States armed forces from Panama".

Panama.[24]

In other respects, the military action, which was commenced just a few hours after a White House Christmas party that Bush had attended,[25] appeared strikingly incongruous with the spirit of the occasion that the party was meant to commemorate. As if impervious to the lives that were either destroyed or made in effect hostages by the armed action, to the cries of agony that ascended the heavens, and to the reduction of sturdy structures and humble places of abode to rubble and ashes, yet again another Christmas party was held at the White House on the evening of the first day of the invasion.[26]

At 00.30 hour of 20 December 1989, the Bush administration launched on Panama a force of invasion named Operation Just Cause and characterized as "the most extensive US military operation since the Vietnam war".[27] To touch in passing on its notable features, the invasion was carried out with a massive force and an intensive use of destructive power. The invading force comprised troops, which ultimately numbered some 27,000,[28] and the state-of-the-art weaponry. The latter included the AC-130H Spectre Gunships, equipped with "two 20mm Vulcan cannons with 3,000 rounds, one 40mm Bofors cannon with 256 rounds and one 105mm howitzer with 100 rounds",[29] the supersonic plane SR-71, Apache helicopters, and the Stealth fighter bomber.[30] In regard to the intensity of the destructive power, 422 bombs were reported to have been

The Permanent Council of the OAS passed resolution #534 (800/89), 22 December 1989, deeply regretting the military intervention. — See, eg, *The U.S. Invasion of Panama*, Independent Commission of Inquiry, 1991, pp. 124-5. The resolution was adopted with the participation of the representative of Noriega's régime. — T.J. Farer, "Panama: Beyond the Charter Paradigm", 84 *AJIL*, 1990, p. 510.

[24] It was reportedly the 20th military intervention. — J. Weeks and P. Gunson, *Panama: Made in the USA*, 1991, p. 1; Johns and Johnson, *supra*, n. 4, p. 10. *Cf.* T. Barry, *Panama: A Country Guide*, 1990, p. 5, where the number of military interventions since the mid-1850s is put at 18.

[25] Press Statement, Bush, *supra*, n. 20, p. 1724.

[26] *Ibid.*, p. 1725.

[27] Weeks and Gunson, *supra*, n. 24, p. 3; J. Dinges, *Our Man in Panama*, 1990, p. 308; Kempe, *supra*, n. 6, p. 9.

[28] "Operation Just Cause", *www.dtic.mil/southcom/hist.html*, p. 2. Weeks and Gunson put the total figure at 26,000. — *Supra*, n. 24, p. 3. D'Amato believes that the troops were "*too few*...with the result that [they] overcompensated for their small number by the disproportionate use of force". — *Supra*, n. 22, p. 522. Bush, however, had explained that he "made a decision...to move with *enough force*...to be sure that we minimize the loss of life on both sides and that we took out the PDF—which we did—took it out promptly" (italics supplied). — Bush, *supra*, n. 20, p. 1730.

[29] www.hurlburt.af.mil/new.../AC_130H_Spectre.html, p. 2.

[30] See, eg, *ICI*, *supra*, n. 23, p. 28; Barry, *supra*, n. 24, p. 115; Weeks and Gunson, *supra*, n. 24, p. 9.

dropped within the first thirteen hours that followed the invasion,[31] bringing "death and misery to the poor quarters of Panama City, clustered around military installations the invaders had to take at all costs".[32] And the two stealth bombers, which "[f]or the first time ever...made combat appearances",[33] dropped their two-thousand-pound bombs reportedly "stunning the Panamanians into submission".[34]

The PDF, whose combat troops were estimated to number between 3,300 and 5,000, has generally been seen not to have put up a serious resistance. Only a few of its members, together with the members of the Dignity Battalions, chose to extend their resistance while the rest fled or quickly surrendered.[35]

A remarkably short time after the launching of Operation Just Cause, the victorious invaders had Panama under their de facto occupation.[36] But Noriega, the principal cause of the invasion, had eluded the invaders. He was not, however, raising the standard of resistance and rallying his forces; the invasion had at a stroke deflated him to the rank of a pathetically scared person who was utterly distracted and desperate for ways out of his plight. He had now become a common fugitive with a tag of one-million-dollar reward posted by the Bush administration for his expeditious and humiliating capture.[37]

Having planned,[38] readied, and ordered a military invasion of a State Member of the UN and the OAS, Bush made public the reasons that pro-

[31] *ICI*, *supra*, n. 23, p. 28; Barry, *supra*, n. 24, p. 115. The explosions were registered by the seismological station at the University of Panama. Weeks and Gunson put the number of explosions registered at the University within the first 14 hours of the invasion at 417. — *Supra*, n. 24, p. 4.

[32] Weeks and Gunson, *supra*, n. 24, p. 4.

[33] Albert, *supra*, n. 9, p. 75.

[34] Kempe, *supra*, n. 6, p. 16.

[35] Zimbalist and Weeks observe that the 1989 US invasion was "the first time [that] more than a handful of Panamanians [died] defending their land". — *Supra*, n. 4, p. 136. Koster and Borbón portray the members of the Dignity Battalions as looking "like barbarian nomads of some new dark age, but when it came to a fight, they fought better than the regular PDF units". — *Supra*, n. 19, p. 362.

[36] See, eg, *ICI*, *supra*, n. 23, pp. 45 *et seq.*

[37] In an answer to a question about the bounty put to him at his news conference of 21 December 1989, Bush had replied with a vengeful disdain and relish that Noriega's "picture will be in every post office in town. That's the way it works. He's a fugitive drug dealer, and we want to see him brought to justice. And if that helps, if there's some incentive for some Panamanian to turn him in, that's a million bucks that I would be very happy to sign the check for." — *Supra*, n. 20, p. 1731. See also, eg, Kempe, *supra*, n. 6, p. 17.

[38] The US Defence Secretary is said to have "admitted that the invasion was derived from an invasion contingency plan...developed a year or more before". — Johns and Johnson, *supra*, n. 4, p. 29.

voked his administration into such a drastic course of action. He stated in his address to the nation on 20 December 1989 that

> [t]he goals of the United States have been to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal treaty. [39]

A little later in the same address, he indicated that he had ordered Noriega to be brought "to justice in the United States".[40] In his letter to Congress dated 21 December 1989, he sent a revised and consolidated list of reasons, which were

> to protect American lives, to defend democracy in Panama, to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988, and to ensure the integrity of the Panama Canal Treaties.[41]

The reasons were advanced apparently to defend the invasion from inevitable charges of aggression[42] and to cloak it in issues of righteousness that many US citizens would find palatable. As any ground alleged to justify the unilateral use of force on the international plane has to come within the UN Charter's legal exception and meet the criteria necessary for its application, we shall consider in the following subsections the legal validity of each of the US reasons, irrespective of the form in which it was presented.

4.2.1 Protection of American Lives

With the US sanctions tightening their stranglehold on the economy of Panama and further alienating Panamanians from him, with a US-supported coup attempted against him at close quarters on 3 October 1989 by Moisés Giroldi, an officer who had his trust,[43] and with having to face a general international isolation, Noriega must have finally real-

[39] *Bush*, *supra*, n. 20, p.1722.
[40] *Ibid.*, p. 1723. See also p. 1726 for the memorandum on the arrest of Noriega.
[41] *Ibid.*, p. 1734.
[42] According to the UN definition, "[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition". — Art. 1, Definition of Aggression, UNGA Resol. 3314 (XXIX), 14 December 1974. See also Art. 3(a) and Art. 3(e).
[43] See, eg, Weeks and Gunson, *supra*, n. 24, p. 86. The US was reportedly half-hearted in its cooperation with the perpetrators of the attempted coup. The troops from the Southern Command failed to block all access roads to the Command Headquarters where Noriega was barricaded. — See, eg, Dinges, *supra*, n. 27, pp. 304-5.

ized that he was irreversibly losing his position. In an apparently desperate move, he had his 510-National Assembly of Representatives appoint him, on 15 December 1989, head of government and name him Maximum Leader. As the motive for its appointment of Noriega, the National Assembly declared Panama to be "in a state of war for the duration of the aggression unleashed against the Panamanian people by the U.S. Government".[44]

Noriega's assumption of the title of Maximum Leader in the fermenting atmosphere then prevailing in Panama must have signalled to those who had remained his loyal followers the resurgence of purposefulness and determination and imbued them with a spur-of-the-moment audacity.[45] It was in such an atmosphere, made more effervescent by the celebrations of the day after, the 16th—Noriega-proclaimed Loyalty Day—that four US Marines, driving back to their base just after 21.00 hours, took a wrong turn and came to a PDF roadblock manned by the fearsome Machos del Monte.[46] The Marines ran the roadblock, the Machos fired, and a bullet fatally wounded the unfortunate Lieutenant Robert Paz, who was in the back seat of the vehicle. The Machos next beat up a navy lieutenant and threatened his wife with sexual abuse: The couple had also taken a wrong turn shortly before the incident of the Marines and come to the same roadblock, where they were detained and from where they were able to witness the incident.[47] Other incidents took place on the fol-

[44] "The Use of Armed force in International Affairs: The Case of Panama", 47 *The Record* of the Association of the Bar of the City of New York, 1992, pp. 708-10. See the discussion *infra*, pp. 126 *et seq.*

[45] Sofaer maintains that Noriega's inflammatory utterances, such as "'we, the Panamanians, will sit along the banks of the Canal to watch the dead bodies of our enemies pass by...'", "had the effect he no doubt intended. Brutal acts against U.S. personnel and their dependents began to occur the next day."— A.D. Sofaer, "The Legality of the United States Action in Panama", *CJTL*, 1991, p. 285.

[46] Trained by Cubans for jungle operations and reputed to have remained loyal to Noriega, these men of the mountains manned the roadblocks around the PDF headquarters. Reportedly, "they stood with AK-47 semiautomatic machine guns...many of them wearing crisscrossing bandoliers, tanktop T-shirts and wild, black beards."— Kempe, *supra*, n. 6, p. 8.

[47] See, eg, *ibid.*, pp. 8 *et seq*; Farer, *supra*, n. 23, p. 513. Significantly, says Sofaer, echoing what Bush had said earlier, no apology or statement of regret was offered by Noriega's régime. — *Supra*, n. 45, p. 285. See also L. Henkin, "The Invasion of Panama Under International Law: A Gross Violation", *CJTL*, 1991, p. 296. Noriega's neglect to offer an apology or express regret for the incidents may be seen as an unfortunate breach of certain salutary standards of behaviour that are expected to remain unaffected by strained relations between States. But a diplomatic lapse regarding isolated incidents in the then circumstances of Panama could hardly constitute a significant factor in a genuine defence of a grave breach of international law.

lowing two days. In one incident, a US serviceman reportedly "shot a PDF policeman who demanded his identification".[48]

Bush had now been handed the opportune cause for venting moral indignation, exacting retribution, and rallying popular support for the already planned military invasion of Panama that he was about to launch. On Sunday afternoon, the 17th, he gave the order for the execution of the plan of the invasion;[49] and on 20 December 1989, the day of the invasion, he declared with finality that "[t]hat was enough".[50]

Protection of citizens is a basic attribute of the sovereign competence of States that is exercisable under the régime of the principle of self-defence. Some, however, limit the territorial scope of the right of self-defence by rejecting the validity of its exercise on foreign territory. For them, any justified protection of citizens involving a breach of a foreign territory should be subsumed under humanitarian intervention.[51] But for others, it appears idle in the final analysis to deny States the right of defending their citizens on foreign territory, provided the conditions governing the exercise of self-defence are fulfilled, and the exclusivity of competence of the territorial sovereign, who is not at fault, is respected.[52] Despite the controversy it has generated, protection of citizens on foreign

Moreover, by having curtailed the normal level of diplomatic relations with the Panamanian government following the dismissal of Delvalle, the US was in some degree contributory to Noriega's diplomatic lapse. In the absence of the normal diplomatic level of communication, it was to PDF officers who sat in the Treaty Affairs Joint Committee with their US counterparts that the US protest of the incident was made at 22.45 hours on 16 December. — *The Record, supra*, n. 44, p. 664.

[48] Dinges, *supra*, n. 27, p. 306; V.P. Nanda, "The Validity of United States Intervention in Panama Under International Law", 84 *AJIL*, 1990, p. 497. The concerned US officer was reportedly discharged from the service after further investigation following the invasion of Panama failed to corroborate his claim of self-defence. — *The Record, supra*, n. 44, p. 638. Sofaer, on the other hand, indicates that "over seventy incidents of violence against U.S. nationals" were documented in 1989 by the Southern Command. Apparently sampled for their gravity were allegations of beatings of an army sergeant with rubber hoses, rape of an army sergeant's wife, firing of shotguns into the home of an army lieutenant, threatening the life of a navy member at gunpoint, and firing at children fleeing in a vehicle. — *Supra*, n. 45, p 284, n. 12; *The Record, supra*, n. 44, pp. 645 *et seq.* But the *ICI* indicates that Panama had documented "over 100 instances of U.S. military provocations in 1989...[which] included U.S. troops setting up roadblocks, searching Panamanian citizens, confronting PDF forces, occupying small towns for a number of hours, buzzing Panamanian air space with military aircraft, and surrounding public buildings with troops". — *Supra*, n. 23, p. 24.

[49] *The Record, supra*, n. 44, p. 637.

[50] *Bush, supra*, n. 20, p. 1723. Bush had declared earlier—17 December 1989—"Enough is enough".— Kempe, *supra*, n. 6, p. 8.

[51] See, eg, Asrat, *supra*, n. 22, pp. 184-5 and the sources referred to there. *Cf.* Henkin, *supra*, n. 47, pp. 296-7.

[52] *Cf.* ch. 2, pp. 40-1, about exclusivity.

territory, in the view of the present author, could validly be based on the right of self-defence: A State is entitled to defend its citizens, which form one of its fundamental constituents; a State is in fact defending itself when it defends its citizens, and the citizens are defending one another by proxy, as it were, through the instrumentality of their State.[53]

In his letter to Congress dated 21 December 1989, Bush alleged that

> [t]he deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties.[54]

In analysing the right of self-defence claimed by the US, it needs to be seen, in the first place, if Art. 51 provided a good basis for the claim, and in the second place, if there existed a situation that necessitated resort to justifiable measures of self-defence.

Art. 51 provides, in part, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations". According to the literal reading of this controversial Article, a situation that will be created "if an armed attack occurs" is the one that can give rise to the exercise of the right of self-defence. In a strict construction of the Article, furthermore, an armed attack that has occurred, and to all intents and purposes has become fully complete, would not meet the standard of necessity that justifies the exercise of self-defence: The armed attack had occurred. In such event, it would be up to the Security Council to decree the measures it deems suitable for the maintenance of international peace and security. On the other hand, in a situation where an armed attack is plausibly expected to occur, the imminence of the attack would in realistic terms create a situation of necessity for resorting to measures of self-defence: The imminence of the attack would in that case be practically indistinguishable from what might be taken to constitute its commencement as to be assimilated with its occurrence. This much, at least, should be conceded by those who deny the existence of the right of resort

[53] See, eg, Asrat, *supra*, n. 22, pp. 159-60, 176 *et seq*; Farer, *supra*, n. 23, pp. 504-6.

[54] Bush, *supra*, n. 20, p. 1734. The US representatives at the UN Security Council and General Assembly debates on the situation of Panama had argued on the basis of both Art. 51 of the UN Charter and Art. 21 of the OAS Charter.— S/PV.2902, 23 December 1989, pp. 8 *et seq.*; A/44/PV.88, 10 January 1990, p. 22.

Art. 21 of the OAS Charter provides: "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." — OAS Treaty Series No. 61, p. 1.

to preventive or anticipatory measures.[55]

We do not need to concern ourselves here with the debated question of whether Art. 51 grants or preserves the right of self-defence, ie whether the Article is the sole source of the right of self-defence under the UN Charter, or admits also of the customary right of self-defence.[56] It needs to be indicated, however, that the unqualified reliance by the US, in the context of the protection of citizens, on Art. 51 to justify its invasion of Panama would seem to place it in the category of those who consider the Article as the sole source of the right of self-defence, and an armed attack as the only valid cause for the exercise of that right.[57] In such a case, the scope of an armed attack, as mentioned earlier, could at least include its plausibly imminent facets. But the generally accepted content of an armed attack would not include instances of a threat of force that have not attained a particular degree of imminence which would necessitate a resort to forcible measures of protection. Were the scope of an armed attack to be so widened, the literal constructionists' rationale for the restrictiveness of Art. 51 would be seriously affected, detracting from the fundamental importance they attach to the Article.

Although the unqualified US reference to Art. 51 might appear to place it in the category of the strict constructionists, the facts that were alleged to justify its claim of self-defence would, on the other hand, appear to indicate otherwise. Whether those facts could qualify to justify an alleged exercise of self-defence will be further discussed later. It should only be mentioned here that even if the strict construction of Art. 51 could not provide a good ground for the US claim of a justified use of force, it would not mean that other grounds were unavailable.

Notwithstanding views to the contrary,[58] the due protection of the nationals of a State on a foreign territory, as mentioned before, would constitute a proper exercise of the customary right of self-defence: Conditioned by the Charter's regulation of the international use of force, the right of self-defence subsists under the UN legal order.[59] Any unilateral use of international force in an alleged exercise of the right of self-defence will be presumed an illegal breach of the UN Charter's prohibition of force unless that resort to force is satisfactorily shown to have

[55] Asrat, *supra*, n. 22, pp. 222 *et seq.*

[56] *Ibid.*, pp. 202-8.

[57] Henkin thinks that '[i]n effect...the Administration claimed that Article 51 permits the use of force in the exercise of the "inherent right of self-defense" even if there has been no armed attack'. — *Supra*, n. 47, pp. 305-6.

[58] See, further, Asrat, *supra*, n. 22, pp. 180-2.

[59] *Ibid.*, pp. 204, 206-10.

complied with the customary international law requirements of necessity and proportionality.

As already noted, Bush had declared that American lives were in imminent danger; the Noriega National Assembly had declared Panama to be "in a state of war for the duration of the aggression unleashed against the Panamanian people by the U.S. Government"; and certain incidents that included a few graver cases, characterized as "inadvertent encounters with low-level operatives",[60] had occurred.

We shall take next a closer look at those facts that had a bearing on the alleged imminent danger to the lives of US citizens. We shall at the same time consider the availability of less radical alternatives, and finally assess if there was a legally recognizable imminent threat to the lives of US citizens that justified the sacrificed lives—both of US citizens and Panamanians—and the destroyed property.

Some 35,000[61] US citizens, in addition to some 13,000[62] military personnel stationed at Southern Command, were residing in Panama before the launching of the invasion on 20 December 1989. One could safely assume that the US force at the Southern Command was well-trained, well-disciplined, well-equipped, and well-motivated, and that it was capable of acquitting itself with commendable professionalism in tasks to which it was assigned.[63] The force was stationed at that important post[64] to help secure and assure the preservation of those objectives that a particular US administration may determine to be of national interest. It would then appear highly improbable that a force of such calibre, on which reposed an important national task, and which was kept in a state of standing readiness, could not have sufficiently defended itself and pro-

[60] Farer, *supra*, n. 23, p. 513. *Cf.* R. Wedgwood, "The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion", 29 *CJTL*, 1991, p. 609, where it is indicated that "the violence faced by American armed services personnel and civilians in Panama was long-standing and more serious than was generally reported in the press". But it had reportedly been stated by a US official that the harassment of US citizens had diminished a lot by August, 1989. — J. Quigley, "The Legality of the United States Invasion of Panama", 15 *YJIL*, 1990, p. 283.

[61] Bush, *supra*, n. 20, p. 1723; Sofaer, *supra*, n. 45, p. 286.

[62] Weeks and Gunson, *supra*, n. 24, p. 3.

[63] In August, 1989, the US was pursuing "a widespread display of force in Operation Purple Storms and Operation Sand Fleas" in Panama. — *The Record*, *supra*, n. 44, p. 631. Regarding these exercises, the OAS Mission that was requested to assist the Panamanians in finding a solution to their political difficulties had found "it necessary to point out the negative effect of the maneuvers" and to indicate that "they [had] been inopportune".— OEA/Ser.F/II.21, Doc.56/89, 23 August 1989, pp. 1, 8. Conducted in the tense Panamanian situation with apparent disregard of possible incidents, the exercises amply manifested the confident capability of the US forces to handle any mission in Panama.

[64] See *supra*, ch. 3, p. 78.

tected the US citizens, were the need to arise in the tense Panamanian situation that immediately preceded the invasion.

As regards the Panamanian side, although the PDF numbered some 15,000, only two divisions with a combined force of some 3,000 were, reportedly, combat-ready by the time of the invasion; and the Dignity Battalions, which numbered some 3,000, were partially armed with rifles.[65] In addition to the comparatively low number of the fighting forces, the esprit de corps of the PDF had been whittled away by Noriega's doings[66] and the appeal by the US "to rise up against Noriega",[67] and suborned by the US intelligence services.[68] The soldierly professionalism of the PDF had also been emasculated by avarice and patent corruption.[69] Regarding the populace, it was neither manifestly enamoured with Noriega, the PDF, and the Dignity Battalions, nor fired with a headlong patriotism as to be predisposed to resist the invasion. It apparently expected the invasion to open the way out of its economic misery. As indicated earlier, the sanctions had in this respect played a supportive role to the military action.

Before the invasion, then, the US possessed a military strength in Panama that was markedly superior to the force that Panama could rely on. Further, with their facilities for observing the Panamanian situation from close quarters, the US intelligence services could not have failed to fully appraise the factual status of Panama's military capability. Yet, despite the manifestly great military advantage that the US forces had in Panama before the invasion, the need to protect them had been included in the alleged need for protecting US nationals from grave danger.[70]

[65] *ICI*, *supra*, n. 23, pp. 28-9; *supra*, n. 35.

[66] Eg, Díaz Herrera, a senior PDF officer who was involuntarily retired on 1 June 1987, "broke the code of silence every other PDF officer had adhered to" (Koster and Borbón, *supra*, n. 19, p. 324), and publicly accused Noriega and the PDF of various grave crimes and corrupt activities. — See, further, *ibid.*, pp. 322, 325 *et seq.*; Barry, *supra*, n. 24, pp. 32-3; Weeks and Gunson, *supra*, n. 24, p. 56.

[67] Dinges, *supra*, n. 27, p. 298. Bush also had sent signals to the PDF. He had, eg, said that "[w]e have no argument with the PDF...The problem is Noriega. If he gets out and they recognize the results of a freely held election...they would have instant (*sic*) improved relations with the United States." — 89 *DSB*, 1989, August, p. 51.

[68] *Supra*, n. 43.

[69] *Supra*, ch. 3, pp. 86-7.

[70] Defending the invasion, Sofaer, for instance, has said that "President Bush was lawfully entitled—and constitutionally obliged—*to protect effectively the forces*" and the other US nationals (italics added). — *Supra*, n. 45, p. 286. The phrase "to protect effectively" might connote, for our purpose here, either protection where such did not exist or was inadequate, or more reinforcement even where an adequate protection existed. As the US forces in Panama appeared capable of protecting themselves effectively, any intention of enhancing their locally available effective protection, albeit seemingly redundant, might be considered as one that seeks to provide them with a higher degree of security. In the latter event, a justifiable reinforcement rather than an invasion should have been the proper course of action.

4.2.1.1 Panama's Declaration of a State of War

It should be noted at first that war in its traditional sense and declaration of war are proscribed under the UN legal order.[71] Panama's declaration of a state of war is discussed here only to make an appraisal of its factual significance and its justificatory effect on the US invasion.

The Bush administration had made much of the state of war declared by the Panamanian National Assembly.[72] Within its proper context, however, the declaration was more precisely a public announcement that indicated Panama to be in a state of war for the duration of what the National Assembly characterized as US aggression.

The circumstances that gave rise to the declaration and the way it was worded seemed to bear more on a frantic attempt to control and withstand a grave state of affairs rather than create a new state of war:[73] The declaration apparently did not produce a state of war but recognized officially and dramatically the existence of a national crisis, ascribed to US aggression, as amounting to and constituting such a state. In practical terms, there might well be little or no significant difference between a new state of war and a mere recognition of an existing crisis as such. However, in view of the weight that Bush had placed on the declaration for the purpose of giving more credence to his claim of protection for US citizens in Panama, it needs to be seen if he and his administration had neglected to discern in good faith the nature of the declared state of war.

In its clear terms, the declaration of the state of war was not an unprovoked act but a response to an alleged US aggression. Putting the declaration and the alleged US aggression in a causal relationship had the effect of casting the declaration in a less reprehensible light than would have been the case had it been made without some semblance of justification. The declaration's upgrading of the status of the alleged US aggression, which had seriously strained the relations of the two States,

[71] See, eg, Asrat, *supra*, n. 22, pp. 95 *et seq.*

[72] Bush, *supra*, n. 20, p. 1734. See *infra*, n. 174 , for the text of the declaration.

[73] Woerner, the former commander of Southern Command, has appraised the declaration of the state of war as describing an existing situation rather than " imply[ing] a change of attitude". — *The Record*, *supra*, n. 44, p. 657. In his acceptance speech of the title and authority of Maximum Leader, Noriega had specifically charged that "[o]n 8 April 1988, the President of the United States [had] invoked the powers of war against Panama. After the Vietnam war, these power (*sic*) of war had only been partially invoked, and at that time they were invoked against Libya. Since that day...the U.S. machinery, through constant psychological and military harassment, has created *a state of war in Panama*." (Italics supplied). — *Ibid.*, p. 711. *Cf.* Quigley, *supra*, n. 60, p. 286, where the Panamanian declaration is assessed more as "a statement that the United States had initiated war with Panama than it was a statement of Panamanian intent to initiate war against the United States".

could also be perceived to have had the effect of reducing the risk of a surprise attack. The tense situation existing prior to the Panamanian declaration must have already sharpened the mutual watchfulness of the parties as to substantially reduce, or rule out, unobserved and unexpected threats.

The level of threat the Panamanian declaration was meant to carry, and was felt to have posed, could be observed from the action and reaction of both parties in Panama during the five days preceding the invasion. On the Panamanian side, no full measures that would have been consistent with a newly-declared state of war were put into motion. On the US side, no higher degree of alert was noticed:[74] The Southern Command did not appear to have resorted to extraordinary defensive preparations and protection of US citizens in Panama. Although the death of Paz, the wounding of another officer, the harsh treatment of a navy officer and the subjection of his wife to lascivious threats have frequently been cited to add weight to the justifications of the invasion, the mere fact that those incidents, unfortunate as they were, occurred, indicated that the servicemen were neither confined to base nor assigned positions to man. They were in town on that fateful evening, as they apparently must have been on other weekend evenings. These factors tend to show that the Panamanians did not intend the full effect of their declaration of state of war, and that the declaration did not cause the US citizens in Panama and the Bush administration in Washington, D.C., a high degree of anxiety. The Panamanian declaration might have created a low degree of anxiety, and put a notch higher the tension created by the US sanctions and the US-supported abortive coup against Noriega in October, 1989, but the concerned parties did not appear to have taken it very seriously. Reference may be made in this regard to what the Committee on International Arms Control and Security Affairs and the Committee on International Law of the Association of the Bar of the City of New York found in the course of their research into the US invasion. They have observed:

> In our numerous interviews with officials of the Department of Defense and the Department of State, no one has suggested that the intentions of Noriega, the Panamanian Defense Forces, or the Dignity Battalions radically changed as of December 17, 1989, or that any of these entities had any plan to initiate an attack on the American community.[75]

[74] See, eg, *The Record, supra*, n. 44, pp. 656-7.
[75] *Ibid.*, p. 673.

It might be extrapolated from the general Panamanian situation preceding the invasion that the declaration of a state of war was simply tailored for Noriega's needs. His desire to do away with his de facto authority, and to have himself invested with a status approximating that of a head of State and its accompanying de jure authority, was probably designed to clothe him with a mantle of immunity from prosecution in the US; it might also have been designed to give him a better bargaining position with regard to any future US action against him. His assumption of the title of Maximum Leader was probably the last rites administered to a moribund personal ambition and a last ditch attempt to infuse his soldiers with some stalwart spirit that must have been in short supply. The measures Noriega took appeared desperate, indicating the tenuous and hopeless nature of his position, which could not have been lost on the US.

Both the US and Panama appeared to have used the terms war and aggression more for their general and political effect than their legal significance. As indicated earlier, the term war that Panama has used has no place under the contemporary rules on the international use of force.[76] Its use of the term aggression, too, did not squarely fall within the UN General Assembly's Definition of Aggression.[77] Any allegation of aggression outside the Definition would need to be determined by the UN Security Council.[78] The US has likewise used the term aggression outside the scope of the Definition of Aggression.[79] Both States could not but have been fully aware that their use of the terms war and aggression did not carry and convey a consequence-bearing technical sense. In addition, the factual situation obtaining in Panama was not persuasively consistent with that of a country in a state of war. Both the US and Panama were, therefore, on notice not to attach undue legal significance to the terms on

[76] See, eg, Henkin, *supra*, n. 47, p. 302.

[77] Resol. 3314 (XXIX), 14 December 1974, Annex.

[78] Art. 39, UN Charter.

[79] Eg, the US representative at the Security Council debate of 20 December 1989 had stated that "Noriega could not be permitted falsely to wrap himself in the flag of Panamanian sovereignty while the drug cartels with which he is allied intervene throughout this hemisphere. That is aggression; it is aggression against us all". —S/PV.2899, pp. 33-4. The same representative had further stated on 23 December 1989 that Noriega had "declared war on my country a long time ago, from the moment he concluded his first deal with the narcotic peddlers who are wreaking havoc on our city streets and who seek, through unmitigated greed, to destroy our nation's most precious resource, its youth. Noriega and his ilk...are guilty of nothing less than premeditated intervention and aggression against my country. "— S/PV.2902, pp. 10-1. Sofaer, *supra*, n. 45, pp. 285-6, where it is stated that the incidents that had occurred in Panama and were alleged to have been "followed by further acts of hostility, constituted a form of aggression against the United States...".

the unlawful use of force that they had employed against one another for political purposes.

Unless Panama's declaration of a state of war was plausibly appraised to come within the prohibited threat of force, the fact that it amounted or not to a provocation would appear to have been of no moment.[80] On the other hand, the fact that it could be appraised as "a declaration of a state of emergency within Panama"[81] would not appear to make it any less a threat of force. Besides, as the situation in Panama on the day of the declaration was not significantly different from that of the preceding months, the declaration's character of emergency did not appear pronounced, but only subsumed in the declaration of a state of war. In any event, the conclusion could not be resisted that the Panamanian declaration of a state of war was essentially a declaration of emergency. As such, it might have amounted to a threat of force that could have called for certain commensurate, non-forcible, precautionary and dissuasive measures.[82] But it did not appear to have attained the degree of a threat of force that justified recourse to anticipatory forcible measures, even where such recourse was admitted to be valid as a matter of law.[83] As indicated earlier, apart from those violent events against US nationals referred to above, the days from the 15th to the 20th December were free from other notable incidents and bore no credible omen of an impending catastrophe. No grave and large-scale threat to US citizens and interests that might have given some legal colour to the US invasion was, therefore, manifested as a result of the declaration of a state of war and Noriega's speech delivered on the occasion.

Before closing our inquiry into the nature of the Panamanian declaration, it should also be mentioned that the US had not submitted to the UN all of its complaints about the treatment of its citizens in Panama, and had consequently failed to make full use of the Organization's dispute resolution processes;[84] it had also failed to opt for certain less radical measures. Whatever the US reasons, its disregard of the UN avenues for peaceful settlement of disputes and enforcement measures reflected unfavourably on its allegation of grave danger to its citizens and its claim of justified use of force. Had the complaints been submitted to the UN, the

[80] Nanda concedes that the Panamanian declaration of war constituted "a clear provocation". — *Supra*, n. 48, p. 497.

[81] Henkin, *supra*, n. 47, p. 301. *Cf. infra*, pp. 150-1, the discussion of the state of emergency.

[82] *Cf.* Nanda, *supra*, n. 48, p. 497.

[83] Asrat, *supra*, n. 22, pp. 222-3. See the discussion of anticipatory self-defence in A. Randelzhofer's commentary on Art. 51, in *The Charter of the United Nations*, B. Simma ed., 1995, pp. 675-6.

allegations and counter-allegations could have been exposed to the scrutiny and persuasive pressure of the world body that might have helped put them in a balanced perspective, and made them amenable to solutions. Having neglected the full observance of its substantive obligation of settling its disputes with Panama by peaceful means,[85] the US was prompt in giving the appearance of complying with its procedural obligation under Art. 51 of the UN Charter.[86] Although couched in terms that purported to comply with the duty of reporting its alleged exercise of self-defence, the US communication to the Security Council was like a formal notice of a *fait accompli*. Coming from a veto-carrying Member of the Security Council that steadfastly maintained the righteousness of its grave breach of international law, the US reporting appeared neither intended to affirm the interim status of the alleged self-defence, nor to submit to the overriding authority of the Security Council.[87] Such practice could hardly be conceived as designed to enhance the authority of the UN.

As regards non-forcible measures that the US could have adopted for the protection of its citizens instead of resorting to military invasion, certain possibilities have been plausibly indicated:

> (1) moving all armed services personnel and dependents onto base areas at an early date; (2) restricting movement of United States military personnel outside base areas except for the performance of official duties; (3) allowing personnel to carry sidearms when travelling outside American bases; (4) providing armed patrols of Canal Commission housing areas; (5) withdrawing American civilians from Panama during the crisis.[88]

[84] See, eg, *The Record*, *supra*, n. 44, p. 665, where it has been observed that "there was no attempt by the United States to present the problem of cumulative violence to the collective security processes of the United Nations in the 24 months preceding the invasion". But it had complained to the Security Council in August 1989 about the Panamanian government's harassment and intimidation of its citizens. — See, eg, Quigley, *supra*, n. 60, p. 279.

[85] Art. 2(3), Art. 33(1), Art. 37(1) UN Charter. In his letter of 20 December 1989 to the Security Council, the US representative, Pickering, wrote as if the dispute concerned Noriega alone. But the sole focus on Noriega could not veil the State of Panama from the dispute; neither did it safeguard that State from the dispute's violative and destructive consequences. — UN Doc. S/21035.

[86] UN Doc. S/21035. Art. 51 requires that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary...".

[87] See S/21048 and S/PV.2902, pp. 18-20 for the vetoed SC draft resolution.

[88] *The Record*, *supra*, n. 44, p. 669.

But neglectful as the US was of the UN process, so was it neglectful of employing less radical alternative means that the standards of necessity and proportionality require in the exercise of an alleged self-defence. Bush confirmed the deliberate neglect of his administration to pursue exhaustively peaceful alternative means when, without presenting any convincing proof, he declared in his address to the nation that he "took this action only after reaching the conclusion that every other avenue was closed and the lives of American citizens were in grave danger."[89]

The occurrence of isolated incidents involving foreign nationals, and the apparently empty threats to their lives made by dictators characterized as boastful,[90] could not suffice to justify a broad breach of the contemporary constraints on the international use of force. The good faith fulfilment of international obligations, including that of the non-use of unlawful force on the international plane, is one of the cardinal principles of the UN Charter[91] that seeks to preserve the integrity of norms: In regard to the point under discussion, the principle would militate against the erosion of the norm prohibiting the unlawful use of force on the international plane. From what has been adumbrated above, therefore, the circumstances did not indicate that the US had breached in good faith its obligation not to resort to force against another State: The alleged protection of citizens lacked the overall genuineness that was necessary to bring the breach of the obligation within the absolving exception of self-defence.

The US claim of protection of citizens was accordingly insufficient to justify the invasion of Panama. This conclusion will be further strengthened when we consider later the price paid in life for the alleged protection. Suffice it here to mention only the US casualties which reportedly comprised 26 persons killed and 324 others wounded.[92]

[89] Bush, *supra*, n. 20, p. 1723. Equally unpersuasive was the US representative's letter to the Security Council which declared, *inter alia*, that "[t]he United States ha[d] exhausted every available diplomatic means". — S/21035.

[90] Eg, the US representative at the UN General Assembly debate of 29 December 1989 had characterized Noriega as "the boastful dictator and indicted drug-trafficker". — A/44/PV.88, 10 January 1990, p. 22. In other regards, there appeared no noticeable preparation for fulfilling Noriega's speech of 15 December 1989 at the National Assembly, where he assured his audience that "[w]e, the Panamanians, will sit along the banks of the canal to watch the dead bodies of our enemies pass by, but we would never destroy the canal". — *The Record*, *supra*, n. 44, p. 636 n. 107. The threat sought to be conveyed by Noriega's speech could not, hence, have been taken so seriously as to warrant a military action.

[91] Art. 2(2) of the UN Charter.

[92] *The Record*, *supra*, n. 44, pp. 639, 982.

4.2.2 Defence of Democracy

The defence of democracy in Panama was the second ground on which the US invasion of that country was sought to be justified. Both in his address to the nation and his letter to Congress, Bush had indicated that ground as one of the reasons for which he ordered the invasion.[93] But the ground was not specifically included in the US letter to the Security Council that gave notice of the reasons for the use of force against Panama.[94] One can safely take the omission of that particular ground from the letter to the Security Council as indicative of a lack of conviction about its justificative aptness.[95] The apparent realization that the ground of the defence of democracy in Panama, in the circumstances presented by Bush, was inappropriate for supporting the claim of the invasion's legal justifiability at the UN should have made that ground equally inappropriate for another type of justification in another forum. This is plainly so because any justification for an international use of force is now under the governing authority of the UN legal order, and unilateral resort to force is always required to meet the conditions of validity envisaged in the Charter. Nevertheless, Bush and other US officials made an unreserved use of the ground of defence of Panamanian democracy in the national forum to assert the blamelessness and salutariness of the invasion.

The forum-oriented use of the ground of defence of democracy would raise questions of motives. Presenting to a domestic audience alone, and not to the UN, that ground to justify an invasion would betray motives that have no proper place in the exceptions to the prohibited use of force on the international plane. The use made of the particular ground for

[93] *Supra*, notes, 39 and 41.

[94] *Supra*, n. 85. The US representatives had mentioned the defence of democracy at the Security Council and General Assembly debates. — Docs. S/PV.2899, p. 31; A/44/PV.88, p. 22.

[95] The US representatives had skirted round the claim of defence of democracy both at the Security Council and the General Assembly debates. They did not address the right of the US to intervene by force for the purpose, but made statements couched in terms that seemed to plead exculpatory reasons for a *fait accompli*. Thus, at the Security Council, the representative stated that "[t]he question before us has never been our commitment to Panamanian sovereignty...for the sovereign will of the Panamanian people is what we are here defending". — S/PV.2899, p. 33. And he continued that "[t]he Panamanian people want democracy...The people of the United States seek only to support them in [its] pursuit". — *Ibid.*, p. 36. See A/44/PV.88, pp. 23 *et seq.* for the representative's statements at the General Assembly debate.

domestic purposes would also seem impervious to the unhappy discordance between the legal order under the UN and the US internal legal order that might be introduced as a result. Membership in the UN must, however, entail the requirement of effecting an operational harmony between matters that are commonly fundamental to the legal orders of the Organization and its Members.[96] For our purpose here, this requirement could be noticed from the peremptory authority of *jus cogens* norms,[97] expulsion from the UN Membership on account of persistent violation of the principles of the Charter,[98] and the precedence of the Charter obligations over those under other international instruments.[99] But Bush must have made up his mind that what mattered most in the final analysis was the satisfaction of the popular expectations of his domestic audience on whom the continued well-being of his term of office depended. He, therefore, seemed in need of giving his domestic audience reasons, such as defence of democracy, which, irrespective of their lack of exculpatory value at international fora, were laudable objectives at one with the national ethos, especially where quick victory was assured by overwhelming human and material resources of high quality. The inevitable success of the US military venture in Panama was guaranteed at the same time to be domestically popular, to instantly bring back into line an aberrant State, and to reassert by way of passable contemporary terms the lopsided conditions that had prevailed in the relational history of the two States.[100] The purpose of Bush for making domestic use of the ground of defence of democracy in Panama would, hence, appear to have been thoroughly motivated by internal political considerations.

Before proceeding further, it bears reiterating that, subject to the legitimate exercise of the UN authority, contemporary international law safeguards the internal order of any State against forcible change by other States. As an attribute of its political independence, the internal order of a State is generally accorded legal protection irrespective of its character-

[96] The introductory paragraph of Art. 2 of the UN Charter lays it down that the Organization and its Members are bound by the principles under the Article, which "for the most part, do impose direct legal obligations". — Art. 2, Randelzhofer, in *The Charter of the United Nations*, *supra*, n. 83, p. 73.

[97] Eg, Art. 2(4) of the UN Charter; Asrat, *supra*, n. 22, pp. 51-2.

[98] Art. 6 of the UN Charter; O. Kimminich, in *The Charter of the United Nations*, *supra*, n. 83, pp. 191-2.

[99] *Ibid.*, R. Bernhardt, pp. 1120-2; Art. 103 of the UN Charter.

[100] See *supra*, ch. 3, pp. 82 *et seq.*

istics and/or the particular reaction it engenders in others.[101] Any unilateral foreign violation of that internal order would consequently be a grave breach of international law; and any reason advanced in justification of the violation would need to come within the strict limits of the accepted exculpatory grounds.[102]

The ground of the defence of democracy in Panama relied on by the US to justify its military invasion would raise the issue of who had authority to decide on the nature and exercise of what was claimed to be a democratic process. Granted, the cancelled Panamanian election of May 1989 was generally considered to have been won by the opposition

[101] See, eg, UNGA Resol. 2131(XX), 21 December 1965, Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States; UNGA Resol. 2625(XXV), 24 October 1970, Friendly Relations Declaration; Ermacora's commentary on Art. 2(7) of the UN Charter in, *The Charter of the United Nations*, *supra*, n. 83, p. 143; H. Bull, "The Continuing Validity of the Rule of Non-Intervention", in *International Law*, 3rd ed., 1993, L. Henkin, R. C. Pugh, O. Schachter, H. Smit eds., p. 908, where it is indicated that, "the rule of non-intervention is essentially bound up with the rule that states are entitled to rights of independence or sovereignty...The consensus behind the rule that states have rights of sovereignty extends to its corollary, that they have the duty of non-intervention"; P. Daillier et A. Pellet, *Droit International Public*, 5e éd., 1994 p. 890, where it is likewise indicated in line with the general view that intervention is "un acte manifestement incompatible avec la Charte des Nations Unies, qui reconnaît l'égalité souveraine des États, et une atteinte directe au principe de la plénitude et de l'exclusivité de la souveraineté territoriale".

Cf. Nicaragua v. *USA* (Merits), *ICJ Reports* 1986, para. 262, where the International Court of Justice observed in connection with a political pledge Nicaragua was alleged to have made: "[E]ven supposing [the] pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization [of American States]...Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in the event." See, further, para. 263.

[102] The praiseworthy desire to do away with injustice and better assure the respect for human rights has as yet to be recognized as endowed with attributes that could justify unilateral forcible measures. D'Amato has argued that " [a] major customary law development since 1948 was the intervention by the United States in Grenada in 1983, and a second one is the Panamanian intervention". — *Supra*, n. 22, p. 523. The alleged "customary law development", however, does not appear to constitute any development. Two instances of unilateral military intervention undertaken by the US to the accompaniment of a general disapproval (eg, GA resols. 38/7, 2 November 1983; 44/240, 29 December 1989) could hardly be sufficient to show some major development of customary law that affects the law on non-intervention. A basic State value that is protected by a *jus cogens* norm could not conceivably be subjected to the hazards of an unsettled practice, still so few and far between. It need be recalled here that the International Court of Justice has observed in *Nicaragua* v. *USA* (Merits), *supra*, n. 101, para. 268, that "the use of force could not be the appropriate method to monitor or ensure...respect [for human rights]".

by a wide margin.[103] But no independent body had been established for the purpose of hearing and verifying allegations both of official malpractices and foreign interference, and issuing its findings.[104] As it was, the US, an active party in the Panamanian contention, thought fit to adopt the conclusions of the observers regarding the actual winners of the election, and to champion the cause of democracy by making it one of the reasons for its military intervention. The US, as any other State, was of course entitled to make its own assessments of events in other States for formulating the conditions that would be suitable for any of its specific relations, and for exerting justifiable pressure intended to bring about an acceptable course of conduct. But its unilateral determination of events in other States could not possess properties that are capable of investing it with the right of using force for other objectives. As indicated in the preceding paragraph, the unilateral imposition by force of a certain system on the internal order of a State, or what amounts to the same, the forcible assumption of tutelar functions over a State for the avowed purpose of giving effect to its laws relating to democracy, was clearly outside the permissible scope of the existing rules of international law.[105] The US unilateral determination of the events in Panama bearing on the issue of democracy and employed in support of the invasion could not, then, furnish a proper legal ground for the military intervention. The US unilateral determination, furthermore, could hardly escape charges of questionable impartiality.

The Bush administration seemed to realize, however, that its ground of

[103] *Supra*, ch. 3, pp. 97.

[104] See *ibid.*, p. 98, re US $10 million allegedly made available by the US to the opposition.

[105] See, eg, Henkin, *supra*, n. 47, p. 298; Nanda, *supra*, n. 48, p. 498. Henkin, as many others, reminds us that the so-called Reagan Doctrine and Brezhnev Doctrine advocating military intervention on behalf of democracy and socialism, respectively, has taken no root in international law. Nanda observes that "[f]oreign intervention prevents the genuine development of democracy" in the State subjected to intervention in the name of democracy (at 499). A unilateral foreign attempt to impose "democracy" on a certain State where the factors necessary for the proper exercise of democracy are inchoate or weak, offers no guarantee that the system would function and assure respect for fundamental rights. Apart from the fact that the motive of such unilateral foreign action is, in realistic terms, suspect, the breach of one norm for the dubious institution of another would be quite unfortunate for the development of the international rule of law. D'Amato, however, seeks to defend such intervention by focusing not on what it "is *for* but what it is *against*" (italics in the original). — *Supra*, n. 22, p. 519. But unless the discussion is taken beyond the present state of international law, the suggested focus of analysis could hardly affect the issues involved: The particular focus could neither help remedy the legal defect caused by the unilateral military intervention in the circumstances under consideration, nor constitute a custom-forming precedent, nor assure a better and genuine substitute for the condemned normative *status quo*.

the defence of democracy in Panama needed some veneer of legality. It enlisted for the purpose the help of Endara, Calderón, and Ford, whom it had taken under its wing as having won the May 1989 election.[106] Bush, accordingly, wrote in his letter to Congress:

> In the early morning of December 20, 1989, the democratically elected Panamanian leadership announced formation of a government, assumed power in a formal swearing-in ceremony, and welcomed the assistance of U.S. Armed Forces in removing the illegitimate Noriega régime.[107]

Pickering, the US representative at the UN, inserted in his letter to the Security Council:

> The United States undertook this action after consultation with the democratically-elected leaders of Panama President Endara and Vice Presidents Arias Calderon and Ford who have been sworn in and have assumed their rightful positions. They welcome and support our actions and have stated their intention to institute a democratic Government immediately. The United States has recognized and will restore normal relation with that Government.[108]

In his address to the Association of the Bar of the City of New York on 20 March 1990, Sofaer, a former Legal Adviser of the Department of State, endeavoured to argue:

> President Bush's authorization of the U.S. action in Panama was founded upon Noriega's illegitimacy, as well as upon President Endara's approval and cooperation. ...
>
> When informed of the impending arrival of U.S. troops in Panama on December 19, 1989, Endara decided to be sworn in as president. He welcomed the U.S. action,...
>
> The cooperation and support of President Endara lends substantial weight to the legitimacy of the U.S. action in Panama. ... That he lacked such clear

[106] The US administration's endorsement of Endara and his running mates followed the Catholic Church's private count of the votes cast at the election. — See, eg, Dinges, *supra*, n. 27, p. 304; Kempe, *supra*, n. 6, pp. 352-4. The administration's adoption of this private count in face of the cancelled election made it the highest tribunal of the Panamanian election. But, as matters stood between the two States, and irrespective of the legal nature of the régime in Panama, the US was neither invested, nor could invest itself, with such an authority, which exclusively belonged and belongs to the territorial sovereign.

[107] Bush, *supra*, n. 20, p. 1734.

[108] *Supra*, n. 85.

control [of Panamanian territory], however, does not deprive his consent of legal significance.[109]

Before taking up the question of weight that might be given to the welcome, support, and approval of, and cooperation in, the invasion ascribed to Endara and his two vice-presidential candidates, the kind of status that they possessed prior to the invasion would need to be ascertained.

Endara had been referred to as president-elect.[110] Since, however, the election had been cancelled by the de facto authority of the land, and no properly invested higher authority had overruled that cancellation,[111] Endara, in strict terms, could not have been considered president-elect. The US persistence in treating him as president-elect amounted, hence, to an unauthorized substitution of foreign authority for that of Panama's.[112] The fact that Endara and his two running mates had won by a reported wide margin of 3 to 1, and were therefore morally entitled to the offices to which the voters had elected them, did not confer on the US the unilateral authority of reinstating by force the results of the frustrated election. As the election was an internal matter, it remained such with all its defects where a properly authorized remedying process was absent. Naming Endara, then, president-elect did not bear the intended legal significance.

Endara had no de jure governmental authority. Since he neither had a meaningful organization that exercised effective authority over a certain Panamanian territory, he lacked also de facto governmental authority. A person whose electoral victory had been denied recognition by the ruthless and corrupt, but effective, masters of his own State, and who otherwise had no legally discernible authority, was, therefore, in no position to validly approve or welcome the US invasion.[113] However much one

[109] *Supra*, n. 45, pp. 288-90.

[110] Eg, *ibid.*, p. 289.

[111] Refusal to recognize the legality of Panama's government did not entitle the US to disregard the existence and acts of that government, and justify its military intervention. Sofaer's attempt to partly justify the US invasion on the alleged illegitimacy of the government in Panama (*supra*, n. 109) lacks, therefore, a valid legal ground. The unilateral characterization of a government as illegitimate cannot *per se* be a good ground for an invasion.

[112] *Supra*, n. 101.

[113] Concerning the question of when Endara gave his reputed approval for the invasion, it appeared from Pickering's letter to the Security Council that the US action was undertaken "after consultation with the democratically-elected leaders of Panama" (*supra*, n. 85). Sofaer, on the other hand, indicated that there was no "formal approval by Endara prior to the commencement of the U.S. action" (*supra*, n. 45, p. 290). Since, however, the effect of Endara's consent on the legality of the invasion would not have been different in either case, the exact date and time of his reputed consent to the invasion is not crucial for the present analysis.

might desire, moral entitlement alone could bestow no better right on a claim to an office than legal entitlement that has been denied domestic recognition; it could not therefore remotely justify foreign military intervention.

The Bush administration sought, nonetheless, to clothe Endara, Calderón, and Ford with legal authority by having them sworn in at the eleventh hour as president and vice-presidents of Panama. This homage to formalism reportedly took place at a US base in the Canal area some hours before the invasion was set afoot.[114] As the swearing in formality was an attempt to install the three persons in the offices which they had not been *duly* declared to have won, its effect hardly differed from a US-sponsored appointment. It did not as such properly confirm an already established result and open the way for a proper exercise of governmental authority. The swearing in formality did not have the quality that could have remedied the legal defect with which the three office aspirers were shackled.[115] In other respects, the nature of Endara's involvement in the invasion did not reveal him as a Panamanian with an independent say in the matter.[116]

It may be observed from the preceding discussion that the US claim of the defence of democracy in Panama was hardly consistent with the democratic process itself. The US had no legal authority to take upon itself the forcible implementation of what it unilaterally accepted as the verdict of Panama's exercise of democracy in disregard of the Panamanian way of exercising democracy. Where foreign implementation of a State's democratic process became necessary and justified in the interest of maintaining international peace and security or fulfilling other UN purposes, the task would properly fall on that Organization. Action taken or authorized, accordingly, by the UN in the legitimate exercise of its competence would be better accepted by the world community than that taken unilaterally, and provide a more suitable precedent for maintaining some passable form of consistency in similar situations. The ever relevant remarks about self-help made by the International Court of Justice in the *Corfu Channel* case, and partly cited before, need to be fully

[114] The swearing in was reportedly officiated by a private attorney (Dinges, *supra*, n. 27, p. 307) at Fort Clayton, a US military base (Henkin, *supra*, n. 47, p. 299).

[115] *Cf.* Henkin, *supra*, n. 47, p. 300.

[116] Sofaer claimed that Endara was not a US puppet (*supra*, n. 45, p. 290). However, before he was sworn in as President, Endara was reported not to have favoured any military intervention in Panamanian affairs (Johns and Johnson, *supra*, n. 4, p. 72). He was also reported not to have been consulted but politely told about the invasion (Henkin, *supra*, n. 47, p. 300, n. 28). In other respects, most of the Latin American States were unwilling to recognize the Endara government. — Weeks and Gunson, *supra*, n. 24, p. 91.

recalled here for their comparative relevance. The Court had indicated there that it

> can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organizations, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[117]

It would be very ironic indeed if the pretended unilateral interest in promoting democracy, including fundamental human rights, were to be allowed to erode the basic international law rules, which are as much necessary both for the protection and development of those rights as for peaceful inter-State relations.[118] And reminders of those basic rules whenever they are breached without any justifiable cause would not so much amount to being "carried away by the rhetoric of statism",[119] as to a harping on the rules in force, which simply have to be observed until duly replaced.

The defence of democracy in Panama advanced by the US in an attempt to strengthen the justification of its invasion could not, therefore, find a valid support under the contemporary rules of international law.

4.2.3 Integrity of the Panama Canal Treaties

Bush had announced to the US Congress that he ordered the military invasion of Panama, inter alia, "to fulfill our responsibilities under the Panama Canal Treaties";[120] and the US representative to the UN had informed the Security Council that the military action was partly based on the US "obligations to defend the integrity" of the treaties.[121] These statements sought to indicate that at the time of the invasion the condition of the Panama Canal was such as called for its protection, and that the alleged protection was envisaged and required by the treaties. The state-

[117] *Supra*, n. 3, p. 35.
[118] *Cf.* Henkin, *supra*, n. 47, p. 299, where it is stated: "The Charter has established that maintaining peace is paramount, even to democracy."
[119] D'Amato, *supra*, n. 22, p. 518.
[120] Bush, *supra*, n. 20, p. 1734.
[121] *Supra*, n. 85.

ments deserve attention.[122] We shall, accordingly, proceed to consider, first, as a question of fact, whether or not the Canal was in a state that justified forcible measures of protection, and second, as a question of entitlement, whether or not the terms of the treaties lend support to the alleged right of unilateral resort to force for the protection of the Canal.

4.2.3.1 Factual Situation

Whether by design or not, the formulation of the alleged protection of the Canal as the protection of the integrity of the treaties appears vague. Taking the formulation from the perspective of a question of fact, we might regard it as relating to the physical and operational "integrity" of the Canal which is under the special régime of the treaties. The physical "integrity" of the Canal was apparently intact. It had not emerged that the Canal was seriously threatened or otherwise affected by the Panamanian authorities during the planning and execution of the US invasion.[123] The Panamanian authorities would understandably have had no reason for deliberately damaging the physical condition of their valuable source of income, especially in 1989 when their country was under the strangling pressure of the US economic sanctions.[124] It might also be added that by 1989 reportedly some 85 per cent of the employees at the Canal Commission were Panamanians.[125] It could be safely presumed then that a hostile Panamanian attempt against the physical integrity of the Canal was highly improbable, and that any such attempt could not have escaped the attention of the 13,000 plus US troops, other US citizens, and all manner of US agents monitoring the activities of the Canal area; all these persons must inevitably have been more vigilant during the tense period preceding the invasion. In what would appear a perfectly reasonable assessment of the Panamanian attitude towards the Canal, it has been remarked that

> as a key economic asset and symbol of Panamanian nationality, the Canal was considered unlikely to be the target of any attack by Noriega, unless in last straits in the course of an invasion.[126]

[122] The statements might have simply been thrown in to bolster the political position of the Bush administration; and "it has been suggested [that they] 'must have been intended humorously'" (Henkin, *supra*, n. 47, p. 302). But lined up as they were with other reasons that sought to justify a serious breach of an international duty, their legal significance would need to be duly assessed.

[123] See, eg, Henkin, *supra*, n. 47, p. 302.

[124] *Supra*, ch. 3, pp. 104 *et seq.*

[125] *The Record*, *supra*, n. 44, p. 616, n. 27; Zimbalist and Weeks, *supra*, n. 4, p. 53.

[126] *The Record*, *supra*, n. 44, p. 690.

It has similarly been remarked that

> Noriega was...careful to do nothing that would be deemed a threat to the Canal. Even Colin Powell, chairman of the Joint Chiefs of Staff, admitted that the 14,000 troops already in Panama would have been "quite adequate" to defend the Canal had there been a need.[127]

As regards the operational "integrity" of the Canal, no disruption of, or serious threat to, the normal course of its activities had been attributed to the Panamanian authorities.[128] It was rather the US that apparently interfered with the normal running of those activities by refusing to pay for the use of the Canal,[129] and closing it down altogether during the invasion.[130]

As a question of fact, therefore, the Panamanian authorities did not appear to have posed any real threat to the physical or operational status quo of the Canal at the time of the invasion. This fact could also be extricated from the letter of Bush to Congress wherein he has stated that

> events over the past two years have made it clear that...the continued safe operation of the Panama Canal and the integrity of the Canal Treaties would be in serious jeopardy if such lawlessness were allowed to continue.[131]

The statement stood to the effect that despite the events alleged to have been "lawless" and to have occurred "over the past two years", the operation of the Canal had neither been disrupted nor its safety endangered: The statement was an acknowledgement that at the time of the invasion the Canal was in no immediate need of protection. This being so, even granting its availability, the US claim of protection of the Canal lacked a valid factual basis that met the requirements of immediacy and necessity. In other respects, a claim of protection of the Canal thus lacking an actual and factual validity would be equally unavailing for the prospective purposes indicated by the Bush statement.

4.2.3.2 The Purview of the Treaties

The US forcible exercise of protection of the Canal is governed by the

[127] Johns and Johnson, *supra*, n. 4, pp. 59-60.
[128] See, eg, Quigley, *supra*, n. 60, p. 299.
[129] Johns and Johnson, *supra*, n. 4, pp. 12, 59; Zimbalist and Weeks, *supra*, n. 4, p. 147.
[130] Dinges informs us that the "U.S. military officials closed the Canal for two days, the first time in its history the Canal had ceased to operate for any reason other than landslides". — *Supra*, n. 27, p. 307.
[131] Bush, *supra*, n. 20, p. 1734.

general and particular rules of international law to which it gave rise.[132] In view of the US avowed concern for, and reliance on, the Canal treaties, recourse need first be had to the terms of the treaties to ascertain the existence and conditions of exercise of a unilateral right of protection.

Briefly reiterated,[133] the treaties comprise the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal. Both treaties evince, and draw from, the territorial sovereignty of Panama over the Canal area. That sovereignty is either specifically stated,[134] or affirmed by provisions relating to certain of its attributes,[135] or emerges from the rights and obligations established under the treaties.[136] The treaties also evince by their terms to be agreements entered into between States and not between particular governments. The necessity of a particular type of government for the continued validity of the treaties does not appear from their terms. A special relationship established by the Panama Canal Treaty envisages the signatories' obligation of cooperating "to assure the uninterrupted and efficient operation of the [Canal]".[137] Also, Panama is to "participate increasingly in the management and protection and defense of the Canal".[138] In regard to the protection and defence of the Canal, the Panama Canal Treaty provides in part in Art. IV:

> 1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.
>
> 2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal.

The primary responsibility to protect and defend the Canal thus placed

[132] See *supra*, ch. 3, p. 80, about Panama's conditions attaching to its ratification of the 1977 treaties.
[133] See *ibid.*, pp. 81-2, for the discussion of the treaties.
[134] Eg, the preamble, Art. I(2), Art. III(1) of the Panama Canal Treaty, 16 *ILM*, 1977, p. 1022.
[135] Eg, *ibid.*, Art. VII(1) and Art. IX(1) have put "the areas made available" to the US under the Panamanian flag and law.
[136] Eg, *ibid.*, Art. I(2) and Art. III(1) wherein Panama has granted to the US rights pertaining to the Canal and the US has undertaken to exercise them in accordance with the agreements; Art. I and Art. II of the Neutrality Treaty whereby Panama has declared the permanent neutrality of the Canal. See 16 *ILM*, 1977, p. 1040 for the Neutrality Treaty.
[137] Art. I(4).
[138] *Ibid.*, Art. I(3).

on the US does not oust Panama's own responsibility of protecting and defending it, but appears intended to indicate where, in terms of resources, the principal burden of the exercise of protection and defence would lie.

Mention may be made of the US reservation to the Panama Canal Treaty where it is stated that

> any action taken by the United States of America...to assure that the Panama Canal shall remain open, neutral, secure, and accessible pursuant to the provisions of the Panama Canal [Treaties] ... shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity.[139]

This reservation appears to arrogate to the US the right of unilaterally determining when it should take its own measures for the stated purposes. It should, however, be recalled that the US reservation is subject to Panama's declared understanding that the parties are under the obligation of fulfilling in good faith the provisions of Art. 1(1) and Art. 2(4) of the UN Charter and of Articles 18 and 20 of the OAS Charter, and that the projected US action will be "consistent with the principles of mutual respect and cooperation".[140] Apart from the obvious fact that a State cannot avoid incurring international responsibility for its acts by merely declaring them to be non-interventionary or non-violative of "of political independence or sovereign integrity", especially where a norm of *jus cogens* status is involved,[141] the Panamanian understanding effectively conditions the unilaterality that might have been intended by the reservation.[142]

The proper implementation of the terms of the treaties appears to envisage the parties' mutual efforts rather than the exclusive unilateral action of each: The cooperation of the parties for the proper attainment of the objects and purposes of the treaties appears to constitute an essential element of the agreements. A unilateral action that manifestly disturbs

[139] 17 *ILM*, 1978, pp. 820-1; see *ibid.*, p. 828 for the corresponding provision in the Neutrality Treaty.

[140] *Ibid.*, pp. 819-20, 826; *supra*, ch. 3, pp. 80-1.

[141] *Cf.* the *jus cogens* provision of Art. 53 of the Vienna Convention on the Law of Treaties. — 1155 *UNTS*, p. 331. See, further, *infra*, n. 151.

[142] *Cf. International Law*, 3rd ed., *supra*, n. 101, p. 489. In connection with the question of a plebiscite on the US Senate's reservations, etc., Panama had reportedly replied that it "had accepted the Senate's conditions, reservations and understandings but regarded them as interpretations of the treaties, not as alterations or amendments". This statement would leave intact Panama's understandings of how the treaties would be implemented.

this mutuality of undertakings issuing from the special relationship established between the parties could not, therefore, be convincingly defended as taken for and under the treaties.[143]

The causes, means, and target of the protective and defensive acts need to be briefly addressed next. As seen in Art. IV(1) of the Panama Canal Treaty, the issue of the protection and defence of the Canal comes to the fore in case of "danger resulting from an armed attack or other actions which threaten [its] security...or...ships transiting it". Inasmuch as both the US and Panama are under a treaty obligation to protect and defend[144] the Canal in due cases, the armed attack and other threatening actions would appear to envisage third parties and/or some outside events.[145] It would not then appear that the parties could validly invoke the right and duty of protection and defence of the Canal against one another on the basis of the treaties without undermining that basis.[146] Even where certain elements of either signatory become responsible for armed attack and other acts that threaten the security of the Canal, it will be those elements, and not their State that can be made the target of the appropriate and necessary measures of protection and defence. Those measures would be undertaken, in the normal course of events, jointly or by one of the parties with the proper consent of the other. If, however, the State of the responsible persons chooses to espouse their actions, the remedy for

[143] C. Maechling, Jr. considers that "[h]ad the United States restricted its December 20 'deployment' to locations needed to protect the canal, the invasion would have fallen within the language of the treaty". — "Washington's Illegal Invasion", 79 *Foreign Policy*, p. 125. As the US measures would still be directed against Panama, the unilateral deployment of a large force without its consent and in the absence of valid grounds would not only upset the status quo relating to the presence of foreign forces on its territory, but it would also infringe its sovereignty. The measures would fall outside the terms of the treaties and constitute a violation of the prohibition of the threat or use of force in international relations. *Cf.* Art. 3(e), Definition of Aggression, UN UNGA Resol. 3314 (XXIX), 14 December 1974 (Annex), which qualifies as an act of aggression "[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement".

[144] The exercise of the defence of a right is normally at the discretion of the one entitled to exercise it. Were the US and Panama under no legal obligation to undertake measures of protection and defence of the Canal under the terms of the Panama Canal Treaties, they would have preserved their discretionary rights of exercise in regard to their respective spheres, ie the US, its investments and other rights in the Canal, and Panama, its territorial sovereignty.

[145] *Cf.* Art. IV(3) of the Panama Canal Treaty, where "a Combined Board compris[ing]...an equal number of senior military representatives of each Party" is envisaged in regard to the protection and defence of the Canal. — *Supra*, n. 134.

[146] Were the legal duty of protection and defence that falls on the parties under the treaties to have them as its possible target, it would constitute an incongruity with the special relationship sought to be established by the treaties.

the other party will lie in the dispute settlement provisions of Art. XIV or other applicable legal grounds outside the terms of the treaties.

Sofaer has argued, however, that the rights of the US under the treaties

> make the United States—Panama relationship unique among sovereign states, and authorize the United States to protect its troops and civilians stationed in Panama for the purpose of defending and operating the Canal.[147]

For clearer analysis of the US claims under the treaties, it would be necessary to separate the protection of "troops and civilians stationed in Panama" from the defence and operation of the Canal. The right of protecting its citizens, as the US has consistently maintained,[148] comes under the rules of self-defence and would not depend on a special authorization by the treaties. On the other hand, the right to defend the Canal, which lies under the sovereignty of another State, would properly issue from the treaties. Although there might be instances where the protection of troops and other citizens would merge with the defence of the Canal, the two could not always go together. Sofaer's formulation of the defence of the Canal as if dependent on the right of the US to protect its troops and civilians seems to ignore the separate sources of the rights. Defence of the Canal under the treaties could not be seen as essentially and materially connected with the protection of US citizens, for that would confuse issues and seek to legalize those US measures against Panama which would otherwise be unlawful. In addition, the phrase "unique among sovereign states" that Sofaer has used in regard to the special relationship established by the treaties, could not have the effect of destroying the legal parity of the parties and giving the US an altogether dominant role.[149] Such an outcome would not be consonant with the Joint Statement of the parties made on 7 February 1974. The statement enunciated, inter alia, that the proposed Panama Canal Treaty would establish "the necessary conditions for a modern relationship between the two countries based on the most profound mutual respect".[150]

From the foregoing, then, it would be difficult to sustain the legality of the US claim that it resorted to military measures against Panama "to fulfill its responsibilities under the Panama Canal Treaties". Besides the absence of a solid factual basis that could support an allegation of the existence of danger to the Canal or ships and give rise to the exercise of the duty of protection and defence, it may be reiteratively stressed that

[147] *Supra*, n. 45, p. 287.
[148] *Supra*, sect. 4.2.1.
[149] See *supra*, ch. 3 pp. 76 *et seq.*, about the relations of the US and Panama in earlier treaties.
[150] 70 *DSB*, 1974, February, p. 184.

the treaties could not be interpreted as enabling the forcible violation of the territorial integrity of one of the parties. Such interpretation would be inconsistent with the peremptory international law norm that prohibits the threat or use of force in international relations;[151] it would upset the juridical equality of the contracting parties, especially of those that a bilateral agreement binds in a special relationship;[152] and it would victimize a State party to a treaty for acts for which it was not liable under the treaty.

Regarding the last issue, it may be mentioned in passing that the US had refused to recognize the governmental authority in Panama, which it characterized as the Noriega régime,[153] but took military measures against the State for what that régime was alleged to have done: In the stated US concern for safeguarding the integrity of the treaties, Noriega and the government of Panama were apparently considered irrelevant. Nonetheless, it should be indicated that the implementation of the treaties was not made dependent on the installation of a certain type of State authority in the US and Panama;[154] hence, recognition of the said authority would not appear necessary for the continued validity of the treaties. Despite its lack of relevance, then, resorting to a course of action that practically had the effect of making the operation of the treaties conditional on the recognition of a particular type of State authority would amount to a unilateral introduction of a new element that impinged on the integrity of the treaties.

Bush had declared in part the necessity of safeguarding "the integrity of the Canal Treaties... [from] serious jeopardy". Taking the term integrity to relate to all important elements, especially the joint enterprise, envisaged in the treaties, any legally unauthorized unilateral interference in the due implementation of those elements would necessarily reflect on the integrity of the treaties. Acts done or omitted on the ground that rec-

[151] See, eg, Art. 53, Vienna Convention on the Law of Treaties, *supra*, n. 141; Henkin, *supra*, n. 47, pp. 302-3. *Cf.* Asrat, *supra*, n. 22, p. 168, where it is stated in connection with the USSR defence of its 1968 military invasion of Czechoslovakia that States "cannot validly be parties to an agreement the object of which would have the effect of contracting out of the obligation under Art. 2(4)" of the UN Charter.

[152] *Cf.* Art. 2(2) of the UN Charter; the Preamble and Art. 26, Vienna Convention on the Law of Treaties, *supra*, n. 141.

[153] See, eg, the President's Statement, Sept. 1, 1989, and the Department Statement, 12 Sept. 1989, 89 *DSB*, 1989, November, p. 69. Sofaer affirms that "the United States consistently refused to accept the Noriega régime as the legitimate government of Panama". — *Supra*, n. 45, p. 289.

[154] *Cf.* Art. 63, Vienna Convention on the Law of Treaties, where it is provided that "[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty ...". — *Supra*, n. 141.

ognition had been withheld from an authority that governs Panama would thus affect the integrity of the treaties. The US Senate resolution of 1 June 1989 not to confirm the appointment of a Panamanian nominated as administrator of the Canal by the Noriega-backed government, and the consequent US refusal to accept one such nominated person,[155] tantamounted to an infringement of the integrity of the Panama Canal Treaty. Neither was the withholding of taxes and fees payable by the US to Panama for the Canal, reportedly $400 million in two years,[156] in line with the expected respect for the proper integrity of the treaty.[157] Most of all, the military invasion of Panama in the name of the integrity of the Canal treaties was an action that gravely infringed that same integrity.[158]

The resort to force against a signatory State for the reputed purpose of securing better the dependability of bilateral treaties would be alien to their objects and purposes. Such resort would be a self-help measure that could not have the treaties as its base nor as its cause for absolution.

In other regards, the blanket welcome and support[159] of the invasion attributed to the Endara government would be irrelevant and of no consequence as being incapable of adding to or detracting from the treaties as they stood in December, 1989. Since, in line with the view maintained here, the treaties do not stipulate the necessity of installing a particular type of government for either party, and the withdrawing or withholding of recognition from a government of one signatory by the other would not affect their status, the treaty position of Endara would not be different from or better than that of Noriega or of any other authority in Panama.

In sum, any desire to better assure a more suitable implementation of the treaties would have been expected to trace the route of renegotiations; and any dispute involving the interpretation of the treaties should have been submitted to the dispute-settlement procedures provided in Art. XIV of the Panama Canal Treaty.

[155] See Art. III(3)(c), Panama Canal Treaty, re the appointment of a Panamanian as Administrator of the Panama Canal Commission from 1 January 1990. — *Supra*, n. 134. Re the refusal to confirm the Panamanian nomination, see Albert, *supra*, n. 9, . p. 63; *The Record*, *supra*, n. 44, pp. 633-4.

[156] Johns and Johnson, *supra*, n. 4, pp. 12-3; Zimbalist and Weeks, *supra*, n. 4, p. 147.

[157] The Panamanian National Assembly has also declared in the fifth preambular paragraph of its Resolution No. 10 of 15 December 1989 that "the U.S....soldiers...violate the integrity of the Torrijos-Carter treaties on a daily basis when they use the Panamanian territory to launch war actions against neighboring countries". —*The Record*, *supra*, n. 44, p. 708.

[158] *Cf. ibid.*, p. 60.

[159] Bush has claimed that the military action "was welcomed by the democratically elected government of Panama". — *Supra*, n. 20, p. 1734. See also the US letter to the Security Council, *supra*, n. 85.

4.2.4 Apprehending Noriega

Apprehending Noriega was not the last factor in the order of justifications that Bush gave for the invasion of Panama. But in the interest of presentational convenience, its discussion is undertaken here last. Noriega had figured in various types of involvement with regard to the other justifications discussed previously. Those discussions will constitute a necessary background for the assessment of the Noriega factor on the scale of the proffered justifications.

Bush had declared to Congress that one of his reasons for ordering military action against Panama was "to apprehend Noriega and bring him to trial on the drug-related charges for which he was indicted in 1988".[160] This factor was not mentioned in the letter of the US representative to the Security Council, and the Legal Adviser of the State Department had reportedly said that "[t]he Administration did not act simply to apprehend Noriega. That would not have been a sufficient basis under international law to act."[161] It would then appear that the factor was not specifically included in the US letter to the Security Council[162] due to the unavoidable awareness of its indefensibility under the standards of the UN Charter.[163] Nevertheless, Bush did not refrain from announcing that factor to his nation and the world as one of his reasons for ordering the invasion.[164] Withholding that factor from the formal notice of the invasion to the Security Council on the one hand, and on the other, announcing it to the nation and beyond reconfirms what has been observed in connection with the justification of the defence of democracy in Panama.[165]

We shall discuss the apprehension of Noriega as a reason of the inva-

[160] Bush, *supra*, n. 20, p. 1734.

[161] *The Record*, *supra*, n. 44, p. 685, n. 272.

[162] The US representative at the Security Council debate had mentioned "combat[ing] drug-trafficking" as one of the US goals, and expounded the evils of the illicit trade, likening it to war and aggression, but he did not mention the justifiability of apprehending Noriega. — Doc. S/PV.2899, pp. 31, 33. The US representative at the General Assembly debate, too, had mentioned, but not actively pursued, combating "the evil of illicit drug trafficking". — Doc. A/44/PV.88, p. 22.

[163] As indicated at various junctures of this study, the use of force in international relations becomes unlawful under the legal order of the UN if it is not used by the UN itself or under its authority, or if it is not a valid exercise of self-defence. A presumption of illegality attaches to every unilateral use of force in international relations. As this presumption places the onus of demonstrating the legality of the international use of force on the party resorting to it, the US had the duty of showing the legality of all the reasons it alleged to justify its invasion of Panama. Whatever the forum, the legal status of the reasons cannot but be uniform. —*Cf.* Asrat, *supra*, n. 22, pp. 229-30.

[164] See Bush, *supra*, n. 20, pp. 1722-3.

[165] *Supra*, pp. 132-3.

sion in connection with his status and the issue of drug-related offences and the trial.

4.2.4.1 The Official Status of Noriega

At the time of the US invasion of Panama on 20 December 1989, Noriega was head of government and Maximum Leader.[166] Noriega's investiture with that office and title was based on Resolution No.10 of 15 December 1989 of the National Assembly of Corregimiento Representatives: Asserting that it was acting by virtue of "the legal and constitutional powers bestowed on it", the Assembly had under operative paragraph 2 of the Resolution created the position of head of government and appointed Noriega to the office as Maximum Leader.[167] The investiture constituted a wide-ranging power that the Assembly saw fit to grant Noriega in a situation that it declared to be a state of war.[168] The new position of Noriega was superimposed on his commandership of the PDF.[169] In a national emergency equated with a state of war, therefore, the National Assembly conferred the appellation of Maximum Leader on Noriega, the commander-in-chief of the PDF, and to all intents and purposes appointed him to the highest position of the State. A brief consideration of the National Assembly, the situation of emergency, and the title of Maximum Leader will help shed light on the new status of Noriega.

4.2.4.1.1 The National Assembly

Whether the National Assembly is characterized as servile, puppet, handpicked, or simply Noriega's,[170] it was what it claimed to be. In the absence of valid Panamanian undertakings, other States lacked the unilateral competence of reviewing that claim and deciding otherwise. Thus, the US had no recognizable legal authority over the constitution and legislative acts of the National Assembly; and any pronouncements it made regarding the legality of the Assembly might have amounted to a manifestation of an intense diplomatic displeasure, but they could not have borne any legal effect in Panama on the acts and decisions of that body. Accordingly, the characterization of the Assembly as "illegitimate"[171]

[166] See *supra*, ch. 3, pp. 89 *et seq.* about Noriega's rise to power.
[167] *The Record*, *supra*, n. 44, pp. 708-9.
[168] See the discussion of the declaration of war *supra*, pp. 126 *et seq.*
[169] See *supra*, ch. 3, pp. 86 *et seq.* about the status of the PDF.
[170] See Kempe, *supra*, n. 6, p. 54; Dinges, *supra*, n. 27, p. 306; Sofaer, *supra*, n. 45, p. 284.
[171] Bush, *supra*, n. 20, p. 1734.

could not have made that body illegitimate, nor its acts illegal.

The National Assembly purported to act as empowered by Panamanian law. Where the Panamanian internal order had not effected the establishment of a body that replaced the Assembly or authoritatively rescinded its acts as ultra vires, neither the status of the Assembly as the nation's parliament[172] nor the validity of its acts were seriously contestable by other States for purposes of unilateral forcible measures.

4.2.4.1.2 Situation of Emergency

A situation of emergency will officially exist in a particular State when its authorities declare the presence of certain circumstances that necessitate the recourse to extraordinary remedial action. Inasmuch as what constitutes a situation of emergency might not be uniformly appraised by all States, what is a situation of emergency for one State might not be so for another. Being an internal matter, however, the assessment of the nature of adventitious circumstances, the declaration of a state of emergency, and the type of remedial measures put into effect are normally left for the decision of the concerned State.

The Panamanian National Assembly charged the US with responsibility for certain circumstances that prevailed in the State, and appraised those circumstances as constitutive of a state of war,[173] which is a state of emergency par excellence. It recited inter alia in Resolution No. 10 that

> for the past 2 years the Republic of Panama...has been under the cruel and constant harassment of the U.S. Government... .
>
> That the...actions...have not only affected our capitalist system and our social and economic development, impoverished all the people, closed off job sources, made our access to consumer goods more difficult, and decreased the flow of tourists...but have also divided and created unrest among the Panamanian people whose integrity as a nation is seriously affected and facing imminent danger. ...
>
> That the Republic of Panama is living in a real state of war... .[174]

The Assembly declared that the extraordinary state of affairs existing in Panama necessitated a struggle "for the survival of the nation" "under

[172] See Henkin, *supra*, n. 47, p. 301.

[173] See *supra*, pp. 128-9 about the apparent significance of the term war as employed by the National Assembly, and the loose use of terms to which both the US and Panama had resorted.

[174] *The Record*, *supra*, n. 44, p. 708.

a single leader".[175] It chose the ill-advised term "state of war", it would appear, for the purpose of starkly portraying the dire situation of Panama. Viewed in this light, that unhappy term could not realistically be made susceptible of a serious military sense that would supersede the peaceful declaration of a state of emergency that was its raison d'être. Despite its use of the term "state of war", then, Resolution No. 10 of the Assembly did not appear to have amounted to more than a formal and dramatic acknowledgement of the existence of a national emergency.[176]

4.2.4.1.3 The Title of Maximum Leader

The Panamanian National Assembly had made Noriega the "maximum leader of the struggle for national liberation" and granted him "special emergency powers".[177] Briefly stated, he could coordinate all manner of official and non-official activities; appoint civilian officials and military chiefs and officers; authorize the negotiation of international agreements; convene various councils, boards, and the National Assembly; and "adopt decisions on any other matter or circumstance not contemplated in this resolution that may affect the nation's life or the country's interests".[178] Such range of powers would appear to fully equate his authority with the literal sense of his title of Maximum Leader.

Mention of the president of the republic was made in connection with the authority Noriega was to have over the country's foreign relations. Section 2.5 of Resolution No. 10 empowered Noriega "[t]o coordinate with the president of the Republic the handling and management of the country's foreign relations". An empowerment to coordinate, in the emergency circumstances of Resolution No. 10, would impliedly invest the coordinator with an overriding authority over matters placed within his sphere of competence. Although coordination might normally and essentially give a sense of a horizontal harmonization of elements "into a common action, movement, or condition",[179] it did not appear to have been so in the special case of Panama where a single person was entrusted with extraordinary powers for the declared purpose of the liberation and survival of the nation. It would then appear that the authority of Noriega, the coordinator, was somewhat higher than that of the president of the republic in those matters of foreign relations that Section 2.5 of

[175] *Ibid.*, p. 709.
[176] See *supra*, ch. 3, pp.103 *et seq.*
[177] *The Record, supra*, n. 44, p. 709.
[178] *Ibid.*, p. 710.
[179] Meriam-Webster, WWWebster Dictionary, 1996.

Resolution No. 10 specified.

The National Assembly would thus be seen to have intended and made Noriega the highest authority of Panamanian internal and external matters. The title of Maximum Leader conferred on him would, accordingly, be commensurate with the Assembly's intention and the tremendous authority it allowed him to have: Whatever the motives[180] behind its Resolution No. 10, the National Assembly had legislated that Noriega have the highest authority of the land for the duration of what it declared to be a state of war; and however short-lived, Noriega had that authority.

It would emerge from the analysis of the three elements—the National Assembly, the situation of emergency, the title of Maximum Leader—that Noriega was the head of government, which made him the chief executive of the Panamanian government, and he had the non-nominal status of maximum leader of Panama, which made him the highest official of his country. In regard to the latter position, the overriding authority that the National Assembly gave Noriega in the face of the president of the State, where there was one, would plainly indicate the higher status with which it intended to invest him for the duration of the emergency: Under the Panamanian legal order, Noriega would necessarily have taken precedence over the formal head of State so long as that emergency lasted; Noriega was as such a sui generis head of State.

In other respects, States that subscribe to the Estrada doctrine,[181] presumably would not have concerned themselves with the effect of Resolution No. 10 on the legal status of Noriega's authority; others might have considered him to qualify to a de facto status in regard both to the position of head of State and that of chief of government.

Some, however, take the view that as Noriega "was formally neither Head of State nor head of government", he did not have "a standing in international law entitling him to the kind of treatment which is required"

[180] See *supra* pp. 126, 128 for some probable motives.

[181] The doctrine, which bears the name of the Mexican Foreign Minister, stands for the proposition that recognition should concern only States, and not governments. In the instructions transmitted to the Mexican diplomatic missions, it has been stated in part: "[T]he Mexican government is issuing no declarations in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implied that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign régimes." — L.T. Galloway, *Recognizing Foreign Governments*, 1978, p. 9.

for the occupants of those offices.[182] This could probably have been so before 15 December 1989. But on that day, as argued above, Noriega was invested with the authority appertaining to those offices by a formal act of the Panamanian National Assembly; he had consequently obtained the necessary standing in international law that entitled him to the corresponding privileges and immunities.[183] Noriega was also the commander of the PDF, which was established, like other national defence forces, "to maintain the independence, authority, and safety of the state".[184] As an organ of State, the PDF partook of its State's entitlement to immunity,[185] which, by a necessary extension, must also have been available to its commander: The latter constituted an integral part of that Force.

4.2.4.2 Drug-related Offences

Bush seemed to have perceived the drug-related indictments of Noriega as granting him an international legal authority to ensure the arrest and prosecution of Noriega by invading Panama. And the former legal Adviser of the State Department has argued that "Noriega was an indicted drug dealer who used his power to prevent Panama's compliance with narcotics conventions requiring, under international law, his prosecution or extradition".[186] It will be necessary, therefore, to consider the provisions of the international agreements on narcotics that would have relevance to our inquiry.

The multilateral international agreements on narcotics to which both the US and Panama are parties are the Single Convention on Narcotic Drugs, 1961,[187] and the Protocol Amending the Single Convention.[188] Art. 36(1) and Art. 36(2)(a)(iv) of the Convention, as amended by Art. 14 of the Protocol, provide, respectively, for the adoption of measures that "will ensure that cultivation [etc]...of drugs...shall be punishable offences", and for the prosecution of any offender "by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made". These provisions are

[182] A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", 247, *RCADI*, 1994, p. 98.
[183] Maechling indicates Noriega's status of Maximum Leader to be "the equivalent of chief-of-state", and to entitle him to "sovereign immunity". — *Supra*, n. 143, p. 127.
[184] 1 Oppenheim (9th), p. 1154.
[185] *Ibid.*, pp. 1157-8; *supra*, ch. 3, p. 87 about the status of the PDF.
[186] Sofaer, *supra*, n. 45, p. 289.
[187] 520 *UNTS*, p. 151.
[188] *Ibid.*, Vol. 976, p. 3.

subject to the constitutional limitations of the parties, and the provisions of Art. 36(2) are, in addition, subject to the legal systems and domestic laws of the parties. Although the parties appear to have obligated themselves to make those acts that are contrary to the Convention punishable offences, and to prosecute offenders, an unrestricted duty of extraditing an alleged offender does not seem to have been envisaged. As the obligation to prosecute offenders, who might be nationals or foreigners, falls on the Party in whose territory the offence is committed, or on the one in whose territory the offender is found, the parties would have an approximation of universal jurisdiction in respect of the offences made punishable under the terms of the amended Convention. The obligation of prosecuting or extraditing would not, however, appear to be as fully effective for the Convention as it would be for other agreements that make extradition mandatory.[189]

In addition, as concerns extradition, Panama has made a specific reservation in the following terms:

> Since, under its Constitution, the Republic of Panama cannot be required by any international treaty to extradite its own nationals, it is signing this Protocol...subject to the express "Reservation" that the amendment made by article 14...(a) does not modify the extradition treaties to which the Republic of Panama is a party in any manner which might require the latter to extradite its own nationals;...(c) may not be interpreted or applied in any manner which gives rise to an obligation on the part of the Republic of Panama to extradite any of its own nationals.[190]

Sofaer, however, has argued that "Panama remains obligated to prosecute [drug] offenders, or it must waive the reservation".[191] But in view of the constitutional and other domestic law constraints to which the provisions of the amended Convention are subjected, and the consequent absence of the full effect of the *aut dedere aut judicare* maxim, it would be difficult to see how Panama could be required to waive its specific reservation: The reservation is independent of the duty to prosecute. Further, as could be noted from the terms of Art. 21(2) of the Protocol, the withdrawal of all or part of a reservation is facultative.

Where Panama is accused of failure to duly carry out any of its obligations under the Convention, the proper remedial process would have to be sought in Art. 48 of the Convention, which provides:

[189] *Cf. supra*, ch. 2, pp. 46 *et seq.* about *aut dedere aut judicare*.
[190] 976 *UNTS*, pp. 99-100.
[191] Sofaer, *supra*, n. 45, p. 289 n. 37.

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.

The international legal régime established for the control of narcotic drugs thus envisages only the peaceful settlement of disputes that relate to the interpretation or application of the amended Convention. This is in conformity with the fundamental obligation of States under the UN legal order to settle their disputes by peaceful means.[192] The amended Convention does not, therefore, envisage, and could not furnish a basis for, a unilateral forcible action against a party in order to enforce its provisions or resolve an impasse.[193]

As indicated earlier, not all the justification for the invasion of Panama that Bush announced to the nation were presented to the UN. Despite the distinction between legal and other types of reasons apparently intended by this manner of selective handling of the justifications, it needs to be repeated here too that every kind of reason advanced in support of a breach of a fundamental norm of international law must necessarily be appraised for its legal worthiness.[194] In this regard, it can be seen from the brief discussion above that the Single Convention on Narcotic Drugs and its amending Protocol, which were implied in the frequent references of Bush to drug-related offences and were specifically mentioned in the arguments Sofaer, could not have provided a good legal basis for the invasion.

4.2.4.3 The Prime Purpose of the Invasion?

Bush's announced purpose of invading Panama "to apprehend Noriega and bring him to trial" meant the effective removal of Noriega from

[192] See, eg, Asrat, *supra*, n. 22, pp. 47-8; Tomuschat, C., Art. 2(3 of the UN Charter, in *The Charter of the United Nations*, *supra*, n. 83, pp. 100-4.

[193] *Cf.* Nanda, *supra*, n. 48, p. 502. The author observes that "[p]erhaps the United States has confused the domestic legality of bringing Noriega before a U.S. court and the international legality of such an act". See *supra*, ch. 2, pp. 61 *et seq.*, re the maxim *male captus, bene detentus*.

[194] See *supra*, eg, pp. 119, 129, 134, for similar remarks in other instances.

authority and Panama. It meant getting rid of a former agent who had become too unmanageable and was obnoxiously interfering with the US hegemonic practices and expectations.[195] It meant making Panama dependably safer and docile for US interests and citizens. It meant teaching a humiliating and vengeful lesson to others who, although not beyond serious personal vulnerability, might still wish to entertain ambitions of the Noriega order. In short, it meant the subsuming in this one reason´all the others proffered by the US to justify its military invasion of Panama.[196]

Reference may be made at this juncture to the telling arguments of Sofaer. He has contended that

> [t]he United States had attempted to negotiate Noriega's voluntary surrender of power, had protested both Noriega's violations of the Canal Treaties and his violence against U.S. forces, and had invoked all available forms of diplomatic and economic sanctions. All these efforts failed.
>
> Under these circumstances, ousting Noriega was a legitimate and necessary foreign policy objective; only that result could end the attacks on U.S. nationals, preserve U.S. (and Panamanian) rights under the Canal Treaties, restore the legitimate, democratic government selected by the people of Panama and end Noriega's alleged involvement in international drug violaions.
>
> ...the objective of removing Noriega...is justifiable under international law... .[197]

The contention of Sofaer amply confirms what has been characterized in this study as the personalized US policy towards Panama.[198] It admits that in pursuit of that policy the US has subjected Panama to coercive measures, which have earlier been appraised to constitute an unlawful intervention.[199] Finally, it seeks to make the forcible removal of Noriega legally justifiable. Reserving the latter allegation of justifiability for a later consideration, we shall merely note here that Sofaer has clearly put the removal of Noriega as the overall objective of the US invasion. Bush, too, appeared to have revealed that much: When asked at a news confer-

[195] See *supra*, ch. 3, *passim*.
[196] See, eg, Maechling, *supra*, n. 143, p. 125, where the author states "to get Noriega" was "the real purpose of the invasion"; *supra*, p. 111.
[197] Sofaer, *supra*, n. 45, p. 290.
[198] *Supra*, eg, pp. 114-5.
[199] *Supra*, ch. 3, pp. 107 *et seq*.

ence if it was "really worth it to send people to their death for this, to get Noriega", he was reported to have replied, "Yes, it has been worth it".[200]

As the ousting of Noriega was the evidently principal objective of the invasion, the other justifications, especially those pertaining to the protection of US citizens and the canal treaties, seemed to have been appended in an attempt to cloak the prohibited use of force with a semblance of legality. However, the fact that the justifications did not possess the necessary legal merits, discussed above,[201] could not have escaped the professional attention of the administration's lawyers. Seeking, then, to impute to them the legal strength they did not possess would betray a conscious disinterest in legality and strengthen the ground for the conclusion that they were not proffered for their genuine legal value. In other respects, although the principal objective of removing Noriega was not formally presented as a legal justification, it would appear remarkable that it was argued later to be so justified.

Regarding Sofaer's attempt to show the ousting of Noriega as a legitimate and necessary foreign policy objective and as justifiable under international law, it should be noted that although foreign policy is an internal matter, it is obviously not free from the constraints of international law. What might be a necessary foreign policy objective might not necessarily be legitimate. A foreign policy objective would be legitimate if its implementation is not designed to breach unlawfully the contemporary norms of international law. Within the context of our inquiry, the objective of ousting a leader—however he/she may be designated—of another State would contravene the principle of non-intervention and offend against the State's legally protected political independence. Since the objective of ousting Noriega stood unjustified by the other reasons of the invasion, which themselves lacked legal merit, and since it was not otherwise brought within the permitted confines of the law, it did not qualify as a legitimate foreign policy objective.

Where the foreign policy objective of ousting Noriega lacked legitimacy under international law, its implementation by means of an invasion would evidently compound the illegality by the simultaneous breach of other protected State interests. As indicated at various junctures above, the self-help action that the invasion constituted violated the territorial integrity and political independence of Panama: It caused in particular the ousting of the appointed leader of the State, the dismantling of the PDF, the arrest and detention of the commander of the PDF without the

[200] Bush, *supra*, n. 20, p. 1729.
[201] *Supra*, sections 4.2.1; 4.2.2; 4.2.3.

proper observance of the privileges due to a prisoner of war,[202] the death and injury of Panamanians, and the extensive destruction of property. In face of such unjustified breaches of international law, Sofaer's contention that "the objective of removing Noriega from authority in Panama is justifiable under international law",[203] would appear to state what rather needed to be validly demonstrated.[204]

But he has proposed a theory to the effect that

> the threat or use of force by states or their surrogates...should be undertaken only when necessary, and for strong and legitimate reasons...The law should be applied in a manner that avoids undermining the legitimate scope of the threat and use of force. Finally, use of force rules should not be applied mechanically, as a "juristic push-button device," but with an appreciation for all the relevant circumstances of each case.[205]

To recall what is now generally taken to be basic and well established, the prohibition of the threat or use of force on the international plane has developed through various stages to attain a normative status that has become peremptory under the UN legal order.[206] As a principal cornerstone of the maintenance of international peace and security, which is taken to constitute the prime purpose of the UN,[207] the prohibition makes an exception only where unilateral force is resorted to in situations of

[202] Art. 4 (A) of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, defines prisoners of war as "persons...who have fallen into the power of the enemy", and includes, among other categories, under (1), "[m]embers of the armed forces of a Party to the conflict" ; and under (3), "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power". Art. 13 of the Convention provides for the protection of prisoners of war against, inter alia, "insults and public curiosity"; Art. 14 lays it down that they "are entitled in all circumstances to respect for their persons and their honour"; and Art. 40 provides that wearing "badges of rank and nationality, as well as of decoration, shall be permitted". According to Art. 5, the provisions of the Convention take effect "from the time [the prisoners] fall into the power of the enemy and until their final release and repatriation". —75 *UNTS*, p. 135.

But Noriega was "handcuffed and chained for the aiplane ride to Miami and [forced] to pose for a mug shot in his undershirt holding a number in front of his chest—the photograph then released to the press". —Maechling, *supra*, n. 143, p. 126. See, eg, *The Miami Herald* of January 5, 1990, which carried Noriega's picture bearing the sign "U.S. Marshall, Miami, FL, 41586"; Albert, *supra*, n. 9, pp. 85-6. Noriega had, however, his four silver stars on the epaulettes of his shirt during his court appearance. —*Ibid.*, p. 89.

[203] Sofaer, *supra*, n. 45, p. 290.

[204] Nanda observes that "the United States has misstated international law in attempting to justify its invasion". — *Supra*, n. 48, p. 494, n. 1.

[205] *Supra*, n. 45, pp. 282-3.

[206] See, eg, Asrat, *supra*, n. 22, pp. 21-37, 50-8.

[207] Eg, *ibid.*, p. 193.

self-defence and, arguably, in strictly defined cases of necessity.[208] Outside these exceptions, unilateral resort to force that comes and goes unsanctioned might be seen as tolerated after the necessary balancing of interests and other factors, or might reflect the weakness of the UN, but it has neither been allowed to interfere with the normative status of the prohibition nor to establish more leeway for self-help measures. The prohibition as it stands is continuously reaffirmed.[209]

Apart from the fact that Sofaer's theory is not warranted by international judicial opinion,[210] the constant practice of States,[211] and the prevailing doctrine, it would widen beyond recognition the exception to the prohibition of the threat or use of force, and correspondingly undermine the effectiveness of the prohibition. It would be a retrogression to the legal situation of the pre-UN Charter days, and a carte blanche for the mighty and the venturesome to appraise as they see fit the limits of "the legitimate scope of the threat and use of force" and the scope of the "necessary,...strong and legitimate reasons" for the purpose of resorting to forcible unilateral measures. Having apparently relied on his theory to defend the various facets of the US invasion that were indefensible under the norms of contemporary international law, he inevitably declared that "the action in Panama cannot be viewed as having been intended to compromise the territorial integrity or political independence of Panama".[212] A full-scale military invasion that resulted in the de facto occupation of the invaded State, and was attended by the substitution of one State authority for another and the dismantling of the defence forces, could not seriously be pleaded as incapable of having been intended to compromise the territorial integrity and political independence of the target State.

[208] Eg, *ibid.*, pp. 198, 230 *et seq.*

[209] Eg, *ibid.*, pp. 240-1.

[210] Eg, notably, the *Corfu Channel Case* (Merits), *supra*, n. 3, p. 4; *Nicaragua* v. *USA*, (Merits), *supra*, n. 101, p. 14.

[211] See *supra*, n. 23, for the censorious reaction generated by the US invasion. The UN, through the General Assembly and the Security Council, has regularly affirmed the inviolability of States' territorial integrity, sovereignty, and political independence by various means of self-help measures that do not come within the generally acknowledged exceptions to the non-use of force on the international plane: Eg UNGA Resol. 49/31, 30 January 1995 (Protection and security of small States); UNSC Resol. 425 (1978), 19 March 1978 (re Lebanon); UNSC Resol. 530 (1983), 19 May 1983 (re Nicaragua); UNSC Resol. 660 (1990), 2 August 1990 and Resol. 661, 6 August 1990 (re Kuwait); UNSC Resol. 696 (1991), 30 May 1991 (re Angola); UNSC Resol. 748 (1992), 31 March 1992 (re Libya); UNSC Resol. 993 (1995), 12 May 1995 (re Georgia); UNSC Resol. 999 (1995), 16 June 1995 (re Tajikstan); UNSC Resol. 1044 (1996), 31 January 1996 (re the terrorist attack on the Egyptian President in Addis Abeba).

[212] Sofaer, *supra*, n. 45, p. 291.

Such kind of pleas had been submitted before and rejected.[213]

More latitude for the unilateral use of force in international relations could arguably be conceded where the failure of the UN in its Charter-assigned tasks,[214] especially those relating to the maintenance of international peace and security, became patent. It has been submitted by the author in another study that there is a contingent relationship between the abstention of States from the unilateral use of force in international relations and the effectiveness of the UN: The contingent relationship might in due instances enable States to reclaim the competence they had relinquished under the terms of the Charter.[215] But the turning point that might free unjustified or unauthorized unilateral military invasions from the constraints of the Charter has as yet to be attained. Rather than being viewed as lacking in effect, the purposes and principles of the Charter, where the prohibition of the international threat or use of force constitutes a prominent part, are constantly affirmed, albeit unsatisfactorily implemented; and the UN has become a universal organization that routinely admits new States into its membership which, without exception, is governed by those purposes and principles. In such circumstances, there would be no valid legal reason for blatantly resorting to the prohibited self-help measures on the international plane. The US allegation that it "has exhausted every available diplomatic means to resolve peacefully disputes with Mr. Noriega, who has rejected all such efforts",[216] did not signify that it had exhausted the full range of the dispute settlement processes,[217] and could not suffice, hence, as a licence to resort to force.

It has to be said in conclusion that none of the justifications for the invasion of Panama proffered by the Bush administration possessed the merits necessary under international law. Moreover, inasmuch as the prime motive of the invasion—that of removing Noriega from his position of authority—breached norms that are otherwise stalwartly defended by the US, and had, consequently, the effect of compromising the US legal stand in allied instances involving other States, it could hardly be viewed as a prudent foreign policy objective. Neither could the other features of the invasion, which will be considered under the next section, bear out the prudence of that policy. In other regards, the large-scale breach of a certain category of legal norms for the reputed purpose of

[213] See, eg, Asrat, *supra*, n. 22, pp. 149-50; Henkin, *supra*, n. 47, p. 307.
[214] Art. 1 of the UN Charter.
[215] Asrat, *supra*, n. 22, pp. 43, 46-7.
[216] *The Record*, *supra*, n. 44, p. 718. See also Bush, *supra*, n. 20, p. 1723; Sofaer, *supra*, n. 45, p. 290.
[217] See Ch. VI of the UN Charter.

bringing Noriega to trial on drug-related charges, ie upholding another category of norms, did disservice to the general notion of legality. Lastly, the willingness of one of the mightiest States of the present world community to discard international legal constraints and opt for a policy of force near the close of the twentieth century was unfortunate: it frustrated the exemplariness expected of the US and left a gaping hole in what had been achieved in the regulation of the international use of force.

4.3 Other Features of the Invasion

Panamanians were portrayed as having enthusiastically welcomed the US invasion of their country; and Americans, particularly those reputed to belong to the US political Right, reportedly indulged in a full spate of jingoism.[218] Those of the US media who reported joy in the ruins of Panama have been faulted for their neglect of the expected and normal degree of professionalism.[219] It has been specifically indicated by certain class-conscious critics that "no consideration was given to the class-based nature of reactions to the invasion...There was virtually no coverage of Panamanians or others who did not thank the Americans for invading their country."[220] Whatever the exact degree of support the invasion enjoyed among the Panamanians, there must have been a substantial sense of relief at the prospect of the lifting of sanctions anticipated to follow the certain US victory.[221] Nevertheless, irrespective of its magnitude, the alleged Panamanian support could not have availed as an ex post facto remedy for the unlawfulness of the invasion. This would be in line with what has been submitted earlier in connection with the legal effect

[218] Johns and Johnson, *supra*, n. 4, pp. 90-2. The *ICI* likened the way the media reported the invasion to "Pentagon press releases". — *Supra*, n. 23, p. 41.

[219] See Johns and Johnson, *supra*, n. 4, p. 69, for a quotation from an article in the *Boston Globe*. It was there reported that although the invasion destroyed the modest dwellings and possessions of the Panamanians living in the poorest part of Panama City, "it lifted their spirits and gave them hope...people stood amid the ruins...shedding tears of happiness in spite of their predicament and cheering the Americans".

[220] *Ibid.*, p. 70. The slum area around the PDF headquarters was set ablaze, and it was there that most of the civilian casualties and the destruction of property occurred. "The conflagration could be seen from luxury high-rises miles away." — Kempe, *supra*, n. 6, p.15. Some of the residents in those buildings reportedly "sat in their living rooms with a panoramic view of the action — glass in hand to toast the downfall of the military régime many of them detested". — Weeks and Gunson, *supra*, n. 24, p. 4; see also *ibid.*, pp. 5-6.

[221] *Supra*, Sect. 4.1; Barry, *supra*, n. 24 , p. 59; Weeks and Gunson, *supra*, n. 24, p. 89.

of the alleged support of the invasion by Endara and his vice-presidents.[222]

The US victory in Panama was the result of a massive use of force; it will be necessary for our study to have a brief look at the casualties and other features of the invasion.

4.3.1 The Casualties

The exact number of Panamanian casualties has not been established. The Southern Command has been accused of obstructing any accurate count of casualties by removing "the official registries from Panamanian morgues and hospitals".[223] In addition, it has been alleged that some Panamanian corpses were put in mass graves,[224] and others found on streets were incinerated by flamethrowers,[225] and others were buried by families and neighbours even "in their own back yards" to avoid arrest by US troops on suspicion of association with the Dignity Battalions.[226] The Panamanian casualties have, consequently, been put at various figures.

The US count has put the Panamanian casualties at 516 dead and 3,000 wounded, and that of the US itself at 26 dead and 300 wounded.[227] The Southern Command, however, has reportedly stated that "there was no complete list of Panamanian civilian casualties".[228] Others have put the number of the dead at 220 for Panamanian civilians, 314 for PDF members, and 26 for Americans, and the number of the wounded combatants at 323 for Americans and 124 for PDF members.[229] Still others have put the number of the dead Panamanians at somewhere between 1,000 and 4,000, and that of the wounded Panamanian civilians at 3,000.[230] Three of the 26 dead Americans were civilians, and of the remaining 23 servicemen, nine reportedly died from "friendly fire".[231] Moreover, a Spanish news photographer was reported to have lost his life in a crossfire between two US units that "apparently mistook each other

[222] *Supra*, p. 137.
[223] *ICI*, *supra*, n. 23, p. 41.
[224] The *ICI* has reportedly compiled a list of 14 mass graves. — *Ibid.* In one mass grave 124 bodies were reportedly discovered.— *Ibid.*, p. 43.
[225] *Ibid.*
[226] *Ibid.*, p. 45.
[227] *Ibid.*, p. 40; Barry, *supra*, n. 24, pp. 29, 102.
[228] *The Record*, *supra*, n. 44, p. 639, n. 121.
[229] Keesing's *The Record of World Events*, Vol. 36, 1990, p. 37181.
[230] *ICI*, *supra*, n. 23, p. 45; *The Record*, *supra*, n. 44, p. 639.
[231] Weeks and Gunson, *supra*, n. 24, p. 10.

for Panamanians".[232] Out of the disputed total number of casualties, then, the US-acknowledged figure for the dead and wounded would be 542 and 3,300 respectively.

In other regards, some 18,000 to 20,000 Panamanians were reportedly made homeless, and property damage was estimated at $1.5 billion.[233] The disintegration of the PDF ushered in a large-scale looting in Panama City.[234]

The outcome of the armed conflict was practically settled within the first few hours of the military operations. The massive force, noted earlier,[235] that the invasion constituted and the absence of an effective resistance[236] rewarded the invaders with a quick victory in displacing Noriega, who was now on the run,[237] and in controlling the Panamanian State machinery. The invaders soon became a force of occupation and proceeded to exercise authority in Panama. US troops patrolled "the streets of Panama City, Colón, San Miguelito and other areas".[238] Reportedly, those troops

> had lists of people to be arrested and were dispatched to the homes of almost all previous government, university, trade union, cultural, and political leaders who had been associated with the cause of Panamanian nationalism since 1968. Prisoners were held at Fort Clayton, Empire Range, and other U.S. military installations. Extensive physical and psychological interrogations were carried out by U.S. military intelligence... .
>
> Every public building, ministry and university was placed under the control of U.S. troops.[239]

The US-installed Endara "government was unable to occupy the presidential palace because it had been taken over by the U.S. military command".[240] The latter reportedly "adopted the habit of making announce-

[232] *Ibid.*

[233] *ICI*, *supra*, n. 23, p. 40; *The Record*, *supra*, n. 44, p. 639; Kempe, *supra*, n. 6, p. 25; Zimbalist and Weeks, *supra*, n. 4, p. 154.

[234] Maechling, *supra*, n. 143, p. 121; Weeks and Gunson, *supra*, n. 24, p. 10. *Cf. Goldstar (Panama) S.A.* v. *United States*, *AILC*, 3rd, Vol. 28, p. 29.

[235] *Supra*, pp. 116-8.

[236] The main resistance reportedly came from the Dignity Battalions.— Koster and Borbón, *supra*, n. 19, p. 375.

[237] Noriega reportedly "was being entertained by a prostitute...when he heard the first explosions at just before 12.45 A.M."; and he fled. — Kempe, *supra*, n. 6, p. 16. He "seemed more interested in saving his own skin than fighting for his dignity". —*Ibid.*, p. 18.

[238] *ICI*, *supra*, n. 23, p. 47.

[239] *Ibid.*, pp. 46-7; Barry, *supra*, n. 24, p. 115.

[240] Barry, *supra*, n. 24, p. 3.

ments in the name of the Panamanian government",[241] and established, under the scheme of a military support group, a shadow government comprising US military and State Department officials:[242] The US embassy was said to have been "in operational control".[243]

The quick victory of US arms and the high number of casualties raise the issue of proportionality, which we shall consider next.

4.3.2 Proportionality

The contending US and Panamanian forces were manifestly not matched in number and equipment.[244] Some leeway in its deployment of force that to a limited extent was disproportionate to its legitimate objectives might be conceded to an invading party: This might be ascribable to the fact that the invading force was in a hostile territory. But the US force of invasion could not have been in a completely hostile country. The invasion was carried out under the immediate authority of the commander of the Southern Command and was hence "an inside job".[245] The disproportionate use of force by the US thus lacked an acceptable justification. Even in regard to its stated objectives, the invasion entailed incongruous results, which may be taken up at this juncture.

The US representative, Pickering, wrote in his letter to the Security Council that the "United States forces will use only the force necessary to assure the safety of Americans and the integrity of the Panama Canal treaties".[246] Sofaer, for his part, argued that the overpowering force was adopted "on the belief that far fewer casualties would result than if any less intensive effort were implemented".[247] Each official was thus asserting in his special formulation the proportionality of the US use of force.

As discussed above, had a real need arisen, the safety of the US citizens could have been assured by the US forces in Panama.[248] There was no justifying ground, hence, for resorting to a military operation, said to be the biggest since the Vietnam war,[249] and involving some 27,000 troops and the state-of-the-art weaponry, to assure "the safety of Amer-

[241] Weeks and Gunson, *supra*, n. 24, p. 96.
[242] The officials were attached to all government ministries and other public institutions. — *ICI*, *supra*, n. 23, pp. 49-51.
[243] Weeks and Gunson, *supra*, n. 24, p. 97.
[244] *Supra*, pp. 117-8; Barry, *supra*, n. 24, p. 115.
[245] *Ibid.*
[246] *The Record*, *supra*, n. 44, p. 718.
[247] Sofaer, *supra*, n. 45, p. 291.
[248] *Supra*, p. 124.
[249] Eg, Kempe, *supra*, n. 6, p. 9.

icans". In addition to being legally unjustified and disproportionate, the invasion appeared self-defeating in assuring the immediate safety of the US citizens: It had caused the death of 23 US servicemen and three US civilians, and the wounding of 300 or so US citizens; whether it could assure their long-term safety was a moot question.

As regards Pickering's affirmation that "only the force necessary to assure...the integrity of the Panama Canal treaties" will be used, suffice it to recall here that the operation of the Canal was under no serious threat,[250] and that it was during the invasion that the Canal was ever deliberately closed.[251] Even if there was an immediate concern for the physical integrity and normal operation of the Canal, resort to force that was more radical than what constituted an appropriate protective measures would not have been justified. The invasion force was in this regard as unnecessary as it was disproportionate.

The swift and overpowering force of invasion that supposedly was intended to cause fewer casualties still resulted in a high number of Panamanian casualties and a great loss of and damage to property. The intensive force used during the invasion has been described as designed "to minimize U.S. casualties by maximizing Panamanian casualties";[252] allegedly, it was not as clean and surgical as the US authorities had asserted.[253] Where the military operation was sought to be justified in part as undertaken to restore democracy, and where in support thereof it was argued that "Panama presented a strong case for humanitarian intervention",[254] the destructive force that made the high civilian casualties a military necessity stood in a marked contrast with the stated ground of the restoration of democracy and the supportive argument of humanitarian intervention.[255] Since the well-being of the innocent victims was as necessary as that of other Panamanians for what should be the nondiscriminating exercise of democracy, that well-being was evidently of basic concern for democracy in Panama. The existence and proper exercise of democracy in Panama could not, consequently, be viewed as capable of admitting an infringement of this basic concern claimed to have been committed on its account. Moreover, the death, injury and

[250] See *supra*, sect. 4.2.3 for the discussion of the alleged integrity of the treaties and the situation of the Canal.

[251] Eg, Dinges, *supra*, n. 27, p. 307; Johns and Johnson, *supra*, n. 4, p. 59.

[252] *ICI*, *supra*, n. 23, p. 37; Barry, *supra*, n. 24, p. 115.

[253] *ICI*, *supra*, n. 23, p. 39.

[254] Sofaer, *supra*, n. 45, p. 288. Henkin has rightly replied that "[t]here is no basis in law for such radical exceptions to Article 2(4)". — *Supra*, n. 47, p. 307.

[255] Defence of democracy was not presented as a legally justifying ground. See the discussion, *supra*, sect. 4.2.2.

homelessness of noncombatants, indicated above, had the effect of destroying the characterization of the military intervention as humanitarian: The deliberate sacrifice of the fundamental human rights of a certain category of innocent persons[256] for the professed restoration of other rights would not deserve to be classified as humanitarian; it would also trample on the progress of respect for human rights gradually achieved by the world community. The US unilateral decision to sacrifice the fundamental rights of a segment of the dwellers of Panama City for the quick attainment of the invasion's objectives could then be taken neither to have served democracy nor to have advanced and protected human rights. The alleged concurrence of "the democratically elected Panamanian leadership"[257] in the strategy of the swift and overpowering force, did not bestow legitimacy on that strategy, nor could it have done so: In the first place, regardless of the legitimacy of its authority, the "elected Panamanian leadership", too, was obligated to respect fundamental human rights; in addition, as its pretensions to authority were predicated on its demand for the proper fulfilment of the requirements of democracy and the results of its process, the leadership was all the more expected to respect all those requirements or be seen to have forfeited its pretensions. In the second place, as the leadership was sworn in under the auspices of the US military when the invasion was set in motion,[258] its authority was of dubious legality, making it incompetent to give the swift and overpowering strategy of the US a convincing exoneration.

4.3.3 The Surrender of Noriega

It could be perceived from the unsatisfactory defence of the invasion by US officials discussed above that the Bush administration was well aware of the illegality of its position. The administration was also aware of the rightful objection of the great majority of the world community to the invasion. Hence, the international use of force that the US nonetheless chose to resort to could not be differentiated from the self-help measures of the pre-UN Charter era. Freed from its ostensible justifications, the single purpose of the invasion was the ousting Noriega from his authority in Panama and eventually transferring him to the US for criminal prosecution. That unilaterally executed act of ousting Noriega from author-

[256] Eg, Universal Declaration of Human Rights, UNGA Resol. 217 (III), 10 December 1948, Art. 2 (entitlement to rights "without discrimination of any kind"), Art. 3 ("right to life, liberty and the security of person"), Art. 17 ("right to own property").
[257] Sofaer, *supra*, n. 45, p. 291.
[258] *Supra*, p. 138.

ity asserted at the same time and in a bold manner the traditional paramountcy of the US will in Panama.

The invasion was successful in immediately displacing Noriega from his authority. True to the character of most dictators with insatiable cruelty, turpitude and venality,[259] Noriega's genuine self reasserted itself when the curtain fell in earnest: The first onslaught of the invasion transformed him into a cringing quarry who hid himself and started to plumb the depths of ignominy.[260] He sought and was granted asylum at the Papal Nunciature on 24 December.[261] After protracted negotiations with the US authorities through the intermediary of the Nuncio, Noriega, wearing his general's uniform to affect a military surrender, walked out of the nunciature's grounds in the evening of 3 January 1990 and faced his pursuers. The commander of the Southern Command and another US general stood nearby as Noriega was immediately searched for weapons by members of the Delta Force and escorted to a waiting helicopter where DEA agents pulled his hands behind his back and handcuffed him.[262] He was flown to the Howard Air Force Base in the Canal area, and a short while later put on a US C-130 cargo plane bound for Miami. In a belated attention to legal niceties, he was formally put under arrest by a DEA agent after the plane left Panamanian airspace.[263] The US thus assumed jurisdiction over Noriega by dint of force.

4.3.4 Breach of Diplomatic Immunity

The US troops put the Papal Nunciature, where Noriega had taken refuge, under siege. It was threatened with forcible entry and subjected "to loud music from powerful speakers outside its walls".[264] Helicopters "flew low enough to shake [its] windows...[and] continued to circle, like vultures...an armored personnel carrier, its engines gunned, pulled up to the back gate repeatedly, with its headlights ablaze, braking and nudging the gate in threatening fashion."[265] The Nuncio reportedly said that "it was the only time he was angry about U.S. actions during Noriega's stay".[266] It may also be noted for its symbolic significance that at the time

[259] See *supra*, ch. 3 , pp. 89 *et seq*, about Noriega.
[260] See, eg, Kempe, *supra*, n. 6, pp. 13-25.
[261] Noriega was reported to have been "green with fear" when he arrived at the nunciature. — Koster and Borbón, *supra*, n. 19, p. 381; Kempe, *supra*, n. 6, p. 25.
[262] *Ibid.*, (Kempe), pp. 415-7.
[263] Albert, *supra*, n. 9, pp. 85-6.
[264] Weeks and Gunson, *supra*, n. 24, p. 117.
[265] Kempe, *supra*, n. 6, pp. 405-6.
[266] *Ibid.*, p. 406.

the Nuncio was the dean of the diplomatic corps.[267]

Concerning reported incidents at other embassies, the residence of the Cuban ambassador was threatened with a US tank, and the ambassador was detained for an hour and a half; "the US troops raided the Nicaraguan ambassador's residence"; and the Peruvian embassy was surrounded.[268]

The violation of diplomatic immunities inevitably raised strong protests. Argentina, Brazil, Colombia, Mexico, Peru, Uruguay, and Venezuela had their joint declaration of 29 December 1989 distributed as an information document of the Permanent Council of the OAS. The document declared in part that the particular States were

> deeply concerned over the measures adopted by the foreign troops employed for the military intervention in Panama, restricting free communication and disrupting the functioning of the diplomatic headquarters of the nunciature and of other countries, demand respect for the rules of international law which guarantee immunity for officials of diplomatic missions and the inviolability of the premises of those missions, an essential condition for the normal course of their activities.[269]

The violations of diplomatic immunities committed by the US troops revealed also the territorial authorities' dereliction of duty in failing to afford the necessary protection to the diplomats and the premises of diplomatic missions. It may be observed here that the complete freedom of action that the Endara government allowed the US troops to pursue various objectives made it an accomplice of the invaders rather than an independent territorial authority.[270]

[267] *Ibid.*, p. 24.

[268] Weeks and Gunson, *supra*, n. 24, pp. 92, 117.

[269] OEA/Ser.F/II.21, Doc.81/90, 3 January 1990. See also Articles 22, 25, 29, 30 of the Vienna Convention on Diplomatic Relations. — 500 *UNTS*, p. 95; *USA* v. *Iran* (hostages), *ICJ Reports* 1980, pp. 40-3 re the fundamental nature of the immunity.

[270] Some 15,000 boxes of government documents were seized by the US troops whose commander was reported to have said: "'There's an enormous quantity of documents. We have them under our custodianship, and I'm satisfied with out custodianship."' — *ICI*, *supra*, n. 23, p. 44. See *ibid.*, pp. 46 *et seq.* for acts of arrest and detention alleged to have been performed by the US forces. Having thus surrendered their authority to the US, Panamanian officials were in no position to complain, for instance, that '"[t]he U.S. government and the U.S. Army have been doing things that contribute to the obstruction of Panamanian justice"'. — *Ibid.*, p. 44.

4.4 Conclusion

We shall conclude this chapter by reiteratively summing up those matters that need to be underlined.

The urge of the US to indulge its traditional hegemonic proclivity for forcibly bringing Panama into line was more compelling than the restraining norms of the contemporary international legal order.[271] After having done much to make Noriega and the PDF what they had become,[272] and finding them to be intolerably intractable, the US asserted its will by measures that turned out to be mutually hurtful.[273] Noriega and the PDF were, consequently, cast down and aside at one stroke; they ceased to be the State organs of Panama on 20 December 1989.[274]

The price paid to wrap the US invasion of Panama in a quick and sustainable victory was high. Apart from the casualties noted above,[275] the monetary cost for the US was reportedly some $2 billion,[276] and the economic loss for Panama occasioned by the invasion was estimated to have "ranged from $1 billion to more than $2 billion".[277] The combined effect of the sanctions and invasion reportedly "resulted in a disaster without parallel in the history" of Panama.[278]

Whatever other gains the invasion might have brought in advancing US policies in Panama, the threat to the personal security of US citizens did not appear to have been completely removed; neither could it be so removed where interactions between peoples continued.[279]

The US invasion of Panama was unlawful and unnecessary. Given more time, the sanctions, albeit unlawful, appeared capable of obviating the highly destructive military operation.[280]

[271] *Supra*, ch. 3, pp. 76 *et seq.*

[272] *Ibid.*, pp. 87 *et seq.*; Koster and Borbón, *supra*, n. 19, p. 373.

[273] *Supra*, ch. 3, p. 94.

[274] The PPF, reconstructed under the auspices of the US to replace the PDF, was established on 12 February 1990. It comprised the National Police, the Air Service, the Maritime Service, and the Institutional Protective Service — *CIA World Factbook, Panama*, 1995, p. 7; Barry, *supra*, n. 24, p. 29; Weeks and Gunson, *supra*, n. 24, p. 99.

[275] *Supra*, pp. 162 *et seq.*

[276] *ICI*, *supra*, n. 23, p. 6.

[277] Zimbalist and Weeks, *supra*, n. 4, p. 154.

[278] *Ibid.*, pp. 154, 165.

[279] One US serviceman was reportedly killed when an armed opposition group calling itself M-20 exploded a grenade in a bar. — Weeks and Gunson, *supra*, n. 24, pp. 92-3.

[280] Barry, *supra*, n. 24, p. 39; Zimbalist and Weeks, *supra*, n. 4, pp. 153-4. *Cf.* Johns and Johnson, *supra*, n. 4, p. 23.

Launching Operation Just Cause[281] against Panama for the purpose of exercising the criminal jurisdiction of the US over Noriega[282] was, in the final analysis, to victimize the notion of legality without making a notable dent in the narcotic business in Panama.[283]

The US resort to massive violence against Panama was an unfortunate precedent that resuscitated the formally discarded policy of force and undermined the qualms of States about opting for the prohibited use of force in international relations.

The US invasion dealt a grave blow to the territorial integrity and political independence of Panama. But it dealt an even graver blow to the yet struggling attempt to subject international relations to the rule of law.

[281] It has been justly observed that "[i]t was an extremely cynical gambit to name a blatantly unjust invasion Operation Just Cause". — Johns and Johnson, *supra*, n. 4, p. 64.

[282] *Cf.* Albert, *supra*, n. 9, p. 3, re the frequency of similar invasions.

[283] *CIA World Factbook*, *supra*, n. 274, p. 6, where Panama is still said to be a "major cocaine transshipment point and drug money laundering center"; Barry, *supra*, n. 24, pp, 102, 135, n. 24.

PART III

USA AND NORIEGA IN JURISDICTIONAL PERSPECTIVE

Chapter 5 Jurisdiction in *USA* v. *Noriega*

This chapter constitutes Part III of the study and discusses the particular legal issues involved in the US exercise of its criminal jurisdiction over Noriega. It also considers certain matters that have a bearing on those issues.

The implementation of the US policy of the late 1980's on Panama by means of a military invasion, which was neither justified under governing international legal norms nor plausibly mitigated by other discoverable standards, has been discussed in the previous chapter. The US has further pursued that policy through the instrumentality of its judicial process in *US* v. *Noriega*[1] to which the defendant was forcibly subjected.

The prosecution of Noriega has been presented by US officials as a law enforcement matter. It may be noted at the outset, however, that the US administrations were well aware of Noriega's illegal activities during the period when he served as their paid agent,[2] and that they made use of the indictments in seeking to persuade him accept a negotiated resignation of his authority.[3] These facts could hardly be consistent with a prime interest in law enforcement. In the circumstances, the indictments were an expedient policy tool. It has also been suggested that Noriega's prosecution "could be considered an enforcement of international law".[4] The

[1] *746 F. Supp. 1506 (S.D.Fla. 1990)*, p. 1511. The District Court for the Southern District of Florida in Miami has indicated that it was "the first time that a leader or a de facto leader of a sovereign nation has been forcibly brought to the United States to face criminal charges". See *supra,* ch. 4, p. 167, how Noriega was transferred to US jurisdiction.

Whatever legal status any government might unilaterally ascribe to a foreign leader, his forced removal—effected unilaterally—from his State to another for the purpose of exposing him to a most probable conviction and sentencing would hardly lend itself to a suitable separation from the foreign policy objective that in the first place sought his ousting from office. Subjecting Noriega to US criminal prosecution was a way of reasserting the traditional hegemonic liberties that the US had enjoyed in Panama (see *supra,* ch. 3). The US courts might be seen as neutral participants in the furtherance of the foreign policy objectives pursued by the executive in regard to Noriega: They could not but help advance incidentally those objectives. (See also *infra,* n. 87.)

[2] See *supra,* ch. 3, pp. 92 *et seq.*; F. Kempe, *Divorcing the Dictator,* 1990, pp. 162, 169-170, 173.

[3] See, eg, S. Albert, *The Case Against the General,* 1993, pp. 55-6, 60; C.E. Hickey, "The Dictator, Drugs and Diplomacy by Indictment: Head-of-State Immunity in *United States* v. *Noriega*", 4 *CJIL,* 1989, p. 756.

legal factors bearing on a kindred position have been discussed in the previous chapter.[5] Irrespective of its legal significance, and in the overall situation of the US-Noriega relations, the designation of the prosecution as an enforcement of international law would not make it any less a tool of foreign policy.

Whatever the motives that inform the prosecution of Noriega, the Bush administration was publicly committed to have him stand trial for drug-related offences.[6] And so, the victorious US troops in Panama City hotly pursued the elusive Noriega and endeavoured to catch him and at the same time prevent him from posing a potential military threat; but after desperately changing hiding places, he finally asked for and found sanctuary in the Vatican Embassy. In seeking a peaceful solution to a problem with which he now became burdened, and which got intractable as the US persisted in its demand for the surrender of Noriega who remained intransigent in his refusal to comply, the Papal Nuncio eventually settled on a strategy of persuasion. He reportedly said:

> My plan was to convince Noriega that the best way out was to give himself up, not to the U.S. or a military power, but to the legal system of the United States, which is fair and would respect his human rights... This plan would satisfy everyone's needs and wouldn't hurt anyone.[7]

The Nuncio's reported attempt at a subtle distinction between the available types of surrender and the expected comparative advantages must have finally impressed Noriega with the futility, and even dangerousness,[8] of his continued asylum at the nunciature. However, whether he thought he was giving himself up to the US military or its legal system when he ultimately decided to surrender had obviously no practical significance.

We shall see in the course of this chapter how the effect given to the

4 *Ibid.*, (Hickey) p. 760.

5 *Supra*, ch. 4, pp. 153 *et seq.*

6 *Ibid.*, p. 148.

7 Kempe, *supra*, n. 2, p. 403.

8 There was a reported crowd of some 15,000 angry Panamanians outside the nunciature (*Noriega*, *supra*, n. , p. 1511) in addition to the threatening US troops surrounding it. As the US-installed Endara government was apparently neither inclined to thwart the attainment of the US objective of apprehending Noriega, nor in a position to afford protection to the nunciature, the threat of a forcible conclusion of the impasse would not have been idle. The failure of the Endara government to protect the embassy was, of course, a dereliction of legal duty. — *Supra*, ch. 4, p. 168. Art. 22, Vienna Convention on Diplomatic Relations, 500 *UNTS*, p. 95; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment, *ICJ Reports* 1980, pp. 30, 32.

US legal system for exercising jurisdiction in the *Noriega* case[9] could be appraised. We shall first take a synoptic look at the indictment and proceed afterwards to study the various grounds discussed in the ruling of the District Court and the judgment of the Circuit Court for upholding US jurisdiction.

5.1 Indictment

The 30-page indictment of Noriega[10] and others, which was filed at the District Court in Miami, Florida, on 4 February 1988, comprised twelve counts and covered the period between 1981 to 1986.[11] It charged the accused with various offences relating to cocaine. As regards Noriega and the pervasiveness of his role in the commission of the offences, Count I charged that he

> exploited his positions to obtain substantial personal profit by offering narcotics traffickers the safe use of the Republic of Panama as a location for transshipment of multi-hundred kilogram loads of cocaine destined for the United States; by permitting the shipment of ether and acetone in and through Panama; by allowing and protecting laboratory facilities for the manufacture of cocaine; by providing a safe haven for international narcotics traffickers; and by allowing the deposit of millions of dollars of narcotics proceeds in Panamanian banks.[12]

The eight counts on which Noriega was convicted may be summarized as racketeering conspiracy and racketeering in respect of the manufacture and distribution of cocaine "with the knowledge that it would be unlawfully imported into the United States", in respect of its importation "into the United States from a place outside thereof", and in respect of "travel and causing travel, use and causing the use of facilities in interstate and foreign commerce in furtherance of a narcotics enterprise".[13] Conspiracy to manufacture and distribute cocaine intending that it be, or knowingly

[9] The Omnibus Order of the District Court in *Noriega, supra,* n. 1, p. 1509.

[10] *Ibid.,* p. 1511 for reference to the indictment; Hickey, *supra,* n. 3, p. 729, where it is stated that "it is the first criminal indictment ever prosecuted by the United States against an entrenched dictator".

[11] Two of the counts were dropped later. The other indictment, that of Tampa, Florida, charged Noriega with involvement in marijuana smuggling. But it was dismissed after Noriega was convicted and sentenced by the District Court in Miami. — See, eg, Albert, *supra,* n. 3, pp. 48-9, 449.

[12] Paragraph 3.

[13] Counts I & II.

that it would be, unlawfully imported into the US, and to import cocaine into the US, and thus to commit offences against the US.[14] Wilfully distributing and aiding and abetting in the distribution of some 800 kilograms of cocaine "with the knowledge that [the same] would be unlawfully imported into...the United States".[15] Aiding and abetting "in the manufacture of multi-ton quantities of cocaine...in Colombia, South America, intending that [the same] be unlawfully imported...in the United States".[16] And travelling and using "facilities in interstate and foreign commerce" in connection with "a business enterprise involving cocaine".[17]

Noriega was brought before the District Court in Miami on 4 January 1990, the day after he had affected a military surrender.[18] But his counsel reportedly declared to the Court that Noriega's appearance was "made under protest", that he "refus[ed] to submit to the jurisdiction of the court", and that he "would not enter a plea to the charges" but "stand mute before court".[19] The Court then entered a plea of not guilty.

The offences with which Noriega was charged related to the period between 1981 and 1986 when he had no head-of-State pretensions; but he had cause for such pretensions at the time of his enforced appearance before the District Court and the subsequent proceedings.[20] Further, the offences constituted acts committed outside the US. The prosecution of Noriega for such offences and the antecedent US military action that made the prosecution possible brought to the fore issues of the validity of exercising domestic jurisdiction in the face of the breached norms of international law and the general notion of legality. At the same time, the nature of the coexistence and possible mutual supportiveness of domestic law and international law at the present stage of the latter's development were brought into a sharp focus.

Noriega sought to have the indictment dismissed by challenging the competence of the Court to exercise both subject matter and personal jurisdiction in the case. In regard to subject matter, although he acknowledged the US to have "generally upheld the exercise of jurisdiction over extraterritorial acts that are intended to have effect within this nation's borders",[21] he maintained

[14] Counts III & VII.
[15] Counts IV & V.
[16] Count VI.
[17] Count XI.
[18] See *supra,* ch. 4, p. 167.
[19] Albert, *supra,* n. 3, p. 90.
[20] *Supra,* ch. 4, p. 151.
[21] Motion to Dismiss Indictment and Incorporated Memorandum of Law, p. 9.

> that extraterritorial application of the criminal law is unreasonable under the unique facts of this case, and cannot be relied upon to secure jurisdiction over the leader of a sovereign nation who has personally performed no illegal acts within the borders of the United States. [22]

In other regards, he pleaded head of State immunity, act of State immunity, diplomatic immunity,[23] and prisoner of war status.[24] He also argued that the illegal manner in which he was brought before the Court involved a violation of substantive due process and gave rise to the proper exercise of the Court's supervisory power as to cause it to decline jurisdiction.[25]

The District Court rejected all motions on jurisdiction in its Omnibus Order of 8 June 1990. We shall take a closer look at that Order and the corresponding parts of the judgment of the Eleventh Circuit Court,[26] in Atlanta, Georgia.

The rules that govern the exceptions to the exercise of jurisdiction and those that enable the exercise of jurisdiction in cases of universally recognized offences and others that come under the terms of special agreements have been surveyed earlier.[27] That survey will serve as a background for the inquiry in this chapter.

5.2 Subject Matter Jurisdiction

It could be noticed in the motion for the dismissal of the indictment that counsel for defence did not so much contest the extraterritorial validity of the statutes under which Noriega was charged as argue against the reasonableness of exercising jurisdiction in the case. The District Court, then, could well have dealt with the issue of reasonableness alone; it chose instead to extend its analysis to the whole question of jurisdiction

[22] *Ibid.*, See also p. 16, where it is maintained that "the proper exercise of restraint mandates a finding by the Court that no extraterritorial jurisdiction attaches in situations involving Heads of State (whether de jure or de facto) who are alleged only to have committed acts within their own sovereign territories". With regard to Noriega's activities specified in the indictment, the Court has noted that they "occurred solely in Panama with the exception of the one trip to Cuba". — *Noriega, supra,* n. 1, p. 1512.

[23] Motion to Dismiss, *supra,* n. 21, pp. 16-46.

[24] Ex-Parte Application for Acknowledgement by This Honorable Court of its Lack of Jurisdiction to Hear or Adjudicate any Issue with Respect to General Manuel Antonio Noriega...a Prisoner of War..., p. 7.

[25] *Noriega, supra,* n. 1, p. 1512.

[26] Nos. 92-4687, 96-4471, p. 2472.

[27] *Supra,* Chapters 1 & 2.

over the offences, and conducted its examination on the basis of international law and the statutes cited in the indictment. Before taking up its analysis, however, it rightly separated the issue of jurisdiction proper from the status of Noriega, which had been joined in the defence plea against the reasonableness of the exercise of jurisdiction by the Court.[28]

The Court considered first the objective territorial theory of jurisdiction.[29] Taking the theory to focus "on the effects or intended effects of conduct",[30] it stated that

> [e]ven if the extraterritorial conduct produces no effect within the United States, a defendant may still be reached if he was part of a conspiracy in which some co-conspirator's activities took place within United States territory.[31]

It indicated further that jurisdiction was permissible

> upon a mere showing of *intent* to produce effects in this country...In the drug smuggling context, the 'intent doctrine' has resulted in jurisdiction over persons who attempted to import narcotics into the United States but never actually succeeded in entering the United States or delivering drugs within its borders. The fact that no act was committed and no repercussions were felt within the United States did not preclude jurisdiction over conduct that was clearly directed at the United States.[32]

Inasmuch, therefore, as the indictment charged Noriega with conspiracy to import cocaine into the US and alleged certain overt acts to have taken place within the US for advancing that conspiracy, and further alleged Noriega's activities in Panama to have resulted in the illegal import of 2, 141 pounds of cocaine into the US, the Court held that the principles of international law it had considered supported subject matter jurisdiction.[33]

Regarding the submission that the exercise of jurisdiction in the case would be unreasonable, the Court found that it lacked support under both international law and the case law. In addition, referring to the US interest in halting the import of illicit drugs, and its duty of curbing illicit drug

[28] The Court stated that "the question of whether the United States may proscribe conduct which occurs beyond its borders is separate from the question of whether Noriega is immune from prosecution as a head of state". — *Noriega, supra,* n. 1, p. 1512. *Cf. infra*, n. 39.

[29] See, *supra,* ch. 2, pp. 40-1.

[30] *Noriega, supra,* n. 1, p. 1513.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*, p. 1514.

trafficking under the Single Convention on Narcotic Drugs, the Court pointed out that

> [g]iven the serious nature of the drug epidemic in the country, certainly the efforts of the United States to combat the problem by prosecuting conduct directed against itself cannot be subject to the protests of a foreign government profiting at its expense.[34]

The Court considered next the statutes under which Noriega was indicted and found them to apply extraterritorially.

The Court's upholding of subject matter jurisdiction in the case could not be seriously challenged. Although the application of the effects theory would need to be carefully circumscribed,[35] it would not appear reasonable or realistic to deny domestic legislation the extraterritorial applicability needed for combating the generally condemned illicit traffic in narcotic drugs.[36] The necessity for holding the validity of such extraterritoriality is made strikingly manifest in the case of those States where the business of illegal drug trafficking is highly lucrative and alluring, and shows ominous signs of entrenchment. To prevent the extraterritorial reach of domestic criminal legislation in these circumstances would deprive States of the deterrent potential of such legislation and greatly diminish the effectiveness of their fight against nefarious crimes perpetrated against them outside their boundaries.[37] Inasmuch as domestic

[34] *Ibid.*, p. 1515.

[35] See, eg, L. Henkin, R.C. Pugh, O. Schachter, H. Smit, *International Law, Cases and Materials*, 3rd ed., 1993, pp. 1054-5 about certain critical views of the effects theory.

[36] See, eg, Art. 36(1)(a) of the Single Convention on Narcotic Drugs, 1961 as amended by Art. 14 of the Protocol Amending the Single Convention on Narcotic Drugs, which provides: "Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty." — 520 *UNTS*, p. 151 and Vol. 976, p. 3 respectively. And it is indicated in the general part of the Commentary on the Article that the Convention "tries to ensure that all activities of the illicit traffic and all forms of participation in such activities not only the principal offenders but also their accomplices, will be prosecuted, that activities of the illicit traffic will be subject to penal sanctions even if they have not been completed (preparatory acts, conspiracy and attempts), that criminals will not escape prosecution and punishment on the technical ground of lack of local jurisdiction in the country in which they are found...". — *Commentary on the Single Convention on Narcotic Drugs, 1961*, UN Publication, Sales, No. E.73.XI.1, p. 426.

[37] *Cf. supra*, ch. 2, p. 43.

criminal legislation seeks to maintain internal law and order, it could hardly be impervious to extraterritorial acts and conspiracies that are inimical to that order. It is not, hence, the principle of extraterritoriality that is at stake here as the proper contour of its implementation, which might vary from context to context. Accordingly, the view in the *Restatement (Third)* that the District Court partially relied on to found subject matter jurisdiction in conformity with the particular allegations of the Noriega indictment would appear reasonable.[38]

In other respects, the different elements that the defence joined together in an effort to bolster its arguments about the unreasonableness of exercising jurisdiction in the case did not appear warranted. It urged the Court to find that no extraterritorial jurisdiction attached to cases that involved heads of State for acts done outside the US, and argued that "[t]o hold otherwise serves only to embroil the Judiciary in matters of foreign policy".[39]

The consideration of whether or not immunity from the exercise of jurisdiction is available because of the presence, for instance, of a head-of-State element has solely status as issue. Where the presence of the qualifying status is ascertained, immunity from the exercise of jurisdiction is recognized. The issue of status is determinable *per se*, and has no necessary relation with issues that may be involved in considerations of the reasonableness of exercising jurisdiction. Similarly, the question of whether an exercise of jurisdiction would embroil the Judiciary in matters of foreign policy relates to the discretion of courts rather than to the reasonableness of the exercise of criminal jurisdiction.[40] Courts inherently possess that discretion for the purpose of preserving the proper

[38] *Noriega, supra,* n. 1, p. 1513; *Restatement of the Law (Third): The Foreign Relations Law of the United States,* 1987, § 402, Comment *d*, where it is explained: "When the intent to commit the proscribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable, the fact that a plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable."

[39] Motion to Dismiss, *supra,* n. 21, p. 16. The plea of immunity based on head of State appeared in the Motion to Dismiss that was filed on 15 Sept. 1988 (*Noriega, supra,* n. 1, p. 1512, n. 3), ie before Noriega was made the Maximum Leader.

[40] See *ibid.*, where defence counsel had also expressed the fear that the exercise of jurisdiction by the District Court would "undercut our nation's role as a protector of the sovereignty of nations". But as borne out by later events, the US administration did not live up to these high expectations that defence counsel placed on the nation. Far from acting "as protector of...sovereignty", the administration wilfully violated the sovereignty of Panama. On the other hand, had the executive, which *inter alia* has authority over such prosecutions and the foreign affairs of the nation, deemed the exercise of jurisdiction by the Court in the case inimical to the interests of the nation, it would obviously have abandoned the prosecution.

functions of the Judiciary. It would then appear that either Noriega had the status that *per se* entitled him to immunity from jurisdiction, or the Court exercised its discretion and declined jurisdiction in the interest of judicial propriety; each of these options was independently determinable with effect and neither was helpful for the plea of the reasonableness of the exercise of jurisdiction .[41]

The US criminal legislation, construed to have extraterritorial reach in circumstances considered reasonable, had thus invested the Court with jurisdiction over the offences with which Noriega was charged. But jurisdiction over the offences did not necessarily mean an unrestrained competence to exercise that jurisdiction.

5.3 Jurisdictional Immunity

It has been noted before that jurisdiction is the hallmark of sovereignty over nationals and territory, and that it is translatable into an authority to prescribe, adjudicate, and enforce.[42] In the absence of international law provisions that enable otherwise, the exercise of such jurisdiction is permissible only in the territory of the exercising State and over its nationals, wherever they might commit those offences that their national legislation makes punishable irrespective of situs. Where provisions of international law allow, or are taken to allow, exceptions to the jurisdictional restrictions of territoriality and nationality, the extraterritorial reach of domestic criminal legislation becomes, or is alleged to become, possible.[43]

The exercise of adjudicative jurisdiction is subject to domestic and international law limitations.[44] These sources of jurisdictional limitations relate to subject matter, as act of State,[45] and status, as impleading a State, its organs and other instrumentalities.[46] In this regard, we shall consider first the ground of status and that of subject matter pleaded by Noriega and take up later the non-immunity issues of due process and supervisory power of courts.

[41] *Cf. supra,* n. 28, for the Court's observation regarding the separation of the issue of status from that of extraterritoriality of the US penal legislation.
[42] *Supra,* ch. 1, p. 18.
[43] *Supra,* ch. 2, pp. 42 *et seq.*
[44] See, eg, P. Daillier & A. Pellet, *Droit international public*, 5e éd, 1994, p. 433; Henkin, Pugh, Schachter, Smit, *supra,* n. 35, p. 1126; Ch Rousseau, *Droit international public*, Vol. IV, 1980, pp. 9-16.
[45] *Supra,* ch. 1, pp. 31 *et seq.*
[46] *Ibid.,* pp. 26 *et seq.*

5.3.1 Head of State

The immunity of a head of State from the exercise of foreign jurisdiction is generally perceived as an attribute that derives from State immunity, which in turn was derived from the immunity of personal sovereigns. The latter, who were deemed to personify their States, were acknowledged to be fully entitled to immunity from foreign jurisdiction.[47]

Drawing from the concepts of independence, equality, and dignity of States, the pre-20th century world accorded to personal sovereigns and States absolute immunity from both personal and subject matter foreign jurisdiction. With the gradual curtailment of the authority and status of personal sovereigns, the entitlement to absolute immunity came to be vested in States, and was extended through them to their organs and certain persons who duly possessed the qualifying requirements. With the introduction of the practice of restrictive immunity, State activities were differentiated between those designated *acta jure gestionis* and others designated *acta jure imperii*: As the proper public acts of States, only the latter continued to enjoy immunity from the exercise of foreign jurisdiction.[48]

The immunities that heads of State can now lay claim to, then, in one respect, attach to their position as the principal organs of their States, and in another respect, relate to those public acts that are covered by immunity.[49] Apart from the personal immunity they enjoy while in office, they are also deemed to benefit from such personal immunity as may be

[47] *Supra*, ch. 1, p. 17.

[48] *Ibid.*, pp. 19 *et seq.*

[49] See *ibid.*, pp. 27-9, for provisions regarding heads of State in the State Immunity Acts of the UK, Canada, and Australia, and in the Harvard Draft; see also, *ibid.*, the discussion in Section 1.4; *Re Honecker*, 80 *ILR*, p. 366; *Kilroy* v. *Windsor*, 81 *ILR*, p. 606, where the suggestion of immunity for the Prince of Wales seemed to have been based on his status as "heir apparent to the throne" and the special diplomatic mission that his official visit constituted; 77 *AJIL*, 1983, pp. 305 *et seq.* for the suggestion of immunity for Ferdinand Marcos and Imelda Marcos of the Philippines; 88 *AJIL*, 1994, pp. 528 *et seq.* for the critical comments of J.W. Dellapenna on the grant of immunity to Aristide in *Lafontant* v. *Aristide*, where on a suggestion of immunity for a recognized head of State, who at the time was in exile in the US, the particular suit was dismissed.

In a suit where the king of Saudi Arabia was made a defendant, the US Department of State, in its letter of 14 September 1965, advised the Attorney General that "King Faisal Bin Abdull Aziz Al-Saud is the Head of State of The Kingdom of Saudi Arabia and as Head of State is not subject to the jurisdiction of any foreign Court without his consent". — 60 *AJIL*, 1966, p. 101.

Head of State immunity is acknowledged to be primarily an attribute of States. — *In Re Grand Jury Proceedings, Doe # 700*, 10 *AILC* (2nd), p. 401. Its contours are considered to be unsettled, — *ibid.*, p. 400 — and its scope is considered to be "in an amorphous and undeveloped state". — *In Re Doe*, 9 *AILC* (2nd), p. 203.

accorded to them under customary international law for their private acts.[50]

In the case of Noriega, the District Court found the doctrine of head of State immunity to be grounded on customary international law and to exempt the bearer of that title from "the jurisdiction of foreign courts, at least as to official acts taken during the ruler's term of office".[51] It held, however, that a person seeking to assert that immunity had to be recognized first as a head of State. It found that Noriega had "never been recognized as Panama's Head of State either under the Panamanian Constitution or by the United States",[52] and denied him, consequently, an entitlement to head of State immunity.

The Court of Appeals, Eleventh Circuit, found that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity", and confirmed the District Court's rejection of the claim to immunity.[53] The Court of Appeals also noted "that Noriega never served as the constitutional leader of Panama".[54]

We shall consider the question of recognition separately, and discuss in a later section the relevance of the claimed status of head of State to the issue of jurisdictional immunity. It need only be observed here that the reference by both courts to the Constitution of Panama in their appraisal of the status of Noriega was tantamount to taking judicial notice of legal facts under the law of Panama. Notwithstanding the authority-bound deference of the courts to the Executive Branch in matters of recognition,[55] they seemed to consider themselves free to take account of a foreign law when seeking to strengthen their conclusions

[50] See, eg, *YILC*, 1991, Vol. II Part Two, p. 22, para. (6), where in the commentary on its draft Art. 3(2), which safeguards the "privileges and immunities accorded under international law to Heads of State *ratione personae*", the ILC explained: "Paragraph 2 is designed to include an express reference to the immunities extended under existing international law to foreign sovereigns or other heads of State in their private capacities, *ratione personae*." See also *ibid.*, p. 18, para. (19), re personal immunity that is coterminous with office; *Republic of the Philippines* v. *Marcos and Others*, 81 *ILR*, p. 596, where it is held that "[a]ppellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if illegal under Philippine law, and his purely private acts". *Cf. YILC*, 1985, Vol. II Part One, paras. 119-125 of Doc. A/CN.4/388 and footnote 161 on page 45 where it is stated: "There is nothing to prevent a court from according immunity to an ex-sovereign as a matter of courtesy."

[51] *Noriega, supra,* n. 1, p. 1519.

[52] *Ibid.*

[53] US Court of Appeals, Eleventh Circuit, Nos. 92-4687, 96-4471, p. 2479.

[54] *Ibid.*

[55] *Ibid.*, pp. 2478-9; *Noriega, supra,* n. 1, pp. 1519-20.

about Noriega's lack of head of State immunity. The District Court, in particular, appeared to take notice of the absence of an alleged fact and interpret at the same time the Constitution of Panama: In regard to the alleged fact, it declared that Noriega had "never been recognized as Panama's Head of State either under the Panamanian Constitution or by the United States", and in regard to its interpretation of the Constitution, it stated:

> Article 170 of the Panamanian Constitution provides for an executive branch composed of the President and Ministers of State, *neither of which applied to Noriega.*[56]

The line of reasoning that the Court thus followed gave the impression that it could have looked also into the Panamanian legislative exercise that meant to confer on Noriega the status of a head of government. The inquiry would have been justified for assessing the significance of the said exercise in weighing the propriety of asserting or declining jurisdiction. Further, the term "recognized" as used by the Court in its reference both to the Panamanian Constitution and to the US exercise of its foreign policy discretion, would not appear to differentiate between the municipal and international effects of recognition. Whatever the legal characteristics of the source from which it derives its authority, the internal "recognition" of domestic authority produces effect of a different order than recognition under international law: The internal "recognition" endows domestic authority with domestic effect, which, as will appear in the course of the following discussion, might not be devoid of merit internationally.

5.3.1.1 Recognition

Recognition is a fundamental institution of international law; it fulfils important functions in a world community which to a great extent is still horizontally ordered. It is a vast subject that has been variously characterized.[57] Here, we shall refer only to those of its aspects that bear imme-

[56] *Ibid., (Noriega)*, p. 1519. (Italics supplied)

[57] Eg, inasmuch as the effects that follow recognition could also result from other modes of declaration of intention, some consider the term recognition not to be "a term of art". — I. Brownlie, *Principles of Public International Law*, 4th ed., 1990, p. 91. Some have declared along the same general lines that recognition of governments "has little substantive content". — L.T. Galloway, *Recognizing Foreign Governments: The Practice of the United States*, 1978, p. 11. Others take the topic to have "been badly misunderstood and needlessly confused". — P.K. Menon, "The Problem of Recognition in International Law: Some Thoughts on Community Interests", 59 *NJIL*, 1990, p. 248. Other characterizations are noted by D. Feldman in "International Personality", 191 *RCADI*, 1985-II, p. 385.

diately on our discussion of head of State immunity.

Recognition is by and large a discretionary tool in the hands of States; but it may be subjected to the decision of the UN.[58] Inasmuch as it plays a critical role in the international relations and activities of States and governments, its absence will impinge on their intercourse and access to available facilities. It is not, however, a necessary condition for the creation and existence of States.[59] Once the constitutive elements of statehood—territory, population, government—become objectively verifiable and are properly combined,[60] a State comes into existence irrespective of recognition. A premature recognition cannot rectify a defect that disqualifies an aspiring entity from attaining statehood, and a refusal to recognize cannot frustrate the statehood of a properly qualified entity. Upon becoming a State, the entity gets invested with a status that endows it with rights and burdens it with obligations.[61] Recognition serves to confirm a State's international personality and to pave the way for its bilateral and multilateral relations that will be attended by legal consequences.

Recognition could relate both to States and governments, and is usually classified as one *de jure* and *de facto* to indicate respectively irrevocability or revocability. So long as their existence is not in question, the *de*

[58] See, eg, UNSC Resol. 217 (1965), 20 November 1965, para. 6, where concerning the illegal authority of Southern Rhodesia, the Security Council called "upon all States not to recognize [it] and not to entertain any diplomatic or other relations with it"; UNSC Resol. 541 (1983), 18 November 1983, para. 7, where the SC called "upon all States not to recognize any Cypriot State other than the Republic of Cyprus"; UNSC Resol. 661 (1990), 6 August 1990, para. 9(b), where regarding the occupation of Kuwait by Iraq, the SC called upon all States "[n]ot to recognize any regime set up by the occupying Power"; UNSC Resol. 662 (1990), 9 August 1990, para. 2, where the SC called for the nonrecognition of the annexation of Kuwait by Iraq.

[59] See, eg, *Wulfsohn* v. *Russian Federated Socialist Republic*, 2 *AILC*, p. 102. As to whether recognition constitutes a State or merely declares its existence—the constitutive and declaratory theories—it now appears that "the weight of authority and state practice support the declaratory position". — Henkin, Pugh, Schachter, Smit, *supra,* n. 35, p. 244. However, the gap between the two doctrines is said to be "rather less in practice than in theory". — *Ibid.,* p. 245. See also, eg, Daillier & Pellet, *supra,* n. 44, pp. 530-2.

[60] An entity might possess the constitutive elements of statehood but could nonetheless be defective as resulting from the nonobservance of fundamental norms of contemporary international law. In such cases nonrecognition could be ordered by the UN. — See, eg, Henkin, Pugh, Schachter, Smit, *supra,* n. 35, pp..257 *et seq.*

[61] See, eg, The UN Definition of Aggression, UNGA Resol. 3314 (XXIX), 14 December 1974, where the Explanatory note of Art. 1 indicates that 'the term "State"...[is] used without prejudice to questions of recognition..."; Brownlie, *supra,* n. 57, p. 92. Re entities, see, eg, B. Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4)*, 1991, p. 89.

jure recognition of States, unlike that of governments, is irrevocable:[62] States continue and survive changes of governments however brought about and whatever their nature and frequency. Governments which espouse policies that are objectionable to others, or get installed through means that others consider irregular, encounter difficulties in gaining recognition.

The recognition of governments has given rise to three approaches identified as the traditional approach, the Estrada Doctrine, and the Tobar Doctrine.[63] Under the traditional approach, the criteria that help determine the recognition of a government are its effective control of a particular State, the absence of substantial resistance to its authority, and its willingness to respect its international obligations. Under the Estrada Doctrine, named after the Mexican foreign minister who reportedly launched it as a reaction to the US policy of refusing to recognize governments not deemed to be constituted legally,[64]

> the recognition of governments that come to power through extraconstitutional means is for all practical purposes eliminated from diplomatic practice. Only new *states* are recognized; when a new *government* comes to power either through constitutional means or otherwise, its relations with outside states remain unchanged.[65]

On the other hand, the Tobar Doctrine, named after, and reportedly developed by, the Ecuadorian foreign minister as a reaction to the frequent coups d'état in Latin America,[66]

> attempts to encourage democratic and constitutional government by refusing to recognize any government that comes to power through extraconstitutional means until a free election is held and new leaders elected.[67]

The Tobar Doctrine has fallen into disuse; some States practise traditional recognition; and a comparatively larger number of States resort to

[62] See, eg, Daillier & Pellet, *supra,* n. 44, pp. 538-9, 543-4; Henkin, Pugh, Schachter, Smit, *supra,* n. 35, pp. 282, 285-6.

[63] See, eg, Galloway, *supra,* n. 57, p. 5; Menon, *supra,* n. 57, p. 253.

[64] See, eg, 2 M.M. Whiteman, *Digest of International Law,* p. 84.

[65] Galloway, *supra,* n. 57, p. 8. See Estrada's declaration in 2 Whiteman, *supra,* n. 64, p. 86. Some consider that the Estrada Doctrine's "precise meaning...was unclear from the start", and the practice of Mexico seemed to support the view that the doctrine "amounted to combining tacit forms of recognition and an effectivist rule for decision".— M.J. Peterson, "Recognition of Governments should not be Abolished", 77 *AJIL,* 1983, p. 42.

[66] 2 Whiteman, *supra,* n. 64, p. 84.

[67] Galloway, *supra,* n. 57, p. 10.

the Estrada Doctrine or some equivalent practice.[68] A growing number of States seem to "follow a policy of downplaying recognition or disregarding the recognition question entirely", which would tantamount to a practice of some form of the Estrada Doctrine.[69]

Recognition is important for the sense of acceptance it confers on a State or government and the practical results it entails. Nevertheless, inasmuch as nonrecognition that did not issue from the authoritative demand of the UN would not detract from the statehood of a properly constituted international entity, it would neither affect the domestic validity of the exercise of authority by a government that effectively controls a State. But it is indicated that in certain States, as in the UK and the US, "the unrecognized state or government cannot claim immunity from the jurisdiction, obtain recognition for purposes of conflict of laws of its legislative and judicial acts, or sue in the local courts as plaintiff".[70] We shall proceed to consider the encumbrances that affect the unrecognized government under three headings: capacity of the unrecognized government; immunity of the unrecognized government; and acts of the unrecognized government.

5.3.1.1.1 Capacity of the Unrecognized Government

The term unrecognized government *per se* is a testimony to the existence of some kind of a public authority that carries on governmental activities.[71] Among the various meanings of government, the one that bears closer affinity to our discussion indicates it to be "[t]he machinery by which the sovereign power in a state expresses its will and exercises its functions".[72] A body that accordingly controls the State machinery and

[68] *Ibid.*, pp. 9-10, 128-30. But Peterson does not consider that the Estrada Doctrine is "prominent in the current discussions" on the recognition of governments. — *Supra,* n. 65, p. 42.

[69] See, eg, Galloway, *supra,* n. 57, p. 129; Menon, *supra,* n. 57, p. 255, where the modern conditions for recognizing a government are said to depend on "whether the new regime has in fact effective control over most of the State's territory and whether this control seems likely to continue".

[70] Brownlie, *supra,* n. 57, p. 99.

[71] *Cf.*, eg, *Sokoloff* v. *National City Bank*, 2 *AILC*, pp. 111-2, where it is indicated that "[j]uridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness..."; Peterson, *supra,* n. 65, p. 35, where it is said that "[i]n the 19th century, national courts tended to treat unrecognized regimes as legally nonexistent".

[72] Black's Law Dictionary, 4th ed., 1951.

effectively exercises multifarious authority within a prescribed territory is the government of the particular State which foreign governments, acting unilaterally, cannot disregard.[73] The recognition of the government by others would be important not as a necessary constitutive factor, but as an act of endorsement that could make access and entitlement to extra-territorial amenities possible.

One of the amenities generally denied to an unrecognized government is its capacity to sue in foreign jurisdictions.[74] Such lack of standing was repeatedly affirmed, for instance, in the US judicial practice on the various occasions that the unrecognized Soviet government had sought legal protection for certain rights it claimed in the US. Illustrative reference may be made to two cases. It was held in one that

> [t]he Soviet Republic never having been recognized as a sovereign state by this government, it may not maintain this libel in the federal courts.[75]

In the other, which is often cited as a governing authority for the issue of standing, it was held

> that a foreign power brings an action in our courts not as a matter of right. Its power to do so is the creature of comity. Until such government is recognized by the United States no such comity exists. The plaintiff concededly has not been so recognized. There is, therefore, no proper party before us.[76]

Even if an unrecognized new régime effectively rules in a State, and a recognized old régime's governmental status is fictitious, the rights and privileges that attend recognition are allowed to continue for the benefit of the ousted régime. It has hence been held, for instance, that

> the Provisional Russian Government is the last that has been recognized, and after its ambassador retired its property was considered by the State Department to vest in its financial attaché. ...

[73] If valid sanctions need be taken against a body that pretends to be a proper government, it should be up to the UN, in line with its responsibility and proper exercise of authority under its Charter, to order the appropriate collective measures.

[74] See, eg, J. Verhoeven, "Relations internationales de droit privé en l'absence de reconnaissance d'un État, d'un gouvernement ou d'une situation", 192 *RCADI*, 1985-III, pp. 59-68. The author notes the case where the USSR, although denied standing to sue in Belgium, was nevertheless charged with the cost of the proceedings. (at 61)

[75] *The Penza*; *The Tobolsk*, *Ann. Dig. PILC*, Years 1919 to 1922, p. 53.

[76] *Russian Socialist Federated Soviet Republic* v. *Cibrario*, *Cases and Other Materials on International Law*, M.O. Hudson, ed., 1929, p. 94. See the similar judicial attitude in, eg, *Sokoloff*, *supra*, n. 71, p. 110; *Guaranty Trust Co.* v. *United States*, 1 *AILC*, pp. 376- 7; *Upright* v. *Mercury Business Machine Co.* 2 *AILC*, p. 347.

> If it be a fact that there is a Russian Socialist Federated Republic now in charge of the government of Russia, it would bring no different result here. ...
>
> ...unless the political department of our government has decided otherwise, the judiciary recognizes the condition of things with respect to another country which once existed, and is still subsisting because of no other recognition.[77]

The impediment that attaches to the standing of an unrecognized government before foreign courts would normally extend to its instrumentalities. In the US, the question would appear to depend on what is sought to be included in the category of State instrumentalities, and on the preferences of the Department of State. In the *Upright* case, it was thought that the issue of the corporate instrumentality's standing as a plaintiff was unclear; and it was there opined that "[p]erhaps it could sue".[78] The standing of an unrecognized government's instrumentality was particularly addressed in a case where the custody of two German paintings was in issue, and where the Weimar Art Collection of the German Democratic Republic sought to intervene. The court indicated its decisional framework by directing that

> [i]f, after a hearing, it is found that the Weimar Art Collection is an arm or instrumentality of the G.D.R., the court will have no choice but to hold that it too is barred from bringing suit. On the other hand, facts may be developed at the hearing which indicate that the Weimar Art Collection is sufficiently independent of the G.D.R. to be entitled to be free of the latter's disability.[79]

Having accordingly heard evidence, the court found the Weimar Art Collection to be an arm and agency of the GDR and denied its motion to intervene.[80]

In an action instituted by a State-owned Angolan corporation at a time

[77] *Lehigh Valley R. Co.* v. *State of Russia*, 1 *AILC*, pp. 436-7. In a relatively recent case that has some connection with the present study, it has likewise been held: "The Executive branch's exclusive power to recognize and legitimize a foreign government is binding upon the courts and precludes a suit in United States courts by an unrecognized government. ... The Doctrine completely precludes the Palma government's intervention and participation in this litigation." — *Republic of Panama* v. *Citizens & Southern Int. Bank*, 9 *AILC* (2nd), p. 108.

[78] *Supra*, n. 76, p. 347.

[79] *Federal Republic of Germany* v. *Elicofon*, 22 *AILC*, p. 151. As the central bank of an unrecognized government, the Banco Nacional de Panama was denied the right to intervene in the *Citizens & Southern Int. Bank* case, *supra*, n. 77, pp. 109-10.

[80] The *Elicofon* case, *supra*, n. 79, pp. 154-5.

when Angola had no diplomatic relations with the US, the defence motion to dismiss for lack of standing was denied principally because the State Department preferred not to discontinue the suit.[81] As regards the status of the plaintiff, the court considered that

> [i]t may well be that TAAG, although wholly owned by the Angolan government, is in fact a discrete and independent entity, which should not be subsumed within its parent government for purposes of this suit.[82]

But it did not find it necessary to decide the question. It was satisfied that

> where the executive branch, either by its actions or words, evinces a definite desire to remove the impediment to a suit brought by an unrecognized government, or an instrumentality thereof, that determination necessarily frees this Court from any strictures placed on the exercise of its jurisdiction.[83]

Although the general judicial practice denies an unrecognized government the capacity to sue before foreign courts, an exception has been noted in the jurisprudence of The Netherlands.[84]

In concluding the foregoing discussion, it may be noted that the use of nonrecognition as a foreign policy tool is one thing, whereas its use as a legal means for preventing or frustrating claims is another. Within the circumscribed context of the discussion here, employing the tool of nonrecognition for practically disavowing the existence of a government that is the de facto authority of a State, and for continuing to bestow the legal rights of that State on a body that in no way measures up to what a government is, would tantamount to an abuse of discretion and to an unlawful intervention in the internal affairs of a sovereign State. It would be strikingly so under the legal order of the UN where the principle of nonintervention is better formulated and more deeply embedded in international law than before.[85]

[81] *Transportes Aereos de Angola* v. *Ronair, Inc., and Jet Traders Investment Corporation*, 21 *ILM*, 1982, p. 1081.
[82] *Ibid.*, p. 1091.
[83] *Ibid.*, p. 1092.
[84] Verhoeven, *supra*, n. 74, pp. 66-7.
[85] See the enumerated formulation of the principle of nonintervention in the UNGA Resol. 2625 (XXV), 24 October 1970. It is stated there, *inter alia*, that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. ...."

In other respects, the effect that courts unquestioningly give, in the kind of cases instanced above, to the preferences of the executive branch on nonrecognition would at times indicate the failure of the judiciary to exercise the full scope of its inherent authority. This would be felt to be particularly so where the separation of powers constitutes the legal fabric of a certain polity. As will be argued later, although the judiciary would not be expected to thwart the prerogatives of the executive, it would be expected to decline lending assistance to policies whose means of implementation might adversely reflect on its integrity.

What has been remarked in the foregoing two paragraphs could be observed in the US attitude towards Panama under Noriega. The US had continued to accord recognition to Delvalle despite the fact that his government was to all intents and purposes fictitious;[86]and the US district courts had refused to allow the Palma government and the Banco Nacional de Panama to intervene in cases brought by the recognized Delvalle government for the "control of funds held in United States banks in the name of the Republic of Panama".[87] Delvalle, whose own election and eventual promotion to the presidency was considered tarnished, had enjoyed at best paper authority before he was ousted from office.[88] In the prevailing Panamanian reality of the late 1980's, his dismissal did not mean nor entail the dismissal of the government. The figurehead was removed and replaced by another figurehead; but the governmental body that mattered—"the substantive government of the state"[89] — was unaffected and continued in its prescribed functions. This raises the question whether recognition or nonrecognition is the same for every type of government, and whether it should produce the same legal consequences in every case. An affirmative answer would hardly appear tenable. In the case being considered, a Panamanian who hardly carried more weight than a mere figurehead, who under the factual circumstances of his tenure of office was dispensable with impunity, and who for all practical purposes appeared as good as irrelevant, could not realistically be seen as fully entitled to the benefits of recognition as would be a properly elected head of a duly constituted government.[90] To enable Delvalle represent

[86] *Supra,* ch. 3, p. 104. The so-called Delvalle's government reportedly comprised, besides himself, "several members of the Washington Embassy headed by Ambassador Juan B. Sosa, and the members of some consular offices". — S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, 1998, p. 198.

[87] The *Citizens and Southern International Bank* case, *supra,* n. 77, p. 111. See also *Republic of Panama*, v. *Republic National Bank of New York*, 27 *AILC* (2nd), pp. 428-9.

[88] *Supra,* ch. 3, pp. 94-5.

[89] 1 Oppenheim (9th), p. 1033. See, further, *infra*, pp. 199 *et seq.*

Panama and act as the guardian of its funds in the US, estimated at some US$ 60 million,[91] when what he could represent was only himself and perhaps the handful of persons with him, could not be satisfactorily justified as a rightful exercise of discretion and shield the US from charges of an unlawful intervention in Panama's public assets and internal affairs.[92] The district courts felt bound to give effect to the recognition of his government even if such a course stretched legality beyond its realistic confines;[93] and that course made the judiciary appear like a department of

[90] See, eg, S. Magiera, "Government", 10 *EPIL*, 1987, p. 208, where it is indicated that "[g]overnment, as the active element of the State, must be able to act effectively for its State in relation to other States and subjects of international law, i.e. to assert the rights and fulfil the duties for the population and the territory represented. Consequently, government must meet the following criteria: (i) Effectiveness, i.e. the authority must be in actual control of the population and the territory or at least a substantial part of these other two elements of the State. (ii) Stability, i.e. the authority must have a reasonable chance of remaining in power. (iii) Independence, i.e. the authority must be separate from other governments and subordinate only to international law"; H.M. Blix, "Contemporary Aspects of Recognition", 130 *RCADI*, 1970-II, pp. 643 *et seq.*

[91] Talmon, *supra,* n. 86, p. 197. According to others, "barely $300 million in blocked property and assets were held in the United States, about half of which was immediately liquid ("cash")". — A. Zimbalist and J. Weeks, *Panama at the Crossroads*, 1991, p. 148.

[92] See, *supra,* n. 86, about the composition of the so-called Devalle government. Delvalle acted in the name of the Republic of Panama, and was so used by the US. Cf. 1 Oppenheim (9th), pp. 1035-6, where it is stated: "In republics the people itself, and not a single individual, appears as the representative of the sovereignty of the state, and, accordingly, the people styles itself the sovereign of the state." —But Delvalle was in no state to represent the people of Panama. In other respects, it has been rightly remarked that "[b]y recognizing a group of exiles politically acceptable to the United States as the Government of Panama and thereby giving them access to Panamanian property in the United States, the US Government in fact disposed of Panamanian State property". — Talmon, *supra,* n, 86, p. 198. See also p. 199 about the possible US obligation to pay compensation. The justice and soundness of such obligation could not be seriously challenged.

One of the important interventionist purposes of the continued US recognition of Delvalle appears in *Republic of Panama* v. *Republic National Bank of New York*. As the court stated it, "[w]hichever faction [between Delvalle and Palma] gains control of the disputed funds will have a decisive advantage over the other for effective control of the government. Consequently, the harm imminent here goes beyond mere monetary loss to the very survival of the lawful Delvalle government." — *Supra,* n. 87, p. 425.

As regards the proper handling of the public funds with which the US-recognized group came to be entrusted, it has been reported that "the U.S. National Security Council had to block an investigation of Delvalle for allegedly embezzling the funds directed to his imaginary Panamanian government". — Zimbalist and Weeks, *supra,* n. 91, p. 146.

[93] *Cf.*, eg, *United States* v. *Pink*, 1 *AILC*, p. 403, where Frankfurter had rightly observed, that "[l]egal ideas, like other organisms, cannot survive severance from their congenial environment."; P.M. Brown, "The Legal Effects of Recognition", 44 *AJIL*, 1950, p. 632, where it is stated: "To deny the fact of [a government's] existence would require metaphysical abstractions and juristic fictions that affront common sense." On the other hand, it has been indicated "that even in States where courts are bound by the executive certificate,

the executive.[94]

The resort to fiction[95] could probably be tolerated in some *sui generis* cases in the interest of a profound sense of justice or other altruistic considerations. Where such concern was absent, however, the resort to non-recognition in instances that approximated fiction could hardly be expected to advance confidence in the concept of legality as an indispensable social tool.

5.3.1.1.2 Immunity of the Unrecognized Government

As seen in the foregoing discussion, the lack of recognition would affect the standing of a government that might want access to foreign courts. Here, we shall look at the position of the unrecognized government when cited as defendant before foreign jurisdictions.

It need be reiterated preliminarily that an entity fulfilling the requirements of statehood would normally attain international personality independent of recognition by other States.[96] The international personality thus gained ipso facto would bring the new State under the umbrella of international law that would ipso jure make it a bearer of rights and duties.[97] Also, any government of that State will need no outside recogni-

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they tend to disregard it when the gap between cognition and recognition becomes too glaring and a maximum effect of non-recognition would lead to absurd or inhumane results". — Blix, *supra,* n. 90, p. 684.

[94] *Cf.*, eg, Brown, *supra,* n. 93, p. 626, where it is observed: "Judges have had more concern to spare the executive embarrassment than to protect the legal interests of private individuals, or of foreign states where sovereign interests were involved."

[95] Verhoeven notes that recognized absentee governments "demeure en principe en droit d'agir en justice, même si elle est devenue une pure fiction comme dans le cas des Etats baltes après la conquête soviétique ou du gouvernement provisoire russe après la révolution bolchevique d'octobre 1917". — *Supra,* n. 74, p. 63. Frankfurter thought that the legal confusion created in those early cases that had to do with the unrecognized USSR government was due to the application of "traditional judicial concepts", which he considered to be of limited value even "in litigation of a purely domestic nature". And in what would relate to the issue of "fiction", he observed in reference to the *Lehigh Valley* case (*supra,* n. 77) that "the Kerensky régime was, in accordance with diplomatic determination, treated as the existing Russian government a decade after its extinction". — The *Pink* case, *supra,* n. 93, pp. 404-5.

[96] See, eg, Art. 1 and Art. 3 of the Convention on Rights and Duties of States, 165 *LNTS*, p. 19. The Convention was signed by a number of States of the Americas, the US and Panama included.

[97] See *ibid.*, Art. 3 where it is provided: "Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts." See also Brownlie, *supra,* n. 57, pp. 89-90.

tion for exercising valid sovereign authority within the jurisdiction of the State and on its behalf.[98]

The unrecognized international legal person whose territorial integrity and political independence are protected by international law cannot conceivably be subjected to foreign proceedings without its consent.[99] The same goes for the unrecognized government of a recognized State. Recognized or not, a State can engage through its recognized or unrecognized government in the peaceful pursuit of activities beyond its borders, provided, obviously, it does not encroach on the jurisdiction of other States, and it is unencumbered by a valid sanction.[100]

The jurisdictional immunity of the unrecognized government was at issue in the *Wulfsohn* case.[101] Wulfsohn sued the Russian Federated Socialist Republic in New York for a certain quantity of furs in Russia that he alleged belonged to him but were confiscated by the government. The New York Supreme Court ruled that an unrecognized government could not "be sued in the courts of this state as a foreign corporation".[102] To arrive at this conclusion, the Court reasoned from the perspective of the Russian government's de facto exercise of authority within its State, the attributes of sovereignty, and the political issues that might be involved. It stated accordingly:

> Whether or not a government exists clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an inde-

[98] *Cf. George W. Hopkins* v. *United Mexican States*, 4 *RIAA*, p. 45, where the illegal origin of a régime was held "not [to] defeat the binding force of its executive acts". See E.M. Borchard, "Decisions of the Claims Commissions, United States and Mexico", 20 *AJIL*, 1926, p. 541, for the kind of effect produced by the US nonrecognition of the régime.

[99] *Cf.* Verhoeven who states that " [o]n pourrait certes concevoir que l'autorité non reconnue soit jugée totalement incapable d'agir en justice, tant en demandant qu'en défendant. Ce n'est cependant point la conclusion à laquelle se tiennent les jurisprudences: la non-reconnaissance entraîne la perte d'une privilège; elle n'engendre pas une incapacité absolue." — *Supra,* n. 74, p. 70.

[100] See, eg, UNCLS, Art. 17 ("Right of innocent passage" through the territorial sea), Art. 38 ("Right of transit passage" through certain straits), Art. 45 (Right of innocent passage through other straits), Art. 87 ("Freedom of the high seas"), Art. 90 ("Right of navigation"), Art. 96 ("Immunity of ships used only on government non-commercial service"), Art. 116 ("Right to fish on the high seas"), Art. 238 ("Right to conduct marine scientific research") — UN Publication, Sales No. E.83.V.5; Art. I, para. 2, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies: "Outer space...shall be free for exploration and use by all States without discrimination of any kind...". — 610 *UNTS* p. 205.

[101] *Supra,* n. 59.

[102] *Ibid.*, pp. 101, 104.

> pendent power, able to enforce its claims by military force, is a fact not a theory.[103]

As the government's exercise of effective authority in Russia was conceded, no further proof was required to ascertain its factual status. The Court merely noted that factual status and explained:

> We have an existing government sovereign within its own territories. There necessarily its jurisdiction is exclusive and absolute. It is susceptible of no limitation not imposed by itself. This is the result of its independence...They may not bring a foreign sovereign before our bar, not because of comity, but because he has not submitted himself to our laws...whether recognized or not the evil of such an attempt would be the same.[104]

The Court finally indicated that any demand for redressing wrongs alleged to have resulted from the conduct of such a government was a political question that was "not confided to the courts but to another department of government".[105]

Although different grounds were relied on for declining the exercise of judicial authority in the case, the decision of the Court was in the final analysis an acknowledgement of the immunity of the unrecognized government from foreign proceedings.[106] Had the Court decided to uphold its exercise of jurisdiction, certain consequences could have been envisaged: Where the unrecognized government refused to acknowledge the exercise of jurisdiction by the court, and judgment by default was entered and followed up by acts of execution, that government would have been given a cause for resorting to peaceful retaliatory measures. As a result, whether or not the political department of the forum State had permitted the exercise of jurisdiction, the relations between the two States would have been adversely affected.[107] Had the unrecognized government, on the other hand, consented to and was allowed to be a defendant before the foreign court, it would presumably have been treated as any other regular defendant and entitled to the available procedural and other rights. It would then have been able to resort, for instance, to the defence

[103] *Ibid.*, p. 102.
[104] *Ibid.*, pp. 102-3.
[105] *Ibid.*, p. 103.
[106] *Cf.* the *Elicofon* case, *supra,* n. 79, pp. 148-9.
[107] *Cf.* the *Wulfsohn* case, *supra,* n. 59, p. 103 about the possible vexing effect of the exercise of jurisdiction on "the peace of nations". If, hypothetically, the court decided on its own to exercise jurisdiction in a case that had an unrecognized and a nonconsenting government as defendant, it would have invaded the constitutionally assigned domain of the Executive.

of setoffs and counterclaims,[108] and gained indirectly a standing to pursue those claims.

It would therefore appear inescapable that the unrecognized government is entitled to immunity when cited as defendant before foreign courts.[109]

5.3.1.1.3 Acts of the Unrecognized Government

We shall consider here, for the limited purpose of appraising the status of unrecognized governments, the kind of effect foreign jurisdictions accord to acts of those governments.

An unrecognized government that exercises effective authority within its territorial jurisdiction is not as fictitious as might a recognized but factually nominal government be.[110] For instance, its acts bear effect within its domestic sphere; its writs run their allotted course; it enters into obligations; it might engage the responsibility of its State.

In regard to the effects under international law of the acts and undertakings of the unrecognized government, reference may be made to the Tinoco arbitration between the United Kingdom and Costa Rica.[111] At issue was the Costa Rican Law of Nullities No. 41: It was passed by the government that replaced Tinoco's, and it sought to annul, *inter alia*, an alleged indebtedness to the Royal Bank of Canada and a concession that the Central Costa Rica Petroleum Company owned for the exploration and exploitation of oil deposits. The indebtedness and the concession arose under the government of Tinoco, which was not recognized by the UK and certain other States; Costa Rica denied liability for the acts and obligations of the Tinoco government; the UK intervened on behalf of the Bank and the Company, both of which were its subjects.

In the part that is relevant to the present study, the sole arbitrator, Taft, found that

> [f]or a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Con-

[108] *Cf.* ILC's draft Art. 9(3), *YILC*, *supra,* n. 50, p. 30.

[109] See other cases referred to by Verhoeven, *supra,* n. 74, pp. 71-3. Some refer to this jurisdictional immunity as an exceptional grant of "procedural competence". — Brownlie, *supra,* n. 57, p. 99, n. 57.

[110] *Cf. supra,* ns. 90 and 92.

[111] 1 *RIAA*, p. 371.

> gress legislated, and the government was duly administered. Its power was fully established and peaceably exercised.[112]

He accordingly held that "the Tinoco government was an actual sovereign government".[113] That government had even declared war against Germany during the First World War.[114] The constitutive factors of the government were those factual elements that gave it effectiveness; and validity for its acts, undertakings, and liabilities flowed from that effectiveness. Recognition by other governments was not a *sine qua non* for its existence and exercise of authority as a government of a sovereign State. The arbitrator has in respect of the latter remark pronounced his opinion in the oft-quoted passage that

> [t]he non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned...Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.[115]

Foreign courts would generally abstain from interfering with acts of an unrecognized government that may be at issue before them.[116] But no

[112] *Ibid.*, p. 379.
[113] *Ibid.*, p. 380.
[114] *Ibid.*, p. 381.
[115] *Ibid.*, See also pp. 382 *et seq.*

The nonrecognition of the Tinoco government by the UK did not entail an estoppel that frustrated the claims advanced by the latter State on behalf of its nationals. The inapplicability of the principle of estoppel in the circumstances lends support to the fact that it is not essential for governments to gain the recognition of other governments in order to function and to engender rights and obligations in the governmental course of events. It further lends support to the fully discretionary nature of recognition, which might be exercised whenever it is found suitable, and about which the unrecognized party has no say as a matter of right. Generally, like the acts of a recognized government, the corresponding acts of an unrecognized government produce a non-discriminating effect.

[116] See, eg., Brown, *supra,* n. 93, pp. 626 *et seq.*; Z.M. Nedjati, "Acts of Unrecognized Governments", 30 *ICLQ*, 1981, pp. 407 *et seq.*; Peterson, *supra,* n. 65, p. 35; Verhoeven, *supra,* n. 74, pp. 61 *et seq.*

In the UK case of *Luther* v. *Sagor*, it was held by the King's Bench Division that " the Russian Soviet Government had not been recognised by His Majesty's Government...that accordingly the court was unable to recognise any such Russian Government or to hold

extraterritorial effect would be acknowledged for such acts.[117] The US judicial practice has adhered in the main to the position that US courts are not competent to review the actions of the unrecognized government.[118] Support for that position was found in the effect given to acts and decrees of the Confederate governments in the US post-Civil War litigations. As explained in the *Sokoloff* case, the acts and decrees of those unrecognized governments

> were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy...On the other hand, acts or decrees that were just in operation and consistent with public policy, were sustained not infrequently to the same extent as if the governments were lawful...These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*.[119]

Later cases that related to Soviet Russia affirmed more forthrightly the need to give effect to the acts of its unrecognized government. It was

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that it had sovereignty or was able by its decree to deprive the plaintiff company of their property." — 2 *BILC*, p. 86; see also p. 96. The UK accorded *de facto* recogntion to the Soviet Government after judgment was given in the case. On appeal, it was held that because the Soviet Government was now recognized "as the *de facto* Government of Russia existing at a date before the decree of June, 1918...the validity of that decree and the sale of the wood to the defendants would not be impugned". — *Ibid.*, p. 98; see also pp. 103-4. See, further, Brownlie, *supra,* n. 57, pp. 99 *et seq.* about this case and other UK cases.

[117] See, eg, *Petrogradsky M.K. Bank* v. *National City Bank,* 2 *AILC*, p. 199, where it was held that "[t]he decrees of the Soviet Republic nationalizing the Russian banks are not law in the United States, nor recognized as law". According to *Salimoff & Co.* v. *Standard Oil Co.*, the consequence of such a lack of extraterritorial effect "has been that corporations non-existent in Soviet Russia have been, like fugitive ghosts endowed with extraterritorial immortality, recognized as existing outside its boundaries. The juristic person, the Russian corporation, dead in the country which created it, has received juridical vivification elsewhere." — 2 *AILC*, pp. 230-1.

[118] The *Wulfsohn* case, *supra,* n. 59, p. 103. It was explained in *Russian Reinsurance Co.* v. *Stoddard* that "[t]he fall of one governmental establishment and the substitution of another governmental establishment which actually governs; which is able to enforce its claims by military force and is obeyed by the people over whom it rules, must profoundly affect all the acts and duties, all the relations of those who live within the territory over which the new establishment exercises rule. Its rule may be without lawful foundation; but lawful or unlawful, its existence is a fact and that fact cannot be destroyed by juridical concepts." — 2 *AILC*, p. 129. It was further explained that "a total disregard of [Soviet] laws and decrees as if they were non-existent, a failure to recognize them as having the full force of law within Russia would be without precedent ". (at 133)

[119] *Supra,* n. 71, p. 112. See also, eg, *Banque de France* v. *Equitable Trust Co.*, 1 *AILC*, p. 444 about the US Civil War cases.

held, for instance, in *Salimoff & Co.* v. *Standard Oil Co.* that

> [t]o refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve...
>
> ...The cause of action herein arose where the act of confiscation occurred and it must be governed by the law of Soviet Russia...The confiscation is...effective. The government may be objectionable in a political sense. It is not unrecognizable as a real governmental power which can give title to property within its limits.[120]

It can be seen from the foregoing discussions, then, that the unrecognized government is not a nonentity that is without legal protection where issues of the exercise of foreign jurisdiction are concerned. It might not avail itself of foreign processes as a right, but it could not normally be subjected to them without its consent.

5.3.1.2 Applicability of Head of State Immunity

It emerges from what went before that recognition of a State by foreign governments is neither a constitutive element of statehood nor a necessary condition for the existence and functioning of a government. "[A]n unrecognized state is not a juridical nullity";[121] an unrecognized government too would not be a juridical nullity.[122] But there would be other considerations for cases under UN sanctions.

5.3.1.2.1 The Effective Government

Governments constitute and provide the instrumentalities by and through which variously structured States act;[123] they manifest the type of authority allotment that is duly adopted by or dictatorially imposed on their respective States. However their principal organs are designated, States will each have the office of head of State or some other equivalent

[120] *Supra,* n. 117, p. 232. It was expressed in another case that "[a] foreign government, although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable". — The *Upright* case, *supra,* n. 76, p. 344.

[121] *Kadic* v. *Karadzic*, 34 *ILM*, 1995, p. 1607.

[122] See, eg, Daillier & Pellet, *supra,* n. 44, p. 543; Magiera, *supra,* n. 90, p. 208.

[123] *German Settlers in Poland*, Advisory Opinion, No. 6, 1923, *PCIJ, Série* B, p. 22.

office,[124] which in either case might be nominal or not and have as many office-bearers[125] as deemed necessary for governmental functions. Further, regardless of its type, and so long as it meets the criteria of effectiveness, stability, and independence, a government will have the competence to represent its State.[126] With respect to Panama, it could not be denied that its government, which the US regularly referred to as "the Noriega regime",[127] met those criteria.

The government of Panama under Palma and afterwards continued to exercise effective, albeit harsh, authority within its jurisdiction despite the destabilizing US economic sanctions and other forms of pressure.[128] Briefly, law and order was maintained; taxes and fees were collected;[129] the undertakings in the treaties with the US and the operations of the Panama Canal were not disturbed nor markedly jeopardized; some 40,000 US citizens lived and worked in Panama;[130] many US companies continued their activities in Panama;[131] by virtue of its effectiveness, the

[124] See, eg, 1 Oppenheim (9th), pp. 1033, where it is stated: "International law prescribes no rules as to the kind of Head a state may have." See also pp.1035-6; Magiera, *supra,* n. 90, pp. 206-7.

[125] The principal office-bearers are usually prime ministers. In *Saltany* v. *Reagan*, the UK Prime Minister was accorded immunity from a civil suit before a US district court. — 18 *AILC* (2nd), p. 122.

[126] See, eg, I Oppenheim (9th), p. 150.

[127] See, eg, President's Statement, May 11, 1989, 89 DSB, 1989, July, p. 70; *ibid.*, November, p. 69.

[128] *Supra,* ch. 3, pp. 105 *et seq.*

[129] It has been reported that following the US Treasury Department's prohibition of paying taxes and fees to the Panamanian government, the US embassy failed to pay its electricity bill and "found itself without power". The prohibition was accordingly modified, exempting "payments of utility bills, departure fees, and taxes on airplane tickets". — Zimbalist and Weeks, *supra,* n. 91, pp. 148-9.

[130] T. Barry, *Panama: A Country Guide,* 1990, p. 103. The US would have expected and required from the de facto Panamanian government, and not from the effectless Delvalle's group, the normal protection due to its citizens. The fact that US citizens were not restricted to US bases would indicate that the US was willing to entrust their safety to the de facto government, and to hold that government accountable when it failed in its duty of protection. Such was the case regarding the incidents of 16 Dec. 1989 that were used as one of the justifications for the invasion of Panama. — See *supra,* ch. 4, pp. 120 *et seq.*

[131] Barry, *supra,* n. 130, p. 104, where it is stated: "No major U.S. Company outside the banking sector pulled up stakes in Panama because of the sanctions." See also pp. 47 *et seq.* The US business concerns must have had some confidence in the unrecognized government to stay in Panama. Their attitude is quite notable when considered in light of the explanation about the purpose of recognition given in the *Guaranty Trust Co.* case. The US Supreme Court has indicated there that "[t]he very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are." — *Supra,* n. 76, p. 379.

government of Panama could have burdened the State with international obligations and State responsibility;[132] the government's acts were acts of State which foreign jurisdictions would not have fully ignored;[133] and the Court of Appeals affirmed the effectiveness of the government by noting that "Noriega lost his effective control over Panama during this armed conflict",[134] ie the US invasion of Panama. For purposes of international law, then, and despite the circumstances prevailing in the State, the government of Panama was one that functioned.

In other regards, the US nonrecognition of the Panamanian government had no effect on either Panama's continued membership at the UN and the OAS, or the continued recognition of its government by other States, or the continued presence of foreign diplomatic missions in Panama City. All the foregoing facts serve as indexes of the stability and independence of the government. Unlike the so-called Delvalle's government, the actual government in Panama was the only territorially effective, stable, and independent government of the country.

5.3.1.2.2 Rights Attaching to Effectiveness

A government might be denied standing for pursuing claims in the fora of a State that has not recognized it, but it could not be impleaded there for acts carried out within its jurisdiction. The immunity from foreign jurisdiction that is generally acknowledged to a State necessarily extends to and protects its government and other organs and instrumentalities.[135] The head of State, the government ministries, "including the armed forces",[136] *inter alia*, are State organs.

[132] See the *Tinoco Arbitration*, *supra*, n. 111, pp. 379 *et seq.*

[133] See *supra*, ch. 1, pp. 32 *et seq.*; the *Upright* case, *supra*, n, 76, p. 345, where it has been held that "[t]he lack of jural status [of an unrecognized] government...is not determinative of whether transactions with it will be denied enforcement in American courts, so long as the government is not the suitor". It has also been restated in the *Elicofon* case, that "[t]he acts of an unrecognized power are normally given effect where it pertains to rights within its own borders". — *Supra*, n. 79, p. 154. *Cf.* Nedjati, *supra*, n. 116, p. 407.

[134] *Supra*, n. 53, p. 2476.

[135] See, eg, *YILC*, *supra*, n. 50, p. 15, para. (9), where it is indicated that "a proceeding against the Government *eo nomine* is not distinguishable from a direct action against the State. State practice has long recognized the practical effect of a suit against a foreign Government as identical with a proceeding against the State."

[136] *Ibid.* See also, *ibid.*,, draft Art. 16(2) about the immunity of "warships and naval auxiliaries", and Art. 19(1)(b) about "property of a military character..."; Art. 95 UNCLS, re the exclusive jurisdiction of the flag State on its warships on the high seas. — *Supra*, n. 100. "Warships being part of a state's armed forces, are state organs."— 1 Oppenheim (9th), p. 1165. See *ibid.*, n. 1 for military aircraft.

As regards Noriega, at the time of his ousting from his public office, he was the commander-in-chief of the PDF[137] and the holder of a position that was not inferior to that of a head of State.[138] The PDF, like corresponding public forces of other States, had the function of protecting the territorial integrity and political independence of Panama.[139] Without needing to belabour the status of armed forces while in other jurisdictions, and excepting offences under international criminal law that raise issues of universal jurisdiction, it will suffice to mention here that the PDF was a State organ which was entitled as a body, and arguably in respect of its commander-in-chief and other members, to immunity from foreign jurisdictions.[140]

As to the significance of Noriega's position in his last days of public office, it will be recalled that he had sought to put a legal mantle on his long exercise of de facto governmental authority. Sweeping powers for the avowed purpose of managing a situation that approximated an emergency were formally put in his hands by a body that claimed legislative competence. However short its duration, Noriega for all practical purposes was accordingly made the head of the Panamanian State. His investiture with the authority that was the functional equivalent of a chief executive and a head of State was a domestic matter, as was the propriety of the investiture. As head of government and *sui generis* head of State he

[137] See *supra,* ch. 3, pp. 86, 102, 106, 107.

[138] See *supra,* ch. 4, pp. 151 *et seq.*

[139] See, eg, *The Schooner Exchange* v. *M'Faddon*, 6 *AILC*, pp. 467-8; Daillier & Pellet, *supra,* n. 44, p. 485.

[140] See, eg, 1 Oppenheim (9th), pp. 1157-8. *Cf.*, eg, Art. 31, European Convention on State Immunity, 74 ETS, 1972, p. 29, which leaves intact the immunities and privileges enjoyed by the armed forces of a State while on the territory of another contracting State; D.W. Bowett, "Military Forces Abroad", 3 *EPIL*, 1982, pp. 267 *et seq.* for the general care and concern with which States agree to let others have jurisdiction in specified matters over members of their forces who are stationed in foreign territories; *France* v. *Germany: The Casablanca Arbitration Award*, 3 *AJIL*, 1909, p. 757, where it stated that "a corps of occupation as a rule ...exercises exclusive jurisdiction over all persons belonging to it". *Cf.*, further, 1 Oppenheim (9th), p. 1160; S. Lazareff, *Status of Military Forces Under Current International Law*, 1971, pp. 1-8, 444, re the jurisdictional rivalry between the Law of the Flag and the law of the territorial sovereign over public forces stationed on foreign soil, and the compromise agreed to.

It is the US standard practice to demand and obtain exclusive jurisdiction over the members of its public forces stationed in other States. — *Ibid.,* p. 38, re Korea, Denmark, Ethiopia, Japan. It was to be expected that this particular concern for its own forces would have induced the US to respect the basic entitlements of the public forces of Panama.

was entitled to immunity from foreign jurisdiction during his tenure of those offices.[141]

Immunity from foreign jurisdiction does not depend on the nature of the proceedings involved: whether civil or criminal, the rationale remains the same. Inasmuch as an unrecognized government or any of its organs or other instrumentalities is entitled to immunity from foreign civil processes in due cases, it would likewise be entitled to immunity from foreign criminal processes in the circumstances discussed above. Furthermore, inasmuch as nonrecognition could not detract from the rights that a State and its government possess ipso facto, it could not serve as a licence for invading those rights. Moreover, if in order to avoid a foreign process an official of a State were to claim a certain status as an organ of that State, and if that status, although controverted, could in the context of the particular State be ascribed to him, he should be enabled to benefit from the entitlements attaching to that status.

5.3.1.2.3 The Role of Courts

It can readily be conceded that a State needs to speak in one voice in matters of foreign relations, and that its political branch should have the exclusive prerogative in that regard. But this should not mean that the judiciary ought to relinquish its authority and simply function as an unquestioning instrument of foreign policy. Deference to the prerogative of the political branch should not preclude the judiciary from declining jurisdiction when the circumstances so warrant. Where the political branch explicitly denied recognition to a government and to an organ of State, as in the case of Noriega, and a court found reason not to exercise jurisdiction in a case instituted against that organ, it would not mean that the court contradicted the political branch and gave a judicial recognition to the unrecognized defendant: The State organ remained unrecognized for other domestic matters of the forum State that were contingent on recognition, but as a defendant in a legal process the organ was under the régime of rules that could not be bound at all times to the effects of nonrecognition. Such would be the case where a court was not fully satisfied that immunity would not be due and resolved its hesitation in favour of the defendant, especially one in a criminal prosecution. The court's de-

[141] *Cf.* Art. 1(1)(a), Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1035 *UNTS*, p. 167, where the term internationally protected person is defined to include, *inter alia*, a head of State, a head of government, or a minister of foreign affairs "whenever any such person is in a foreign State".

cision would in the event evince the principle of judicial independence and the allied notion of judicial integrity that together safeguard the proper exercise of judicial authority.

When an organ of a foreign State is before it as a defendant, a court would be expected to ascertain on its own motion that its jurisdiction is not affected by any entitlement to immunity.[142] This could and should lead it to verify that certain facts and circumstances of which it could take notice, as the District Court did in Noriega's case,[143] would not impinge on the proper exercise of its jurisdiction. Were it to decline jurisdiction on the basis of a judicially noticed factual situation, it would only be performing a function that is properly judicial. Its action would not constitute *res judicata*. It could reassume jurisdiction once the obstacles to its exercise are removed.

In the case of Noriega, although the District Court had acknowledged that he "was the *de facto* head of Panama's government",[144] it nonetheless gave effect to his nonrecognition by the Executive and held "his claim to a 'right' of immunity against the express wishes of the government [to be] wholly without merit".[145] The "right" to immunity that Noriega alleged was not of course one that he could lay claim to as an individual, but one which, as derived from the State, attached to his office. Had that office continued to be available to him, the crucial consequences of which will be discussed under the next heading, his prosecution in the US would have meant the exercise of foreign jurisdiction over an organ of State without the consent of the latter and the infringement of its immunity. Although Noriega failed to qualify for head of State immunity—not for the reasons given by the Court, but for others that will be indicated later—his claim brought into a sharp focus the issue of State immunity; it was not hence wholly devoid of merit, and it should have weighed with other factors in making the Court hesitant about exercising jurisdiction.

[142] ILC's draft Art. 5 on State immunity provides that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State...", and Art. 6(1) provides that a State "shall ensure that its courts determine on their own initiative that the immunity of [other States] is respected". — *YILC*, *supra,* n. 50, pp. 22-3. See also draft Art. 21(1)(c).

[143] *Supra,* n. 1, eg, p. 1519, where the District Court took notice of what it considered to be legal facts: that Noriega was not recognized as head of State under the Panamanian Constitution; that he was the commander of the PDF; that he was not elected as head of Panama's government; that he annulled the 7 May 1989 elections.

[144] *Ibid.,* p. 1520.

[145] *Ibid.*

The District Court concluded its rejection of the head of State immunity with the observation:

> [A]ccepting as true statements of counsel regarding Defendant's position of power, to hold that immunity from prosecution must be granted "regardless of his source of power or nature of rule" would allow illegitimate dictators the benefit of their unscrupulous and possibly brutal seizure of power. No authority exists for such a novel extension of head of state immunity, and the Court declines to create one here.[146]

It has been indicated at various places of the present study that municipal jurisdictions lack legal competence to judge the political and other acts of foreign States. The UN, on the other hand, has the authority for determining that a certain situation in a State constitutes a threat to international peace and security, and for ordering the appropriate remedial measures, including nonrecognition of particular acts of public authorities:[147] Unless there is a competent UN authorization or another valid title, international law does not license intervention in the internal affairs of States. The legitimate or illegitimate manner in which State authority is assumed and exercised is an internal matter that produces effects and gives rise to immunities in due instances. The world is replete with dictators who unscrupulously and brutally exercise power that they have seized in the same manner. Yet, in obeisance to the political morality that guides the world community, international law has not deprived them of the benefit of immunity from foreign jurisdiction; and domestic courts have as a rule given effect to that immunity. In this respect, the District Court had no valid ground for considering Noriega as an exception. It may further be noted generally that the unscrupulous and brutal nature of the seizure and exercise of State authority constitutes a situation that in essence would be unaffected by recognition. That situation might be given recognition, yet it would still preserve its essential character of unscrupulousness and brutality and be no different from one that is similar but unrecognized. In such circumstances, acknowledging the right of immunity to the recognized situation alone would merely indicate that immunity *per se* is oblivious of the source of State power and the manner of its exercise.

[146] *Ibid.*, pp. 1520-1.

[147] See, eg, internal situations that were declared to constitute threats to international peace in Frowein's commentary on Art. 39 of the UN Charter in *The Charter of the United Nations*, B. Simma ed., 1995, p. 612.

5.3.1.2.4 Relevance of the Plea of Head of State Immunity

Head of State immunity from foreign jurisdiction is due to an office holder in the circumstances indicated before.[148] Unless the immunity is validly waived, or an offence under international criminal law that does not admit of immunity is involved,[149] a head of State will not be amenable to foreign jurisdiction during his tenure of office.

Noriega was indicted for offences that took place between 1981-1986.[150] During that time he was the commander-in-chief of the PDF, and the real authority behind the government. But he was neither the head of State nor the head of government in Panama. And he had not held either of these offices on 4 February 1988, the date of his indictments. Had he been holding one or both of these offices on 15 December 1989, the National Assembly would hardly have found it necessary to invest him, by its Resolution No.10, with the title of Maximum Leader and head of government.[151] It would therefore appear that the plea of head of State immunity that was submitted in 1988 was not an appropriate objection to the exercise of jurisdiction.

On the other hand, after Noriega was formally invested with the status which was functionally equivalent to that of a head of State, he became eligible for head of State immunity:[152] He benefited from that immunity so long as he retained his status; once he irretrievably lost that status, he lost his eligibility to the immunity.[153] The unlawful manner in which Noriega was ousted from his position in Panama and forcibly transported to the US has been discussed earlier; what effects that unlawful recourse to force might have entailed will be considered later.[154] It will suffice to

[148] *Supra,* ch. 1, pp. *36 et seq.*

[149] *Supra,* ch. 2, pp. 46, 50 *et seq.*

[150] *Supra,* pp. 175 *et seq.*

[151] *Supra,* ch. 4, pp. 151 *et seq.*

[152] It has been reasserted in the Ex-parte Application that "General Noriega was the Jefe de Estado (Chief of State) of the Republic of Panama and thus the court has no jurisdiction based upon the Doctrine of Head of State Immunity". — *Supra,* n. 24, p. 7. The District Court has, however, noted that Noriega "concedes that he does not fit within traditional notions of a head of state as defined by customary international law". — *Supra,* n. 1, p. 1520. The statement seems to ignore that the appellation, function, and status of a head of State might vary from State to State. To deny immunity because a particular set of facts do not conform to what is held to be the stereotype head of State would unduly curtail its scope and detract from what has been described above as its character, ie "immunity *per se* is oblivious of the source of State power and the manner of its exercise".

[153] *Cf.*, eg, E. Satow, *A Guide to Diplomatic Practice*, rev. ed., 1922, p. 7; A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", 247 *RCADI*, 1994, p. 88.

[154] *Infra*, pp. 223 *et seq.*

note here that by the time he was arraigned before the District Court at Miami, Noriega was neither the Maximum Leader, nor the head of the Panamanian government, nor the commander-in-chief of the PDF, which had already been disbanded. The only trappings of office that he retained were his military uniform and the rank of general. It emerges therefore that he had been effectively severed from any public office from which he could have derived an entitlement to immunity from foreign judicial processes. Besides, he had no State that awaited or demanded his return to his previous public offices.[155] Under such circumstances, and not because of his nonrecognition by the US, it is submitted, head of State immunity was unavailable to him; the plea based on that immunity was not, accordingly, an appropriate objection to the exercise of jurisdiction.

In another specific respect regarding Noriega's position as commander-in-chief of the PDF, he would seemingly have been entitled to the immunity due to a State organ had he retained that position and had not the PDF lost its identity. We shall refer to the question of the PDF when discussing Noriega's prisoner of war status.

It line with the foregoing inquiry under the rubric of Head of State, it may be said in conclusion that the District Court and the Court of Appeals were right in rejecting Noriega's claim of head of State immunity. But their reliance for that purpose on the sole ground of the US nonrecognition of the status of Noriega made them appear the reluctant tools of the executive branch: They were not prepared to take a course of action which, although properly judicial, might have failed to fully effectuate, but not contradict, the position of that branch of the government.[156]

5.3.2 Prisoner of War

Noriega claimed the status of a prisoner of war and challenged the jurisdiction of the District Court in his Ex-Parte Application that was filed on

[155] As one of the factors for rejecting the claim to head of State immunity, the Court of Appeals has stated "that Panama has not sought immunity for Noriega".— *Supra,* n. 53, p. 2479. The statement is remarkable in view of the open complicity of the Endara government in the removal of Noriega. Inasmuch as that government could not have been expected to demand immunity for Noriega, the absence of such demand could not be rightly mentioned as a negative proof. Noriega was a Panamanian who was not even accorded an intimation of protection from the government of Panama. In the special circumstances of the Noriega case, it would appear to have correlated better with the interests of criminal justice to have entertained a mental attitude of him as a person who for all practical purposes was de facto stateless.

[156] See *supra,* pp. 203 *et seq.*

26 January 1990.[157] He relied on a number of provisions in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, commonly known as Geneva Convention III,[158] and argued:

> The crimes for which he is charged did not occur during the period of armed conflict. Therefore, he seeks from this court the immunity from prosecution entitled a prisoner of war.[159]...
>
> Due to the fact that the United States Government has violated numerous Articles of the Convention...[he] demands that he be immediately interned in a third country willing to accept him from which he may be repatriated or released... .[160]

In its Memorandum filed on 2 February 1990, the prosecution indicated that whether or not Noriega came under Geneva Convention III entailed judgments on certain matters, such as the nature of the armed conflict in Panama, and contended:

> Those judgments are not within the usual competence of the judicial branch, and the court should avoid determination of those issues if the [defendant's] motion can be otherwise resolved.[161]

The prosecution then argued against the meanings that Noriega sought to place on the Convention Articles he relied on to support his motion. Before fully presenting its arguments, however, the prosecution submitted two reasons why the Court should not address the issue of the Convention's applicability:

> First,...the United States has determined, as a matter of policy, that Noriega...should be given the protection accorded to prisoners of war under the Geneva Convention...
>
> Second, there is a serious question whether the pertinent provisions of the Geneva Convention are self-executing in various contexts...[162]

Since the prosecution chose to argue against the defence Ex-Parte Application without needing to contest Noriega's alleged prisoner of war

[157] *Supra,* n. 24.
[158] 75 *UNTS*, p. 135.
[159] Memorandum of Law in Support of Ex-Parte Application...., p. 11. See also pp. 13, 21.
[160] *Ibid.*, p. 25.
[161] Government's Memorandum of Law in Response to...Noriega's Challenge to this Court's Jurisdiction, p. 6.
[162] *Ibid.*

status, the Court did not find it necessary to rule on that status. Instead, it dealt with Articles 22, 82, 84, 85, 87, and 99 of Geneva Convention III and concluded that its jurisdiction was unaffected. We shall proceed to consider the issues raised in connection with the plea of prisoner of war under the headings of prisoner of war status, status of Noriega under detention, and effect on jurisdiction.

5.3.2.1 Prisoner of War Status

The US was unwilling to acknowledge clearly and officially the prisoner of war status of Noriega. The Legal Adviser of the Department of State wrote in this regard to the Attorney General

> that all individuals captured during the hostilities would be provided the protections normally accorded to prisoners of war until their precise status could be determined. ...that these protections should be provided to any members of the PDF who fell into U. S. hands until their final release and repatriation even if they might not be entitled to these protections under the terms of Article 4 of Geneva Convention III.
>
> It should be emphasized that the decision to extend basic prisoner of war protections to such persons was based on strong policy considerations, and was not necessarily based on any conclusion that the United States was obligated to do so as a matter of law.[163]

Both the US and Panama have been parties to Geneva Convention III since 1955 and 1956 respectively;[164] the US Senate had unanimously ratified the Convention;[165] and the undertakings of the parties under the terms of the Convention have become their legal obligations.[166] This being so, it is not easy to comprehend why giving effect to the protections envisaged in the Convention should have been characterized as

[163] Letter of 31 January 1990.

[164] H.S. Levie, *Prisoners of War in International Armed Conflict*, 59 *International Law Studies*, U.S. Naval War College, pp. 509-10.

[165] RECOMMENDATION, *United States* v. *Noriega* [808 F. Supp. 791 (S.D. Fla. 1992)], 25 *AILC (3rd)*, p. 274.

[166] As regards the respect for human rights in armed conflicts, the UN General Assembly has called on "all parties to any armed conflict to observe the rules laid down in...the Geneva Conventions of 1949", among others, and has invited "those States which have not yet done so to adhere to those instruments". — Operative para. 1, Resol. 2852 (XXVI), 20 December 1971. The terms "observe" and "adhere" convey the requirement of implementing and undertaking, respectively, the legal obligations formulated in the instruments.

based on policy considerations rather than on legal obligations. It might well be that any acknowledgement of legal obligations in the circumstances was thought to create difficulties for the prosecution of Noriega and other members of the PDF, and to interfere with the freedom of action that the US intended to have in handling their cases: The difficulties relating to the prosecution might have pertained to issues of immunity; and the question of interference with the US freedom of action might have pertained to the institution of the Protecting Power.[167]

As regards the issue of immunity, the Legal Adviser of the Department of State had written that

> neither the laws of war nor Geneva Convention III were ever intended to provide any kind of immunity for common crimes committed against the Detaining Power outside of military hostilities.[168]

But, the need that he felt for specifically raising the matter of immunity would seem to indicate a certain anxiety about its effect on the successful prosecution of the PDF members, particularly of Noriega. The anxiety would be understandable in view of the extraordinary manner that enabled the actual prosecution of Noriega and the uncertainty about the judicial reaction to the inevitable plea of immunity.

As regards Protecting Powers, the first paragraph of Art. 8 of Geneva Convention III provides in part:

> The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. [169]

These terms confer a large measure of competence on a designated Protecting Power, and correspondingly curtail the Detaining Power's possibility of seeking to treat prisoners of war in the sole light of its reading

[167] It has been indicated that the institution of the Protecting Power "has not been utilized in the international armed conflicts which have taken place since the Convention became effective". And this has been ascribed, in part, to the "existence of a general reluctance, because of the provisions of Article 2(4) of the Charter of the United Nations, to admit the existence of and participation in international armed conflict". — Levie, *supra,* n. 164, p. 263.

[168] *Supra,* n. 163.

[169] See Levie, *supra,* n. 164, p. 262, n. 26, about the great value ascribed to the institution of Protecting Powers in the scheme of Geneva Convention III.

of Geneva Convention III.[170] Even though the Endara government could have been depended on not to press for the designation of a Protecting Power, there was no certainty that subsequent Panamanian governments would have followed suit. Avoiding any formal acknowledgement of prisoner of war status for Noriega and other PDF members might hence have appeared to the US officials as a preferable course of action.

Reference may be made to a remark that relates to the foregoing and was made by the District Court about Noriega's prisoner of war status. The Court has found it necessary to observe that

> (t)he government has thus far obviated the need for a formal determination of General Noriega's status. On a number of occasions as the case developed, counsel for the government advised that General Noriega was being and would continue to be afforded all of the benefits of the Geneva Convention. At no time was it agreed that he was, in fact, a prisoner of war.
>
> The government's position provides no assurances that the government will not at some point in the future decide that Noriega is *not* a POW, and therefore not entitled to the protections of Geneva III.[171]

In addition to the official attitude towards the prisoner of war status of the PDF members that he disclosed in his letter to the Attorney General, the Legal Adviser of the Department of State had maintained "the Geneva Conventions of 1949...not to be self-executing in certain contexts".[172] As indicated earlier, the prosecution, too, had presented the same views to the District Court.[173] Whatever the motives that lay behind such an attitude, the extent to which Geneva Convention III would be self-executing is of fundamental importance for the determination of prisoner of war status and for bringing to the fore the applicability of particular rules.

A person becomes a prisoner of war following an armed conflict that

[170] See *ibid.*, p. 280, where it is explained: "The fact that the entire Convention is to be 'applied with the cooperation' of the Protecting Power undoubtedly empowers the latter to make suggestions to the Detaining Power with a view to the improvement of the lot of the prisoner of war even with respect to areas in which no specific reference is made to the Protecting Power. ... Similarly, the fact that the Convention is to be applied 'under the scrutiny' of the Protecting Power undoubtedly empowers it to investigate, and to request reports from the Detaining Power, in unspecified areas." See also, eg, Art. 78, para. 2, about the unrestricted right of prisoners of war "to apply to the representatives of the Protecting Powers...in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity".

[171] RECOMMENDATION, *supra*, n. 165, p. 272.

[172] *Supra*, n. 163.

[173] *Supra*, n. 162.

need not be designated war.[174] The US invasion of Panama, which occasioned the military conflict between the invading force and the force of Panama purporting to act in defence of its State, had as such the legal character of an international armed conflict between the two States. This legal character remained unaffected by the span of the conflict, the condoning attitude of the US-installed Endara government, and the eventual disbandment of the PDF.[175] Where members of either force, then, became prisoners of the other party, they entered the category of prisoners of war and came under the régime of the Convention. Noriega and the other Panamanians who fell "into the power"[176] of the US as a result of the international armed conflict were, accordingly, prisoners of war as recognized under Geneva Convention III. They maintained that status "from the time they [fell] into the power of the enemy...until their final release and repatriation".[177]

Regarding the beneficiaries under the Convention, Art. 4 provides in part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of these armed forces;...
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining Power;... .[178]

These provisions obviously cover Noriega, and the District Court was of the opinion that they did.[179] The US refusal to recognize his political authority did not affect his commander-in-chief status; neither did it

[174] Art. 2, para. 1, provides that the "Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them". Under the legal order of the UN Charter, the term war has lost the legal significance it had. — See, eg, Asrat, *supra,* n. 61, pp. 95 *et seq.*

[175] See *supra,* ch. 4, pp. 116-8.

[176] See Levie, *supra,* n. 164, pp. 34 *et seq.*

[177] Art. 5, para. 1 of Geneva Convention III. (*Supra,* n. 158. See, further, the *Commentary* of the International Committee of the Red Cross, 1960, pp. 74 *et seq.* about the meaning of the phrase "final release and repatriation".

[178] See, eg, Levie, *supra,* n. 164, p. 36; H. McCoubrey, *International Humanitarian Law, The Regulation of Armed Conflicts*, 1990, pp. 80 *et seq.*; C. Pilloud, "Protection of the Victims of Armed Conflicts", in *International Dimensions of Humanitarian Law*, UNESCO, 1988, pp. 168 *et seq.*

[179] RECOMMENDATION, *supra,* n. 165, p. 273.

deprive the Panamanian armed forces, nor him as their commander-in-chief, of any entitlement to the status of prisoner of war. He was as much a beneficiary of Geneva Convention III as any other commander in another State, entitled, eg, to the respect due to his person and his honour,[180] to "wearing of badges of rank and nationality as well as of decorations",[181] and to be treated with the regard due to his rank and age.[182]

In short, entitlement to the status of prisoner of war is brought forth by the presence of the conditions prescribed in Geneva Convention III. Entitlement to that status could not be subject to the discretionary policy considerations of the parties to the Convention, for otherwise their undertaking "to respect and ensure respect for the...Convention in all circumstances"[183] would lose its full sense.

5.3.2.2 Status of Noriega Under Detention

According to the description by the defence counsel, the surrender and arrest of Noriega took place when he

> in full military uniform, came under the control of a general of the American Army...[he] was taken by army helicopter to Howard Air Force Base, where he was transferred to another military aircraft, where army doctors...administered a health examination. At the aircraft, [he] was stripped of his four...star general's uniform by agents of the Drug Enforcement Administration. He was placed in a nondescript military flight suit and handcuffed again. Once the military aircraft took off and was airborne, outside of Panamanian territory, only then did agents of the D.E.A. formally "arrest" [him].[184]

The prosecution corroborated the essence of the foregoing description with the statement that

> on January 3, 1990, [Noriega] left the [Vatican] Embassy and presented himself to American military officials. He was then immediately transferred to the custody of DEA agents who arrested him for the offenses charged in the indictment.[185]

[180] Art. 14, para. 1 of Geneva Convention III. Art. 39, para. 3 provides that "[o]fficer prisoners of war are bound to salute only officers of a higher rank of the Detaining Power". —*Supra*, n. 158.

[181] *Ibid.*, Art. 40. See also Art. 87, para. 4, where it is provided that a "prisoner of war may not be deprived of his rank by the Detaining Power".

[182] *Ibid.*, Art. 44, para. 1.

[183] *Ibid.*, Art. 1.

[184] Ex-Parte Application, *supra*, n. 24, p. 5. See also *supra*, ch. 4, p. 167.

[185] Government's Memorandum of Law, *supra*, n. 161, p. 4.

It emerges, therefore, that Noriega had surrendered to the US invading forces as the commander-in-chief of Panama's military; and as discussed above, by that act of surrender and the decision of the US military to keep him in custody, he became a US prisoner of war as from 3 January 1990.[186] His arrest afterwards by the DEA agents was a civil arrest that did not affect his new status of prisoner of war, which, as noted earlier, attached to him until his final release and repatriation.

The US military transferred Noriega from its custody to that of the DEA agents apparently in accordance with the following directive of Bush:

> In the course of carrying out the military operation in Panama which I have directed, I hereby direct and authorize the units and members of the Armed forces of the United States to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. I further direct that any persons apprehended pursuant to this directive are to be turned over to civil law enforcement officials of the United States as soon as practicable.[187]

The order that Noriega and others be transferred to civilian law enforcement officials as soon as practicable was probably designed to make it appear that the military was not involved in a police work.[188] Once Noriega became a US prisoner of war, however, it appeared redundant to have him arrested again by the DEA agents, especially in view of the prosecution's later and successful argument about his liability for offences that preceded his new status.[189] As a prisoner of war he was already in the custody and under the jurisdiction of the US,[190] as well as under the pro-

[186] See Art. 5 of Geneva Convention III; RECOMMENDATION, *supra,* n. 165, p. 274, where the District Court found Noriega to be a prisoner of war. And regarding the self-executing issue of the Convention, the Court declared "that given the opportunity...[it] would almost certainly hold that the majority of provisions of Geneva III are, in fact, self-executing". (at 275)

[187] *Memorandum for the Secretary of Defense, December 20, 1989, George Bush, Book II, 1989, Public Papers of the Presidents of the United States,* 1990, p. 1726.

[188] *Cf.* The Government's Memorandum of Law, *supra,* n. 161, p. 30, where it was contended that "the prohibition on the use of the military as a *posse comitatus* can have only domestic application, since that term has traditionally been understood to mean the power of a local sheriff to call upon military personnel within the jurisdiction to aid civilian enforcement efforts...Congress did not contemplate that any part of the [Posse Comitatus] Act would apply to military operations overseas."

[189] See *infra,* p. 215.

[190] Art. 12, para. 1 of Geneva Convention III provides that "[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them". — *Supra,* n. 158. See Pilloud, *supra,* n. 178, pp. 168-9 for the different forms that constitute capture.

tection of Geneva Convention III.[191]

Although the US administration was reluctant to formally acknowledge Noriega's prisoner of war status, certain officially uncontested facts would appear to have affirmed that status: Noriega was not prevented from appearing in court in his military uniform; the standard of his treatment was measured against that available to the members of the US armed forces;[192] and, as will be noticed in the discussion under the next heading, Geneva Convention III was made instrumental in the rejection of his claim to immunity from prosecution.

Appearing in his uniform of a foreign general during his trial for non-military offences, Noriega must have cut an incongruous figure in the civilian Court. The imprisoned general whose forces had been disbanded, and who had lost all other bases of public authority, seemed to have sought refuge in his military uniform for the purpose of constantly reminding the Court both of his past office and present status. Some others might possibly have shrunk from appearing in a military uniform when going through a similar trial, but Noriega clung to his uniform as if it was an indispensable talisman in his odyssey through his gruelling prosecution.

5.3.2.3 Jurisdictional Effect of Noriega's Status

Noriega had asserted his prisoner of war status under Geneva Convention III, challenged the jurisdiction of the court, and demanded to be transferred to a neutral third party country to be interned there as a prisoner of war.[193]

As maintained in the foregoing discussion, Noriega has the status of a US prisoner of war under the terms of Geneva Convention III. A particular aspect of the Convention that is relevant to our discussion here, makes him "subject to the laws, regulations and orders in force in the armed forces of the Detaining Power".[194] Whether he could be tried by a US District Court and interned in the US are matters that had to be deter-

[191] See *supra,* ch. 4, p. 158, about the apparent inconsistency of his process of arrest with certain provisions of Geneva Convention III. See also, eg, RECOMMENDATION, *supra,* n. 165, p. 277, where the District Court considered that it would be "inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law".

[192] See, eg, Government's Memorandum of Law, *supra,* n. 161, pp. 9-11 about the principle referred to as "equivalency".

[193] Ex-Parte Application, *supra,* n. 24.

[194] Art. 82, para. 1 of Geneva Convention III. — *Supra,* n. 158.

mined in conformity with the Convention.

Regarding its competence to try Noriega, the District Court held in reference to Art. 84 of the Convention[195] that

> federal district courts have concurrent jurisdiction with military courts over all violations of the laws of the United States committed by military personnel. The indictment charges...various violations of federal law...These are allegations of criminal misconduct for which any member of the United States Armed Forces could be prosecuted.[196]

Regarding the prosecution of a prisoner of war for acts committed prior to capture, Art. 85 of the Convention provides:

> Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.[197]

The District Court noted[198] that the provision "appears to recognize the right to prosecute asserted by the Government", and that the charges against Noriega related to a period "well before the military action and apprehension by surrender".

But without necessarily constricting its meaning, the provision might also be read as conveying the sense that the "acts committed prior to capture" contemplated those that were connected with the armed conflict that brought forth the status of prisoner of war. It is, however, stated in the Commentary of the International Committee of the Red Cross that "Article 85 does not exclude the possibility of prosecution in respect of other acts".[199] Although due weight should be accorded to the authority of the Commentary, the statement would invite challenge where the military measures that occasioned prisoners of war were illegal *ab initio*.

A prisoner of war may well become liable for his acts and omissions that take place after his capture and that are punishable under the laws, regulations, and orders of the Detaining Power.[200] But subjecting him to

[195] Art. 84, para. 1 provides: "A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war."

[196] *Noriega, supra,* n. 1, pp. 1525-6.

[197] See McCoubrey, *supra,* n. 178, pp.103-4 about the problems that the implementation of the provision might give rise to.

[198] *Noriega, supra,* n. 1, p. 1526. See also *Commentary, supra,* n. 177, p. 417.

[199] *Supra,* n. 177, p. 418.

[200] Art. 82, para. 1 of Geneva Convention III provides in part that "the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against [its] laws, regulation or orders". — *Supra,* n. 158.

the exercise of domestic jurisdiction for offences he may be alleged to have committed prior to his capture would call for other considerations. Although it might be unnecessary to take into account the legal nature of armed conflicts for the purpose of invoking Geneva Convention III, the determination of such legal nature would appear to be in order when valid effect is sought to be drawn from them, as was done in the case of Noriega: The issue is not related to status but to the effect that is acknowledgeable to an illegal use of force in international relations.

It bears reiterating that the contemporary prohibition of the threat or use of force in international relations does not admit of exceptions that are not envisaged by the Charter of the UN.[201] Results obtained through an international use of force outside the narrowly prescribed limits of the Charter should be denied legal effect in the interest of preserving the sense and purpose of the prohibition.[202]

In the case of Noriega, he became a US prisoner of war and amenable to its jurisdiction as a result of its unlawful use of force against Panama.[203] Because of the grave violation of an international law norm of *jus cogens* status involved in the case, the District Court was expected to distinguish it from cases that involved the breach of lesser grade legal provisions, and to decline jurisdiction over Noriega's pre-capture offences. But the Court did not see cause for freeing the case from the general judicial practice of upholding jurisdiction regardless of the illegal manner in which a defendant was apprehended.[204] The failure to differentiate

[201] See, eg, Asrat, *supra,* n. 61, pp. 45-6, 198, 241.

[202] See, eg, UNGA Resol. 2625 (XXV), 24 October 1970, where, under the principle relating to the prohibition of force, it is stated: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." *Cf.* Asrat, *supra,* n. 61, p. 151, for the discussion of the use in evidence of the mines taken from Albanian territorial waters by a UK force in connection with its illegal breach of Albanian sovereignty.

[203] See *supra,* ch. 4, pp. 166-7. As will be argued *infra* in connection with the discussion of the manner in which Noriega was brought to the US, the District Court had no need to determine the illegality of the US use of force against Panama for declining to exercise jurisdiction. The supervisory authority of courts could have enabled it sufficient leeway in appraising the effect of certain facts on its proper exercise of jurisdiction.

[204] See, *supra,* ch. 2, pp. 60 *et seq.* The District Court was satisfied that the pre-capture offences were not precluded by Geneva Convention III (*supra,* n. 158), and that Article 22 of the Convention did not divest it of personal jurisdiction (*Noriega, supra,* n. 1, pp. 1527, 1529). In regard to the latter, the Court held: "It is inconceivable that the Convention would permit criminal prosecutions of prisoners of war and yet require that they be confined to internment camps thousands of miles from the court house and, quite possibly, defense counsel." *Ibid.,* p. 1527. Art. 22, para. 1, of Geneva Convention III provides: "Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries."

between the effects resulting from the violation of an international law norm that is accepted as *jus cogens* and other violations of law could not but detract from the status of the *jus cogens* norm. Even if jurisdictional effect would not be denied to its violation, it would nonetheless appear that a serious breach of the norm which is not duly rectified will irremediably contaminate with illegality the fruits of the breach. The assumption of jurisdiction in Noriega's case is as a consequence a bearer of that illegality.

It may be noted here that the UN Charter has rightly been declared to possess a "paramount importance...in the promotion of the rule of law among nations". [205] But the domestic practice of giving legal effect to an illegal breach of a fundamental Charter norm will inevitably cause the retrogression of the rule of law among States: It will discourage any heightened aspiration for rule-oriented peaceful relations of States; and it will ultimately augur ill for both domestic and international legal orders.[206]

In concluding our discussion of issues related to prisoners of war, it may be summed up that the US had acquired personal jurisdiction over Noriega as a result of his apprehension by its military; Noriega retained the status of a prisoner of war until it was terminated by his release and repatriation. By the time he was made a US prisoner of war, Noriega had definitely been deprived of his bases of public authority that would have entitled him to immunity from foreign jurisdiction. As a US prisoner of war, Noriega had become liable to its laws, regulations, and orders; his argument that he should be interned in a third country appeared far-fetched. Finally, however, the well-founded general disapprobation of the world community that attended the US invasion of Panama, and that enabled the District Court to assume personal jurisdiction over Noriega,

[205] UNGA Resol. 2625 (XXV), 24 October 1970, preambular para. 4.

[206] Where grave breaches of international law are involved in the domestic assumption of jurisdiction over a defendant in a criminal case, the administration of that jurisdiction's criminal justice could hardly ignore international law standards without adversely affecting the general notion of legality. Likewise, an international criminal tribunal before which a defendant is brought in grave violation of international law provisions (including domestic law provisions recognized by international law) could not appear capable of upholding jurisdiction without detracting from the general notion of legality. Since domestic law and international law would need to interrelate to the extent required by the degree of cohesion attained at any stage by the world community, they cannot duly fulfil that objective unless they rest on a commonly held notion of legality. Whether domestic or international, law would be self-defeating if the rules that it designed to regulate the conduct of natural and juridical persons as well as States were to lack mutual supportiveness in their fundamental application.

could and should have made the US courts hesitant about exercising that jurisdiction.

5.3.3 Diplomatic Immunity

In order to complete our coverage of issues of status raised as jurisdictional challenge, we shall briefly refer next to the plea of diplomatic immunity.

Seeking to have his indictment dismissed on the ground of diplomatic immunity, Noriega had alleged that "contemporary American foreign relations law treat[ed] heads of state in many circumstances as the functional equivalent of diplomats";[207] that he "at all times pertinent to the charges...maintained a Panamanian Diplomatic Passport, and was granted multiple entry Diplomatic Visas by the United States Department of State";[208] and that he "would be entitled to Diplomatic Immunity if he were arrested here".[209]

Noting that "Noriega concedes...that his assertion of diplomatic status does not fit within the confines of either the Diplomatic Relations Act or the Vienna Convention on Diplomatic Relations",[210] the District Court ruled:

> Among other deficiencies, the government of Panama never requested that Noriega be accredited as a diplomat and the United States at no time granted Noriega such status, as required by the Convention, Articles 9 and 10. Nor did Noriega ever meet the Department of State's standards for accreditation, which require, *inter alia*, that the individual reside in the Washington D.C. area and devote official activities to diplomatic functions on an essentially full-time basis.[211]

In other regards, the District Court dismissed as irrelevant the issues of the possession of a Panamanian diplomatic passport and the grant of a US "A-2" visa: It held the former to be a reflection of certain internal considerations that did not *per se* produce legal consequences, and the latter to be insufficient *per se* for conferring diplomatic immunity.[212]

Within the context of the bilateral relations of States, diplomatic

[207] Motion to Dismiss, *supra,* n. 21, p. 39.
[208] *Ibid.,* p. 41.
[209] *Ibid.,* p. 46.
[210] *Noriega, supra,* n. 1, p. 1523; Motion to Dismiss, *supra,* n. 21, p. 43.
[211] *Noriega, supra,* n. 1, pp. 1523-4.
[212] *Ibid.,* p. 1524.

immunity is governed by the rules of privileges and immunities[213] codified in the Vienna Convention on Diplomatic Relations.[214] As indicated in the fourth preambular paragraph of the Convention, the purpose of the "privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States". This purpose would envisage the establishment of foreign diplomatic missions and the residence of diplomats in foreign States. The establishment of foreign missions and diplomatic relations, in turn, would take "place by mutual consent".[215] Where on the basis of mutual consent the prerequisites for diplomatic status are fulfilled, the Convention's rules on privileges and immunities begin to take effect.[216]

Noriega, however, was not specifically accredited to the US and could not therefore have come under the terms of the Convention. As held by the District Court, the fact that he had a Panamanian diplomatic passport and US diplomatic visas could not "strongly buttress"[217] his contention about his entitlement to diplomatic immunity. Since the grant of the US diplomatic visas was obviously discretionary, Noriega would have been an unlikely candidate for those type of visas after he fell from US grace. The indictments and the ensuing US attitude towards him would belie the probative value that he sought to place on those visas. For the period covered by the indictments, therefore, he could not have diplomatic status inferred from his Panamanian diplomatic passport and the US diplomatic visas.[218] As argued and concluded in the previous sections, regarding the post-indictment period, especially that between 15 December 1989 and 3 January 1990—the day he fell within the personal jurisdiction of the US—the privileges and immunities to which he might have been entitled derived not from diplomatic status but his public offices in Panama.

[213] No distinction appears to be purported by the two terms; together they are used to signify entitlements in due instances. See, eg, the US *Diplomatic and Consular Staff* case, *supra,* n. 8, p. 40; Daillier & Pellet, *supra,* n. 44, p. 717; 1 Oppenheim (9th), pp. 1071, 1090-1. *Cf.* F. Przetacznik, *Protection of Officials of Foreign States according to International Law,* 1983, p. 10.

[214] *Supra,* n. 8.

[215] *Ibid.,* Art. 2.

[216] See, eg, *ibid.,* Articles 4(1); 9; 13(1); 22(1), (3); 23; 24; 27(2), (3), (5); 29; 30; 31(1)-(3); 34; 36; 43.

[217] Motion to Dismiss, *supra,* n. 21, p. 41.

[218] See the contention in *ibid.,* pp. 45-6.

5.3.4 The Act of State Plea

Act of State relates to subject matter; it constitutes the ground for a valid defence against an exercise of foreign jurisdiction. Insofar as necessary for the present study, its application in the US and other jurisdictions has been outlined above in Part I.[219] With that outline as background, we shall briefly discuss here the attempt of Noriega to benefit from the act of State doctrine.

Indicating that the act of State doctrine "requires courts to refrain from adjudicating claims that challenge the legality of official acts committed by foreign officials in their own territories",[220] Noriega contended:

> The compelling evidence of the doctrine's applicability is found in the indictment itself. As...discussed at length...the central theme of the charges...is that he utilized and exploited his official position in Panama to aid and abet drug traffickers and money launderers.[221]

He further contended that "because of the way the government chose to frame the charges",[222] the analysis he cited from *Republic of Philippines* v. *Marcos*[223] was applicable. He finally contended that the doctrine was applicable irrespective of the legal nature of his source of public authority.[224]

The District Court understood the act of State doctrine to be "an issue preclusion device",[225] and, as interpreted recently, to emphasize the need for precluding "judicial encroachment in the field of foreign policy and international diplomacy".[226] However, in line with other judicial precedents, the Court asserted the ultimate judicial authority in regard to the

[219] *Supra,* ch. 1, pp. 31 *et seq.*
[220] Motion to Dismiss, *supra,* n. 21, p. 31.
[221] *Ibid.,* p. 33.
[222] *Ibid.,* p. 34.
[223] 10 *AILC* (2nd), p. 332. The 9th Circuit Court had explained in the cited text: "Plaintiff's case implicates the act of state doctrine in its most fundamental sense. In order to resolve plaintiff's various claims against Marcos, the court will have to adjudicate whether Marcos' actions as President were lawful under Philippine law. A number of the acts plaintiff challenges are purely governmental ones, such as expropriation of property and creation of public monopolies. These were not merely the acts of Ferdinand Marcos, private citizen, while he happened to be president; they were an exercise of his authority as the country's head of state and, as such, were the sovereign acts of the Philippines." The contextual mention of "private citizen" was not, however, exactly supportive of the defendant's position; the defence seemed to have overlooked its undermining effect.
[224] Motion to Dismiss, *supra,* n. 21, p. 36.
[225] *Noriega, supra,* n. 1, p. 1521.
[226] *Ibid.,* p. 1523.

applicability of the doctrine.[227] In other respects, the Court observed that it was not clear whether public officials and governments to whom the doctrine would extend needed to "be recognized or 'accepted' as such";[228] but since it was able to rely on other considerations in dismissing the plea of act of State, it did not find it necessary to pronounce on the issue of recognition.

The Court disposed of the act of State issue by noting that the defendant had failed to discharge his burden of proof. It stated:

> In order for the act of state doctrine to apply, the defendant must establish that his activities are "acts of state," i.e., that they were taken on behalf of the state and not, as private acts, on behalf of the actor himself.[229] ...
>
> The Court fails to see how Noriega's alleged drug trafficking and protection of money launderers could conceivably constitute public action taken on behalf of the Panamanian state...The inquiry is not whether Noriega used his official position to engage in the challenged acts, but whether those acts were taken on behalf of Noriega instead of Panama.[230]

The act of State or an equivalent doctrine would have as rationale the protection of variously categorized acts of foreign States from the official scrutiny of other jurisdictions. Whatever the ground on which it is sought to be based, the proper implementation of the doctrine would necessarily require the separation of acts that need to be protected from other acts that do not qualify for protection.[231] Although the category of acts that come within the protective umbrella of the doctrine might vary in different jurisdictions,[232] the distinction between public and private acts would appear to be generally retained.

The failure of Noriega to demonstrate that the offences with which he was charged came within the category of acts protected by the act of State doctrine deprived his plea of valid contents.[233] His very attempt to make use of the doctrine despite the nature of the charges drawn against him appeared inconsistent with his plea of head of State immunity: While the latter plea might have sought in part to uphold the dignity of

[227] *Ibid.*
[228] *Ibid.*, p. 1521.
[229] *Ibid.*
[230] *Ibid.*, p. 1522.
[231] See *supra*, ch. 1, pp. 31 *et seq.*
[232] See, eg, *ibid.*, p. 34.
[233] The District Court has concluded in this regard that "Noriega has not demonstrated that his alleged drug-related activities were in fact acts of state rather than measures to further his own private self-interest". — *Supra*, n. 1, p. 1523.

the head of State's office, the act of State plea had, in the circumstances, the effect of debasing it.[234] The plea of act of State was, then, obviously a misplaced defence.

In different regards, as a particular act becomes an act of State by virtue of the prerogatives of statehood of the entity from which it emanates, it would not appear that the privileged status of the act could be made dependent on the recognition of the entity or its government by others.[235] As discussed above, recognition is not an international law requirement for either the existence of a State or the legality of the acts of its government.[236]

An entity that fulfils the conditions of statehood would normally become a State under international law and gain an independent existence on the international plane.[237] Its government, by means of which it acts, gives the necessary implemental expression to its sovereign authority.[238] The exercise of sovereign authority, in turn, constitutes an act of State irrespective of recognition and the legal character of the government: The act of an unrecognized government of a recognized State could not ordinarily be less an act of State than that of a recognized government or of an unrecognized State. So long as a government exercises a generally effective authority in an entity properly constituted as a State, its act would be an act of State. The exemption from the exercise of foreign jurisdiction generally acknowledged[239] for acts of State would, then, serve as a sufficient indication of the right of an unrecognized government to claim the privilege of that exemption for its sovereign acts.

It would, consequently, follow that were Noriega charged with acts

[234] The world community has recognized "that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind"; and it has declared itself to be conscious of its "duty to prevent and combat this evil". — Preambular paragraphs 3 and 4, Single Convention on Narcotic Drugs, *supra,* n. 36. In view of this attitude, it could not be possible to maintain that drug-related offences committed for private gain would be protected by the act of State doctrine. Even if the State were to officially engage in criminalized drug-trafficking activities, it could not benefit from the privileges attaching to act of State; it would rather expose itself to appropriate unilateral measures or UN-authorized sanctions.

[235] On this score, Noriega had rightly contended that the effect of act of State was independent of his source or nature of authority. — Motion to Dismiss, *supra,* n. 21, p. 36.

[236] *Supra,* pp. 185 *et seq.*

[237] An entity that aspires to statehood but is hindered by valid international sanctions under the UN legal order would experience difficulties in attaining its objectives.

[238] See the *German Settlers* case, *supra,* n. 123, p. 22.

[239] Contractual exceptions to the application of the act of State doctrine have been made in certain instances. See, eg, *Kalamazoo Spice Extraction* v. *Provisional Military Government of Ethiopia*, 3 *AILC* (2nd), p. 592.

which could have come within the ambit of the act of State doctrine,[240] he could have benefited from the privilege of jurisdictional exemption that attaches to the acts. The US nonrecognition of his position and the authority of his government would not have affected the status of the acts and the privileges due to them.

5.3.5 Manner of Obtaining Jurisdiction

In addition to issues of status and the act of State doctrine, Noriega challenged the jurisdiction of the District Court by alleging the illegality of the manner in which he was brought to the US. He argued that the US invasion of Panama involved constitutional and international law violations, and that there was need for exercising judicial supervisory authority.[241] We shall take up first the issues relating to constitutional law violation and supervisory authority and discuss later those relating to international law violation.[242]

[240] Where by acquitting himself of the burden of proof indicated, eg, in *Alfred Dunhill* v. *The Republic of Cuba*, (24 *AILC*, p. 218), *Noriega (supra,* n. 1, p. 1521), a defendant successfully demonstrated the presence of an act of State, nonrecognition could not tenably be held to hinder the flow of the legal consequences that attach to the act.

[241] *Noriega*, *supra,* n. 1, p. 1529.

[242] Noriega has also argued that "he was brought to the United States in violation of the Treaty Providing for the Extradition of Criminals, May 25, 1904". The Court of Appeals, *supra,* n. 53, p. 2479. See also *Noriega*, *supra,* n. 1, pp.1528 *et seq*. The argument was not sustained. The District Court dismissed it in light of its analysis of the Single Convention on Narcotic Drugs and the purposes of Geneva Convention III. The Court of Appeals relied on the US Supreme Court decision in *United States* v *Alvarez-Machain* and held: "[T]o prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner. Noriega has not carried this burden, and therefore, his claim fails." (at 2480) See *supra,* ch. 2, pp. 66 *et seq*. for the discussion of the *Alvarez-Machain* case. See also M.J. Glennon, "State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain", 86 *AJIL*, 1992, p. 756, where the author asks: "Does it make sense, though, to breach justice in the method of seizure so as to do justice in the manner of trial? Does it make sense to violate due process internationally so as to pursue due process domestically? I think not. When government is a law violator, the law is undermined, and an example is set for other individuals and governments to follow.

"This is the risk run by this shortsighted executive branch policy and its judicial legitimation." See *supra,* n. 206 re the need for a commonly held notion of legality in both the domestic and international legal orders.

Regarding Noriega, his extradition argument could not have been of help. In cases like *Alvarez-Machain*, the government was involved through its agents, and it could have disavowed their acts. But in Noriega's case, the unlawful act was officially undertaken by the government itself in pursuit of its foreign policy objectives. That unlawful act breached a

5.3.5.1 Due Process[243]

In the US judicial practice, the application of the due process clause is predicated on the violation of rights personal to a defendant who invokes its benefit. Other violations are generally not taken to affect the exercise of jurisdiction over a defendant. Particularly, "the manner by which a defendant is brought before the court normally does not affect the ability of the government to try him".[244] This apparent indifference to the manner in which jurisdiction is established is identified by the maxim *male captus, bene detentus*, and it is generally referred to in the US as the Ker-Frisbie doctrine.[245]

The District Court did not think the Ker-Frisbie doctrine was exceptionless.[246] It declined "to rule out the possibility of a Toscanino exception in circumstances of extreme and outrageous government conduct".[247] Nevertheless, it considered that

> Noriega does not, and presumably cannot, allege that the Government's invasion of Panama violated any right personal to him, as required by the Due Process Clause...The defendant does not claim that he was personally

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peremptory norm of international law which stands higher than a rule governing conditions of extradition in a bilateral treaty. Where the breach of the extradition treaty was subsumed, as in Noriega's case, in the breach of the peremptory norm, the treaty could not be independently effective so long as the breach of the peremptory norm stood unaffected: Forcibly arresting and transferring Noriega from Panama to the US was a breach of the extradition treaty that was necessarily made part of the breach of the peremptory norm. In any case, since the US-installed Endara government had acquiesced in the US breach of Panama's territorial integrity and political independence, and since the breach had the objective, *inter alia*, of removing Noriega from office and having him prosecuted in the US, it was clear that the government had to all intents and purposes assented to the forcible transfer of Noriega to the US and the attendant negation of the extradition treaty. Without finding it necessary to consider here if narcotic offences had become extraditable under the treaty, it would appear that Noriega became practically remediless under that treaty when, far from championing his cause, his own State became his adversary.

[243] "Nor person shall...be deprived of life, liberty, or property, without due process of law". — Fifth Amendment, the US Constitution. *AILC, Sources and Documents*, Vol. I, p. 288.

[244] *Noriega, supra,* n. 1, p. 1529.

[245] See the discussion, *supra,* ch. 2 , pp. 61 *et seq.*

[246] The Court said that "it is not enough for the defendant to assert, *without more*, that his arrest was illegal" (italics supplied). — *Noriega, supra,* n. 1, p. 1530. The Second Circuit Court had earlier held that "in recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court". — *United States* v. *Gengler*, 30 *AILC*, p. 440.

[247] *Noriega, supra,* n. 1, p. 1531. See *supra,* ch. 2, p. 70, about the *Toscanino* case.

> mistreated in any manner incident to his arrest, at least not in any manner nearly approaching the egregious physical abuse stated in Toscanino. ...[248]
>
> Nothing in Toscanino or in the other decisions cited...in any way suggests that the due process rights of third parties may be vicariously asserted...[249]

The Court accordingly dismissed Noriega's due-process based objection to its exercise of jurisdiction.

The US judicial practice might well deny a defendant in an ordinary criminal prosecution the disciplining effects of the due process clause where he was not subjected to torture, brutality, and similar outrages against his person. But the issue that would need to be addressed here is whether the same should hold true in the case of a singularly extraordinary prosecution as that of Noriega. Without presuming to engage in the interpretative intricacies of a domestic legal rule, it might not appear unreasonable and unjust to argue that the due process clause should be given the construction that would accord with the particular situation of a defendant in an unusual criminal prosecution.

Noriega was the commander-in-chief of the PDF; and despite his non-recognition by the US, he was the leader of Panama.[250] These two offices had made him the formal and factual bearer of responsibility for the security and welfare of the Panamanian State, the Panamanians, and the public forces. How fit he was for the positions, and how well he acquitted himself in his duties would be immaterial for ascertaining if it was on account of his offices that the US invasion of Panama wrought ills on Panamanians, the PDF, and himself. Further, any legal effect that is sought to be drawn from the consequences of the invasion, and pleaded against the exercise of the US criminal jurisdiction, would be unaffected by the US reluctance to recognize his positions and his government.

As discussed before,[251] the US resorted to a military invasion of Panama because Noriega, the commander of the PDF and the leader of Panama, had become intractable. Noriega, who to all appearances was the immediate and principal reason of the invasion, was soon reduced by the US military action to the figure of a widely and assiduously hunted fugit-

[248] *Noriega, supra,* n. 1, p. 1531.

[249] *Ibid.,* p. 1532. Citing *United States* v. *Payner,* where in footnote 9 of its judgment the US Supreme Court has indicated that 'the fact remains that "[t]he limitations of the Due Process Clause...come into play only when the Government activity in question violates some protected right of the *defendant*"' — 65 L Ed 2d, p. 477 — the Court of Appeals also held that "whatever harm Panamanian civilians suffered during the armed conflict that preceded Noriega's arrest cannot support a due process claim". — *Supra,* n. 53, p. 2481.

[250] See *supra,* ch. 4, pp. 151 *et seq.*

[251] *Ibid.,* pp. 111-2, 157.

ive, and Panamanians were subjected to deaths and injuries.[252] It would hence appear that the unconscionable Panamanian casualties were joined with any violations of personal rights that Noriega might have endured.

Taking up first the issue of personal rights, had Noriega alleged any violations of personal rights as held by both the District Court and the Court of Appeals,[253] his allegations would not have related to violations of personal rights that resulted from his physical maltreatment. Rather, he might have alleged that the mental and emotional anguish that were induced in him by the invasion itself and exacerbated by the doggedness with which the invaders pursued him was tantamount to violations of his personal rights. Under the very special features of the case, the non-physical factors that constituted the mental and emotional anguish would have been expected to give rise to the same considerations as those that applied to cases of serious physical maltreatment. Noriega, a leader in his own country, had become the cause of his country's invasion. Driven by fear, he had gone into hiding and begun to move from one haven to another in a grossly unseemly manner. His asylum at the Vatican Embassy was attended by constant and noisy threats of physical danger that could not have been responsibly discounted.[254] How much less an act of torture or brutality, or one that is a shock to the conscience, or an outrage against a person could all the intimidation and fear that finally broke his resistance and forced him to surrender have been in comparison to any physical maltreatment that might be considered egregious? What could the proper yardstick have been in a case like Noriega's?

The US invasion had induced such a consternation in Noriega that he seemed to have spontaneously opted to lay aside all sense of duty, personal honour and dignity of office, and to abandon his forces as well as the responsibility for the security of the State and its inhabitants with which he was entrusted.[255] Could it be argued, then, that he had not fallen under the sway of some extraordinary mental and emotional pressure, transcribable into some form of torture, that forced upon him such aberrant conduct and a thorough dereliction of duty? Even if not identified as torture, could not the pressure be seen as no less an invasion of personality than an egregious physical maltreatment? Could the non-physical causes of an aberrant conduct and a remarkable dereliction of duty be any less egregious than the physical outrages that induce malleability in case of an abduction or extraction of confession? It needs to be borne in

[252] *Ibid.*, pp. 162 *et seq.*
[253] *Supra*, n. 1, p. 1531; n. 53, p. 2481.
[254] See *supra*, ch. 4, pp. 167.
[255] *Ibid.*, pp. 150-1.

mind that whether or not Noriega should have stood his ground and met a heroic fate would not have been at issue. In raising the effect produced on his volition by the non-physical dimension of the US use of unlawful force against Panama, he would merely have sought the protection of the due process clause in a criminal trial rather than in defence of his conduct and honour. At all events, whether deliberately or not, he did not explore this particular line of defence.[256]

In short, the unlawful invasion of Panama was no ordinary law enforcement action, and the trial of Noriega was no ordinary criminal prosecution. In these circumstances, had Noriega contended that the grave non-physical elements indicated above were serious violations of his personal and official rights and duties, it might not have appeared implausible. To restrict the scope of the protection sought to be afforded by the due process clause to the physical manifestations of gross personal abuses might not appear to do full justice to the purposes of the protection.[257]

With regard to the issue of whether Noriega could benefit from the violation of the due process rights of third parties, the District Court held:

> [N]one of the Panamanian victims whose rights, if any, Noriega asserts are being indicted or subjected to jurisdiction in this Court; in this context, the only party interested in having the indictment against Noriega dismissed is Noriega...he is attempting to extend the substantive reach of the Due Process Clause and the 'third-party' standing doctrine to encompass an expansion, as opposed to a mere assertion, of third-party rights and remedies.[258]

As noted above, Noriega had official responsibility for the security of Panamanians and other persons residing in Panama. Where, in order to get at him, a number of persons were made victims of an unlawful use of arms,[259] a connection necessarily arose between their personal rights and his responsibility for their safety: The violation of their personal rights constituted in effect the violation of his corresponding responsibility for their protection; and that responsibility comprised his official right, authority, and duty of preventing, *inter alia*, any violations of their per-

[256] Similar types of non-physical factors might not, however, avail an indicted individual who is pursued and arrested in a regular law enforcement process. Such was not the case of Noriega.

[257] *Cf. Rodriguez-Fernandez* v. *Wilkinson*, 1 *AILC* (2nd), p. 65, where the concept of due process is considered not to be static.

[258] *Noriega*, *supra,* n. 1, p. 1532. See the Court of Appeals judgment, *supra,* n. 53, p. 2481.

[259] See *supra,* ch. 4, pp. 162-3.

sonal and other rights. The connection was special in the peculiar circumstances of the case; and those circumstances expectedly necessitated a construction of the due process clause that reflected them. It may be observed here that whether or not the person charged with the particular responsibility was capable of conscientiously attending to it would be irrelevant to the issue of the connection and its extendible legal effects. It would then appear that extending the remedy of the violation of third party personal rights to the violation of the official responsibility of the person charged with the security of the third parties would neither appear incongruous with the general spirit of the due process clause nor unconscionable; and the vicariousness that may be apparent in such an extension would be one that was necessitated by the combination of facts that called for special considerations.

The presence of Noriega before the District Court bore the stigma of all the violated third-party rights that he had the duty to protect. The stigma remained conspicuously attached to his enforced presence in the US during the various phases of exercise of jurisdiction over him. It was a standing reminder of what the courts were unable or unwilling to do.

5.3.5.2 Supervisory Authority

Noriega had also sought to have his indictment dismissed on the basis of the supervisory authority doctrine. He had argued that if the District Court did not decline the exercise of jurisdiction over him it would "sanction and become party to the Government's...misconduct in invading Panama and bringing [him] to trial".[260] But both the District Court and the Court of Appeals did not find the doctrine applicable.

The District Court explained that the supervisory authority doctrine

> is in essence a judicial vehicle to deter conduct and correct injustices which are neither constitutional nor statutory violations, but which the court nonetheless finds repugnant to fairness and justice and is loathe to tolerate...As invocation of supervisory power to dismiss an indictment is a harsh remedy, it is reserved only for flagrant or repeated abuses which are outrageous or shock the conscience.[261]

The Court further explained that

> the fact that a defendant's own...rights have not been violated is not decisive...If, for example, we were confronted with a pure law enforcement

[260] *Noriega, supra,* n. 1, p. 1535.
[261] *Ibid.*

> effort in which government agents deliberately killed and tortured individuals for the sole purpose of discovering a fugitive's whereabouts in order to secure his arrest, the Court would face a situation which properly calls for invocation of its supervisory powers.[262]

However, the Court did not find the arrest of Noriega to have been a law enforcement action, but one incidental to a military operation undertaken in pursuit of foreign policy objectives that raised political issues. As it felt constrained by the political question doctrine, it did not wish to consider the legality and effects of the US invasion of Panama. It concluded that

> even if we assume the Court has any authority to declare the invasion of Panama shocking to the conscience, its use of supervisory powers in this context would have no application to the instant prosecution...Since the Court would in effect be condemning a military invasion rather than a law enforcement effort, any 'remedy' would necessarily be directed at the consequences and effects of armed conflict rather than at the prosecution of Defendant Noriega for alleged narcotic violations. The Defendant's assumption that judicial condemnation of the invasion must result in dismissal of drug charges pending against him is therefore misplaced.[263]

The Court of Appeals did not enter into an extensive discussion of the supervisory authority. It merely indicated that

> we are aware of no authority that would allow a court to exercise its supervisory power to dismiss an indictment based on harm done by the government to third parties.[264]

And basing itself on its understanding of the *Payner* case,[265] it concluded that an indictment may not be dismissed

> if the government treated third parties unconscionably, where, as here, such an approach would circumvent the Supreme Court's limiting construction of the Fifth Amendment.[266]

As noted in the discussion under the foregoing rubric, Noriega's attempt to defeat the US exercise of jurisdiction by relying on unconscionable acts committed against Panamanians was dismissed as being a

[262] *Ibid.*, p. 1536.
[263] *Ibid.*, p. 1540. See *supra,* pp. 173-4, the discussion about the prosecution of Noriega as a law enforcement matter.
[264] *Supra,* n. 53, p. 2482.
[265] *Supra,* n. 249, p. 468.
[266] *Supra,* n. 53, p. 2482.

vicarious assertion of third party due process rights. The Court of Appeals extended the due process ground to its consideration of the doctrine of supervisory authority and affirmed the dismissal by the District Court of the argument related to the doctrine. It may be noted here that, for purposes of its decision, the Court of Appeals did not find it necessary to take up the foreign policy aspects involved in the case.[267] The District Court, on the other hand, considered the supervisory authority doctrine within the context of law enforcement and the pursuit of foreign policy objectives and concluded that it could be properly invoked in the former but not the latter context.[268]

In order to better understand the views of the two courts, it might be helpful to refer to the judicially-held purposes of the supervisory authority doctrine. The US Supreme Court has indicated that

> [t]he purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights...; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury...; and finally, as a remedy designed to deter illegal conduct... .[269]

Focusing on the purpose of preserving judicial integrity, it is readily noticeable that, first, the preservation of that integrity would begin and be coterminous with the judicial process, and second, it could not properly be seen as capable of admitting a discrimination between sources that give rise to factors which impinge on it. The preservation of judicial integrity would thus include the jurisdictional aspect of the judicial process; and, as will be argued, the question of judicial integrity should not be made dependent on the nature of the source from which the contaminant proceeds.

Until the final disposal of his case, Noriega was entitled to invoke the supervisory authority doctrine at the jurisdictional as at any other stage of his prosecution. In an attempt to move the District Court to preserve judicial integrity, he had accordingly argued in the terms quoted in the opening paragraph of this rubric.

The US invasion of Panama was manifestly unlawful under interna-

[267] *Ibid.*, n. 6.

[268] To the District Court, "[t]hat foreign policy objectives rather than just law enforcement goals are implicated radically changes the Court's consideration of the government conduct complained of and, consequently, its willingness to exercise supervisory power". — *Noriega, supra,* n. 1, p. 1538. See also p. 1536 where the District Court's construction of the *Payner* case is wider than that of the Court of Appeals.

[269] *United States* v. *Hasting*, 76 L Ed 2d, p. 103. See also *Noriega, supra,* n. 1, p. 1535.

tional law, and it was arguably so under the US Constitution.[270] It had caused the death and injury of innocent persons as well as the destruction of property. Despite the officially stated other reasons, and in line with the conclusion arrived at in the present study,[271] the prime purpose of the invasion was the removal of Noriega from his position of authority and the reassertion in Panama of the traditional US hegemonic interests.[272] Not only was Noriega to be removed from his position of authority, but he was also to be taken to the US for purposes of prosecution and suitable chastisement.[273] The invasion, then, had political and law enforcement aspects. Whichever of these two aspects was predominant would neither affect the character of the invasion nor the reality of the casualties that it entailed.

The casualties were sufficiently grave.[274] The facts, with a passable degree of accuracy, were public knowledge in the US, and the courts could have taken notice of them. In other respects, where the personal rights of individuals that were deliberately sacrificed for the attainment of a certain goal were made an issue in a US judicial process, the proper determination of the issue could hardly be unaffected by the due process clause. The same facts, moreover, that gave rise to the applicability of the due process clause would, in appropriate instances, and irrespective of the party seeking to benefit by them, give rise to the supervisory authority doctrine.

The District Court would appear to have been right in entertaining the possibility of an exercise of supervisory authority in law enforcement cases that involved outrages against third parties.[275] But the Court did not appear justified in denying that remedy in the *Noriega* case because of its characterization of the invasion of Panama as a measure of US foreign policy that fell outside the field of judicial inquiry. Despite the political and law enforcement matters involved in the invasion, the Court found no evidence which suggested "that military troops were sent into Panama for the singular or even primary purpose of enforcing U.S. narcotics laws

[270] See *infra* pp. 236 *et seq.*
[271] See *supra,* ch. 4, pp. 156 *et seq.*
[272] See *supra,* ch. 3, pp. 76 *et seq.*
[273] See *supra,* ch. 4, pp. 111, 115, 155 *et seq.*
As reported by Albert, Noriega,"[a]lone with his wife and three daughters,...cried, a gut-wrenching cry of emotion, deep and long", after he was convicted. — *Supra,* n. 3, p. 440.
[274] See *supra,* ch. 4, pp. 162 *et seq.*
[275] *Noriega, supra,* n. 1, p. 1536.

by bringing a suspected drug dealer to trial".[276] It could have given, however, due consideration to a set of facts that were prompted and realized by the invasion: The US had placed a reward for the capture of Noriega;[277] he was hunted like a fugitive; he was forced to come out of his place of asylum; he was arrested and his rights were read to him. In such circumstances, the invasion was clearly invested with a law enforcement aspect; and what the Court considered in regard to the arrest of Noriega to be an "incident to the broader conduct of foreign policy"[278] did not efface that law enforcement aspect. Further, unless the discernible law enforcement aspect was considered to be fully assimilated with the foreign policy aspect of the invasion, making the whole judicial process an instrument of that policy, the separate identity of the two aspects would subsist. The District Court does not, therefore, appear to have rightly discarded the law enforcement aspect of the invasion and avoided the supervisory authority doctrine.

Even if the invasion were accepted to have been solely a foreign policy measure, a court could not rightly decline the exercise of its supervisory authority where invasion-derived elements that could give rise to such exercise were present. The District Court, could not, therefore, have been spared, under the political aspect of the invasion, the task of deciding if the alleged facts did or did not justify the exercise of its supervisory authority: Irrespective of the kind of aspects assigned to the invasion, the third-party unconscionable casualties stood, as did other physical damages. Inasmuch as Noriega fell into the hands of the US as a result of such casualties and damages, the introduction of his person into the US judicial stream was not free of them. To seek, then, to differentiate with effect between the sources of the same contaminant would not appear to accord with common sense and the uniformity of justice anticipated in the case. The judicial integrity that the supervisory authority was meant to preserve[279] remained affected so long as the tainted personal jurisdic-

[276] *Ibid.*, p. 1537. The exercise of supervisory authority became an issue in Noriega's case because personal jurisdiction was made possible by the invasion. As the supervisory authority is the judiciary's own and independent *cordon sanitaire*, it would not appear susceptible of being governed by the purpose of the invasion—singular, primary, incidental, or tangential.

[277] Asked at a news conference of 21 Dec. 1989 why he had approved the bounty on Noriega, Bush had replied: "His picture will be in every post office in town...He's a fugitive drug dealer, and we want to see him brought to justice." — *Bush, supra,* n. 187, p. 1731.

[278] *Noriega, supra,* n. 1, p. 1537.

[279] See eg the *Payner* case, *supra,* n. 249, p. 484, where the dissenting opinion has indicated that "the supervisory powers are exercised to protect the integrity of the *court*".

tion remained undisturbed.[280]

It would follow from the preceding discussion that the Court of Appeals was right to have refrained from the political question doctrine when determining the supervisory authority issue. But its ground for holding the supervisory authority inapplicable did not appear persuasive. Even if one is an outsider to the US judicial practice, it would appear on the basis of general adjudicative practices that the Court of Appeals did not give the special features of the case the full consideration they deserved. Relying only on precedents that disallowed the relevance of violated third-party rights where due process and supervisory authority issues were involved, the Court appeared to have ignored the particular responsibility, discussed under the preceding rubric, with which Noriega was formally charged. In the unique circumstances of the case, that responsibility should have strongly militated against equating the gross violations of the rights of Panamanians with the unlawful third-party search that figured in the *Payner* case. The Panamanian casualties of the US invasion could not in fact and in fairness be seen as detached from the said responsibility of Noriega. After all, following the formulation in the *Payner* case, it could not be said that the US measures did not violate "some protected right of the *defendant*".[281]

Further, the Court of Appeals sought support for its position in the remarks and reference of the Supreme Court in the *Payner* case, where it is indicated:

> The supervisory power merely permits federal courts to supervise "the administration of criminal justice" among the parties before the bar.[282]

The parties in criminal cases are the member of a designated public office and the accused. The courts are empowered to exercise their supervisory authority in those cases for the obvious purpose of ensuring the regularity of the administration of criminal justice. Dismissal of an indictment, albeit a harsh measure, would be one of the available remedies for effectively dealing with various irregularities. Where a criminal case was not properly before a court, or it was so fraught with grave irregularities that it could not be allowed to proceed without tarnishing the judicial process, the court, in the exercise of its duty to supervise the administration of criminal justice between the parties, would need and be

[280] What has been argued under the due process clause regarding the entitlement of Noriega to rely on the violations of third-party personal rights is relevant for the point being discussed.

[281] *Supra*, n. 249, p. 478, n. 9.

[282] *Ibid.*, p. 476, n. 7; Court of Appeals, *supra*, n. 53, p. 2482.

expected to dismiss the indictment. In line with the connection established above between the responsibility of Noriega for the security and welfare of the inhabitants of Panama, and the gross violations of their rights wrought by the US invasion, the dismissal of his indictment in the exercise of the court's supervisory authority over "the administration of criminal justice" would neither have offended against justice nor, apparently, the cited precedents.[283]

The supervisory authority doctrine, in the final analysis, is in the interest of judicial integrity.[284] The latter could not admit of being unnecessarily glossed over by resort to narrow interpretations of provisions that fail to take into account the very special circumstances of Noriega's case. The courts could have exercised better their supervisory authority in that case and avoided giving the impression that they were helpless in matters related to foreign policy.

The courts might have felt that condemning the invasion of Panama was outside the domain of the judiciary. But it would not appear to follow that seeking to maintain judicial integrity was dependent on a prior judicial condemnation of the invasion.[285] Without formally ruling on that

[283] Mention might be made here of what has been referred to as "the careful balance of interests embodied in the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated... .") decisions of the US Supreme Court. The remedy of exclusion of evidence procured in violation of the Fourth Amendment, according to the Court, "must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule". — The *Payner* case, *supra,* n. 249, p. 475. The Court concluded that "Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices". — *Ibid.,* p. 477. Although the case is clear in denying the right of a person, not himself victim of a violation of the Fourth and Fifth Amendments, to challenge the admissibility of an illegally obtained evidence, it will be hard to take the opinion as holding that denial of right in absolute terms: There might be factors that might not involve the accused but still constitute serious breaches of law that could undermine the administration of justice. And there might be cases like Noriega's where the rights of third parties could be involved in a *sui generis* manner with those of the accused.

Regarding the balance between societal interests and those of the accused, it would not appear right to take the case of Noriega as an ordinary criminal case. The balance of interests in his case was between the interests of the international society, including the US, and the US domestic interests; and, strange as it might seem, jurisdictionally, Noriega's interests happened to coincide with those of the world community. Both the District Court and the Court of Appeals were not inclined to adopt such an analytical perspective.

[284] See the Dissenting Opinion in the *Payner* case, *supra,* n. 249, p. 484.

[285] The District Court thought that even if it had authority to condemn the invasion, the effects of its condemnation would have concerned the consequences and effects of the armed conflict rather than Noriega's case. — See *supra,* p. 230 for the quoted text. As argued earlier, it is the nature of the effects of the armed conflict rather than its purpose that should give rise to the exercise of the supervisory authority. And whether or not the invasion was judicially condemned, the nature of the effects remained unaltered.

US foreign policy exercise, the courts could have been justified in taking notice of the notorious facts of the invasion and declining to exercise jurisdiction over Noriega in the interest of preserving their judicial integrity. Declining jurisdiction in the circumstances would have been a very severe measure; but, as the case itself was of a very extraordinary nature, the measure would not have been disproportionate. Declining jurisdiction in the circumstances, moreover, would not have infringed on the foreign policy measures undertaken by the political branch; those measures would have followed their duly allotted course and produced domestic effects not otherwise declared null. Without each being or creating an unwarranted obstacle for the other, the judicial and political branches of the US government would have remained within their constitutionally authorized separate competence. Naturally, the judicial reluctance to exercise jurisdiction could have added some weight to the view of those who sought to cast the invasion in an unfavourable light. But any such eventuality would only be incidental to the judicial position and relate to an already accomplished act.

It needs to be said in closing that the combined effect of the due process clause and the supervisory authority doctrine was strong enough in Noriega's case to warrant sufficient hesitation about exercising jurisdiction. Regardless, therefore, of the gravity of the offences involved, the sheer blatancy of their commission, and the apparent depravity of Noriega, he, as a defendant in a criminal case, could have been given the benefit of that hesitation, and the exercise of jurisdiction in his case declined.

5.3.5.3 Violation of International Law

Noriega had sought to contest the personal jurisdiction of the District Court by arguing that the US military invasion of Panama violated Art. 2(4) of the UN Charter,[286] Art. 20 of the OAS Charter,[287] Articles 23(b) and 25 of the Hague Convention Respecting the Laws and Customs of

[286] Art. 2(4) of the UN Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." — 15 *UNCIOD*, p. 335.

[287] Art. 20 of the OAS Charter provides: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized." — *OASTS*, No. 6, p. 1; 119 *UNTS*, p. 3.

War on Land,[288] Art. 3 of Geneva Convention I,[289] and Art. 6 of the Nuremberg Charter.[290] But the Court held that on his own he lacked standing for availing himself of those provisions.

Despite the grave breach of international law occasioned by the invasion, the jurisdictional effect of the breach was not given the in-depth analysis that the very special circumstances of the case called for; neither, apparently, was the international law issue pursued in appeal. We shall note first the grounds relied on by the District Court in dismissing the contentions of Noriega, and discuss later the significance of international law for the case.

The District Court held that the Articles of the UN Charter, the OAS Charter, and the Hague Convention cited by Noriega did not create enforceable private rights; Art. 3 of Geneva Convention I related only to internal or civil wars and did not concern the US invasion of Panama; and the applicability of Art. 6 of the Nuremberg Charter was not established. The Court, accordingly, concluded that Noriega did not have the necessary

> standing to challenge violations of these treaties in the absence of a protest by the Panamanian government that the invasion of Panama and subsequent arrest of Noriega violated the country's territorial sovereignty.[291]

As a result, the Court found it unnecessary to consider "whether [those] treaties were violated by the United States military action in Panama",[292] and refrained "from reaching the merits of [Noriega's] claim under the Nuremberg Charter".[293]

In our analysis of the ruling of the Court on the issue of the violation of international law, we shall focus on the prohibition of force in international relations enjoined under the UN Charter to see if the breach of such a fundamental norm could be without any jurisdictional effect in the *Noriega* case. As the thrust of the other treaty provisions cited to contest the jurisdiction of the Court will be subsumed in our consideration of that Charter norm, it will not be necessary to refer to them separately. We

[288] Art. 23 provides: "In addition to the prohibitions provided by special Conventions, it is especially forbidden:" (b) "To kill or wound treacherously individuals belonging to the hostile nation or army". Art. 25 provides: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." — *The Hague Conventions and Declarations of 1899 and 1907*, J. B. Scott, ed., 1915, p. 100.

[289] 75 *UNTS*, p. 31.

[290] See *supra*, ch. 2, p. 45.

[291] *Noriega*, *supra*, n. 1, p. 1534.

[292] *Ibid.*

[293] *Ibid.*, p. 1535.

shall, however, need to refer briefly to the place of international law in the US legal order for the purpose of putting our inquiry in its appropriate context.

The US Constitution[294] includes provisions that relate to international law.[295] Art. I, Sec. 8, Cl. 10 establishes the authority of Congress

> [t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.

Art. III, Sec. 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;... .

Art. VI, Cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

In the oft-quoted passage of the US Supreme Court opinion in *The Paquete Habana* case it has been stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[296]

[294] *Supra,* n. 243, p. 288.

[295] See *Restatement (Third), supra,* n. 38, p. 41, where it is indicated that "[f]rom the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done". See also R. Higgins, "United Kingdom", in *The Effect of Treaties in Domestic Law,* F.G. Jacobs and S. Roberts eds., 1987, p. 125, where customary international law is said to be "part of English law without any specific legislative act being needed to achieve that fact".

[296] 1 *AILC,* p. 104.

Although the law of the land, international law "is inferior to the Constitution".[297] It has been held

> that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.[298]

The US Constitution has clearly indicated the status of treaties in the Supremacy Clause of Art. VI without mentioning customary international law.[299] We shall, however, consider each of these sources of international law so far as necessary for our present discussion.

5.3.5.3.1 Treaties as Supreme Law of the Land

Under international law, a treaty is "an international agreement concluded between States in written form and governed by international law".[300] In the US judicial practice, too, "a treaty is primarily a contract between two or more independent nations".[301] To gain the status of domestic law and come within the Supremacy Clause of the US Constitution, a treaty would need to comply with the validity requirements of both international law and US law. As Henkin explains,

> [t]he status of a treaty as law of the land derives from, and depends on, its status as a valid, living treaty of the United States. It is not law of the land for either the President or for the courts to enforce if it is not made in accordance with constitutional requirements, or if it is beyond the power of the President and Senate to make, or if it violates constitutional prohibitions. It is not law of the land if it is not an effective treaty of the United States internationally because it is not binding or is invalid under international law, or because it has expired, or has been terminated or destroyed by breach (whether by the United States or by the other party or parties).[302]

A treaty, valid under both international law and US law, may be self-executing or non-self-executing.[303] Regardless, however, of the self-

[297] L. Henkin, "The President and International Law", 80 *AJIL*, 1986, p. 932.
[298] *Reid* v. *Covert*, 8 *AILC*, p. 257.
[299] See, eg, *Restatement (Third)*, *supra*, n. 38, Part I, Chapter 2, Introductory Note.
[300] Art. 2(1)(a), Vienna Convention on the Law of Treaties, 1155 *UNTS*, p. 331.
[301] *Whitney* v. *Robertson*, in Hudson ed., *supra*, n. 76, p. 961. See also *Weinberger* v. *Rossi*, *71 L Ed 2d*, p. 724, where the term treaty is held to include executive agreements.
[302] L. Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed., 1996, p. 204.
[303] The distinction between self-executing and non-self-executing treaties has been described by some as "a judicially invented notion that is patently inconsistent with express language in the Constitution". — J.J. Paust, '"Self-Executing" Treaties', 82 *AJIL*, 1988, p. 760.

executing issue, which is taken to be a matter of domestic law,[304] a treaty is binding as the supreme law of the land.[305]

A treaty is generally seen as self-executing if it is considered not to require an implementing legislation. According to one judgment of the US Supreme Court the

> constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[306]

As equivalent to an act of Congress, a treaty has been held to fall under the sway of the legislature. Reference by way of example may be made to *The Chinese Exclusion Case*, where, in regard to self-executing treaty, the US Supreme Court held:

> If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.[307]

One particular category of treaties that is generally held to be self-executing is that which "create[s] obligations to refrain from acting".[308] According to an opinion of the Court of Appeals of Kentucky,

> [w]hen it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to

[304] See, eg, *Frolova* v. *USSR*, 2 *AILC* (2nd), p. 539; T. Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law", 235 *RCADI*, 1992-IV, passim.

[305] Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 203.

[306] *Foster and Elam* v. *Neilson*, 2 *AILC*, p. 427. See also *Whitney* v. *Robertson*, *supra,* n. 391, p. 961; Henkin, (*Foreign Affairs...*), *supra,* n. 302, pp. 198 *et seq.*; J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", 86 *AJIL*, 1992, p. 320.

[307] (*Ping* v. *United States) 1 AILC*, p. 198. See also, eg, Jackson, *supra,* n. 306, p. 320; L.H. Tribe, *American Constitutional Law*, 2nd ed., 1988, pp. 226 *et seq.*; C.M. Vázquez, "The Four Doctrines of Self-executing Treaties", 89 *AJIL*, 1995, pp. 695-6. Tribe indicates also that "[a]t a minimum, it seems clear that an executive agreement, unlike a treaty, cannot override a prior act of Congress" (op. cit., p. 229).

[308] Henkin, Pugh, Schachter, Smit, *supra,* n. 35, p. 215.

> override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."[309]

Although some would argue "that in the United States the strong presumption should be that a treaty or a treaty provision is self-executing, and that a non-self-executing promise is highly exceptional",[310] others are of the opinion that "treaties do not generally create rights that are privately enforceable in courts".[311] It has been held, accordingly, in regard to the provisions of the UN Charter that Articles 1, 55 and 56 are not self-executing. It has been explained that

> [t]hey state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons...Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.[312]

To some, this "tendency...to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution".[313] In any case, the prohibitions of the Bill of Rights and other limitations of the exercise of federal power, are taken to apply to treaties.[314] In other regards, some draw a clear distinction between the invocability of a treaty and the function of the private right of action made available under a self-executing treaty. It is contended, for instance, that those 'relying on a treaty as a defense to a criminal prosecution...do not need a "private right of action," as they are not seeking

[309] *Commonwealth* v. *Hawes*, 16 *AILC*, pp. 442-3. See examples of self-executing and non-self-executing treaties in Henkin, Pugh, Schachter, Smit, *supra,* n. 35, pp 216-7. In another instance, the treaty between the US and the UK that prescribed the limits within which the US could exercise jurisdiction over UK vessels, and was in issue in *Cook* v. *United States*, was held to be "in a strict sense...self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions". — 5 *AILC*, p. 333. *Cf. United States* v. *Ferris*, in Hudson ed., *supra,* n. 76, pp. 676-7. Geneva Convention III has been considered to be self-executing. — RECOMMENDATION, *supra,* n. 165, p. 272.

[310] Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 201.

[311] Concurring opinion of Bork in *Tel-Oren* v. *Libyan Arab Republic*, 77 *ILR*, p. 237.

[312] *Sei Fujii* v. *State*, 14 *AILC*, p. 407. See also, eg, the *Frolova* case, *supra,* n. 304, pp. 540-1; the *Tel-Oren* case, *supra,* n. 311, p. 238; *Handel* v. *Artukovic*, 1 *AILC* (2nd), p. 232.

[313] Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 201.

[314] *Ibid.,* p. 185.

to maintain an action'.[315] In respect of non-self-executing treaties, some consider that "they can be used indirectly as a means of interpreting relevant constitutional, statutory, common law or other legal provisions".[316]

5.3.5.3.2 Customary International Law as Supreme Law of the Land

The status of customary international law is not clearly indicated in the US Constitution.[317] But it has been stated that from the "national beginnings [of the US] both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction".[318] Appropriately enough, it has been held that customary international law must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today".[319]

Whether considered as federal common law,[320] or *like* federal common law,[321] or as not included within federal common law,[322] the self-executing treaty doctrine is said to be inapplicable to customary international law.[323] As self-executing, customary international law would be "equal in authority to an act of Congress for domestic purposes".[324] Some, however, doubt that customary international law could prevail in case of con-

[315] Vázquez, *supra,* n. 307, p. 721. See also p. 719; Jackson, in *The Effect of Treaties in Domestic Law, supra,* n. 295, pp. 156-9.

[316] Paust, *supra,* n. 303, p. 781.

[317] *Restatement (Third), supra,* n. 38, p. 41.

[318] L. Henkin, "International Law as Law in the United States", 82 MLR, 1984, p. 1557. See also *supra,* n. 296, the passage from *The Paquete Habana* case; Henkin, Pugh, Schachter, Smit, *supra,* n. 35, p. 168.

[319] *Filartiga* v. *Pena-Irala*, 1 *AILC* (2nd), p. 19. The reference to 1789 relates to the year that the Alien Tort Act was enacted. The Court was exercising subject matter jurisdiction in the case on the basis of that Act. See also the *Kadic* case, *supra,* n. 121, p. 1596; A. D'Amato, "The Alien Tort Statute and the Founding of the Constitution", 82 *AJIL*, 1988, pp. 62-7 for a brief history of the Act.

[320] See, eg, the *Filartiga* case, *supra,* n. 319, p. 23; M. J. Glennon, "Can the President Do No Wrong", 80 *AJIL*, 1986, p. 923.

[321] See, eg, Henkin (in *MLR*), *supra,* n. 318, p. 1561.

[322] See, eg, J.I. Charney, "The Power of the Executive Branch of the United States Government to Violate Customary International Law", 80 *AJIL*, 1986, p. 918, n. 14.

[323] Paust, *supra,* n. 303, p. 782.

[324] Henkin, (in MLR), *supra,* n. 318, p. 1566. See also *Restatement (Third), supra,* n. 38, p. 42, where it is stated that "customary international law,...like treaties and other international agreements,...is accorded supremacy over State law by Article VI of the Constitution".

flict with a federal statute.[325] Nonetheless, from a purely analytical perspective, it would appear difficult not to put US treaties and customary international law on the same hierarchical level. Customary international law, after all, is the necessary milieu of those treaties.[326]

Certain norms, such as those present in Art. 2 of the UN Charter,[327] are both treaty and customary international law norms. The Charter prohibition of the threat or use of force in international relations, for instance, is a treaty as well as a customary international law norm; in addition, it has attained the status of *jus cogens*.[328] This status should entitle it to a special place in the Supremacy Clause.

Despite its status in the US Constitution, the violation of international law is neither held to be prohibited nor deprived of domestic legal effect.[329] But such violation is not lightly presumed;[330] and "[t]o the extent possible, courts must construe American law so as to avoid violating principles of public international law".[331] Although the breach of an international obligation might not be denied domestic effect, it would, nonetheless, entail the responsibility of the US under international law.[332]

[325] See, eg, F.L. Kirgis Jr., 'Federal Statutes, Executive Orders and "Self-Executing Custom"', 81 *AJIL*, 1987, pp. 373 *et seq*. But see, eg, J.J. Paust, "The President IS Bound by International Law", 81 *AJIL*, 1987, p. 389. *Cf.* L. Wildhaber/S. Breintenmoser, "The Relationship between Customary International Law and Municipal Law in Western European Countries", 48 *ZaöRV*, 1988, p. 206, where it is indicated that "most countries give priority to [customary international law] over conflicting rules of statutory municipal law".

[326] As the law of the US, customary international law is said to be "full of constitutional uncertainties". — Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 246.

[327] See, eg the commentaries on Art. 2 of the UN Charter in *The Charter of the United Nations*, *supra,* n. 147, pp. 72 *et seq*.

[328] See, eg, Asrat, *supra,* n. 61, pp. 50-2; Henkin, Pugh, Schachter, Smit, *supra,* n. 35, p. 885.

[329] See, eg, *Restatement (Third)*, *supra,* n. 38, § 115 (1); Henkin, (*Foreign Affairs...*), *supra,* n. 302, pp. 196, 214; 240-1. In regard to the power of the president to ignore provisions of international law as the law of the land, a distinction is drawn between treaties and customary international law: "Unlike treaties,...principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by any Presidential act." — *Ibid.*, p. 243. *Cf.* the US Supreme Court's obiter in *The Schooner Exchange* case, *supra,* n. 139, p. 469 to the effect that "[t]he treaty binds [the sovereign] to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract".

[330] Eg, *The Chinese Exclusion* case states that "[i]t will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country". — *Supra,* n. 307, p. 198. See also *ibid.*, p. 199; the *Whitney* case, *supra,* n. 301, p. 962.

[331] *Garcia-Mir* v. *Meese*, 6 *AILC* (2nd), p. 402. See also, eg, *Lauritzen* v. *Larsen*, 5 *AILC*, p. 180; *McLeod* v. *United States*, 17 *AILC*, p. 455; *Weinberger* v. *Rossi*, *supra,* n. 301, pp. 720-1; *Restatement (Third)*, *supra,* n. 38, § 114 and Comment *a*.

[332] See, eg, *Restatement (Third)*, *supra,* n. 38, § 115 (1) (b).

In view of the recognized powers of Congress and the President to violate the US international undertakings that issue from customary international law and treaties, the question arises as to whether such powers are not qualified by a peremptory norm of international law. Where international law, albeit inferior to the Constitution, is the law of the land,[333] and contemporary international law has established a hierarchically structured normative order, it would appear imperative that domestic jurisprudence reflect in due cases the altered status of the norms. The reluctance or failure to make the necessary adjustments would bring an irreconcilable and disruptive confrontation between the domestic and international legal orders. It need hardly be emphasized that such confrontation would be inimical to the reign of law in international relations.

According to Art. 53 of the Vienna Convention on the Law of Treaties,

> a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[334]

It is readily noticeable from the Article that universality and peremptoriness are the twin properties of the norm: Universality makes it a norm of customary international law, and peremptoriness gives it a status higher than other norms that have not yet attained its rank. Breach of a peremptory norm in a treaty entails the nullity of the treaty.[335] Where treaties constitute the supreme law of the land, as in the US, the requirement of their initial and continuing validity under international law must necessarily bring about the incorporation of peremptory and other relevant norms of customary international law in the national legal order.[336] When there arises a domestic need for ascertaining the validity of US treaties, courts would take judicial notice[337] of and apply such of those norms as the nature of the issues involved calls for. The duty of taking judicial notice of relevant international law norms would go to affirm the secure

[333] Some suggest that in the monist/dualist categorization of States, the US "stands somewhere in between". — Jackson, *supra,* n. 306, p. 320. *Cf.* Henkin, (The President...), *supra,* n. 297, p. 932.

[334] *Supra,* n. 300.

[335] The first sentence of Art. 53 of the Vienna Convention on the Law of Treaties decrees that a treaty will be "void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law".

[336] See, eg, Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 204, n. 108.

[337] See, eg, *The Paquete Habana* case, *supra,* n. 296, pp. 112, 115-6; *Ker* v. *Illinois*, 15 *AILC*, p. 359.

place of customary international law within the Supremacy Clause of the US Constitution. That affirmation would at the same time be an acknowledgement of any existing gradation of customary international law norms and of the higher status that peremptory norms command.

A peremptory international law norm in the US legal order would, therefore, approximate basic constitutional provisions.[338] So long as the norm is allowed to maintain such a privileged status under the domestic legal order, it could not but militate against any domestic effect sought to be given to its breach.[339] It would not in the circumstances appear proper that the breach be left unremedied, whatever the constitutional position of the domestic authority that commits the breach and the means used for the purpose.[340]

The US Constitution has incorporated international law without reference to a specific period. The content of international law as US law can therefore be variable, reflecting at any particular period the settled practice of States and various international decision-making bodies. Contemporary international law, as US law, would accordingly have its present-day content. One of the principal features of contemporary international law is the prohibition of an unauthorized resort to force on the international plane. It bears repeating that this prohibition is both a treaty and customary international law norm and has the status of *jus cogens*. Because of its special status, it could hardly appear possible to breach the norm with impunity: It could hardly appear that its breach could be given domestic legal effect without disturbing its status vis-à-vis other basic provisions of the Constitution whose breaches would necessarily be denied legal effect.

[338] See, eg, J. Lobel, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law", 71 *VLR*, 1985, p. 1137. The author indicates that "[t]he fundamental norms of international conduct impose quasi-constitutional limits on Congress...If Congress violates a rule accepted by the international community as a peremptory norm of international society, it acts without power." *Cf.* Glennon, *supra,* n. 320, (80 *AJIL*) p. 923, where it is maintained that "with congressional authorization, the Chief Executive can disregard any norm of customary international law". It is further indicated that "[h]e may also disregard peremptory norms, although it might be noted that governmental violation of a peremptory norm would likely be unconstitutional". — *Ibid.,* n. 2.

[339] *Cf.*, eg, Lobel, *supra,* n. 338, p. 1073, where it is indicated in connection with the domestic effect given to the US violation of international law that "[r]ecent political, social, and legal developments, however, have shaken the foundations of this widely accepted theoretical framework".

[340] *Cf. ibid.,* pp. 1141-2, where it is maintained that "norms should apply to the unilateral acts of a state as well as to treaties. There is no reason to accord unilateral acts a better status than treaties." See *Princz* v. *Federal Republic of Germany*, 33 *ILM*, 1994, pp. 1497 *et seq.* for the views of the dissenting opinion about *jus cogens* and jurisdictional immunity.

Even if the Constitution is considered not to prohibit Congress and the President from violating international law, a peremptory international law norm ensconced as such in that instrument would appear to affect that liberty of violation.[341] Were that norm to be viewed as lacking constitutional authority to prevent its violation, there would hardly be any justification for its privileged status among other international law norms. It might well be that

> both the Congress and the President continue to have their *power*—though not the *right* under international law—to declare war, use force, or otherwise act in violation of the United Nations Charter, as they have the power (though not the right) to disregard other international obligations.[342]

But the violation of the non-use of force in international relations will affect the US position in regard to the UN legal scheme for maintaining international peace and security;[343] it will constitute a unilateral opting out of the scheme; it will undermine the peremptory authority of the norm. Where the US felt itself capable of keeping at bay any serious international reaction, it can act, as any other State in the same position, to have the status of an international law norm altered. Where no such attitude is clear, however, it will be difficult to see how the violation of a peremptory norm could be given domestic legal effect. The mere existence of the power to violate a peremptory norm could not debase the status of the norm where that status is otherwise consistently asserted by words and deeds: The norm is either wholly peremptory—in the contemporary sense of the term—or not; it would not appear capable of admitting of half measures. So long, then, as the US continues to uphold the peremptory status of the norm that prohibits the use of force in international relations, giving domestic legal effect to its violation would appear incompatible with the privileged position that it is expected to have in the US Constitution.

National courts might be constrained to refrain from inquiring into the merits of justifications—as those advanced in the case of the US invasion of Panama—for a violation of a peremptory international law norm. The

[341] It appears that effect has not yet been given in the US "to the doctrine of *jus cogens*". — Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 204, n. 108.

[342] Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 251.

[343] Eg, one of the objectives of the UN stated in the Preamble of its Charter is "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest". (7th para.). The aspiration for a better ordered world would appear to have essentially been the rationale for the development of international law into hierarchical norms.

political question doctrine will be the principal ground on which they rely for refusing to inquire into such alleged violations of international law.[344] What is expected of them will be submitted in the discussion under the next heading.

In concluding this discussion, it needs to be said that the US courts have the duty of taking judicial notice of customary international law and its peremptory norms, and giving effect to them where they are unduly violated. As has been rightly observed,

> [t]he doctrine that the political branches of government have unlimited power to violate customary international law or treaties is out of step with modern developments in international and domestic law, which require that fundamental international norms should be binding domestically.[345]

5.3.5.3.3 Role of the Judiciary

It will be recalled that the District Court had denied Noriega standing to beneficially assert violation of international law, and held Art. 2(4) of the UN Charter and Art. 20 of the OAS Charter, which constituted the principal violated provisions, to be non-self-executing. The Court had accordingly refrained from considering if the US invasion of Panama violated international law. It will further be recalled that the Court had made individual standing dependent on the protest of a State that alleges violation of its sovereignty.

Individuals generally lack standing in international law:[346] In the absence of specifically enabling or obligating provisions inserted in international legal instruments,[347] they can neither pursue claims nor be proceeded against before international judicial or semi-judicial bodies.[348] But other considerations would be at work with regard to domestic courts. Unless otherwise prescribed for reasons of age, condition of health, status, or other causes, natural and juridical persons have a right

[344] See, eg, Henkin, (*Foreign Affairs...*), *supra,* n. 302, p. 143.

[345] Lobel, *supra,* n. 338, p. 1179.

[346] On the level of the International Court of Justice, Art. 34(1) of the Statute of the Court provides: "Only States may be parties in cases before the Court." — 15 *UNCIOD*, p. 335. On the regional level, Art. 44 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides: "Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court." — 213 *UNTS*, p. 221. Art 61(1) of the American Convention on Human Rights is essentially similar to that of the European Convention. — 9 *ILM*, 1970, p. 673. See, further, *Restatement (Third), supra,* n. 38, § 703, Comment *c*.

of access to domestic courts and a duty of appearing before them when so ordered duly. The individual's lack of standing in international law might not necessarily foreclose his competence of raising before domestic courts a particular violation of that law. His competence to seek to benefit from an alleged violation of international law would depend on the status of that law in a specified domestic legal system and the purpose for which the violation is invoked.

International law, as discussed above, has been incorporated in the US legal system and occupies a place within the category of the supreme law of the land. The question that needs to be addressed, then, is whether a defendant in a criminal case could never derive a beneficial defence from a grave violation of international law.

As seen at various junctures of this study, the manner in which a person is brought within a certain jurisdiction is generally held not to hinder the exercise of jurisdiction.[349] Breaches of international law occasioned by instances of abduction, for example, have not been allowed to affect the normal exercise of jurisdiction by US courts.[350] However, not all breaches of international law are of the same gravity. The gravity of a particular breach of international law could be ascertained *inter alia* from the status of the breached provision, the manner of its breach, the means by which it is breached, and the international reaction the breach provokes.[351] It would appear implausible in these circumstances to consider that jurisdiction is exercisable regardless of the status of the breached provision: Putting all breaches of international law on the same level in regard to the exercise of jurisdiction would unjustifiably fail to acknowledge, and give effect to, the hierarchy of peremptory and non-peremp-

[347] See, eg, Articles 173, 175 of the Treaty Establishing the European Economic Community, 298 *UNTS*, p. 11; Art. III, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 *ILM*, 1981, p. 230; *Restatement (Third)*, *supra,* n. 38, § 906, Reporters' Notes, 1; Daillier & Pellet, *supra,* n. 44, pp. 695-7; Ch Rousseau, *Droit International Public*, Tome II, pp. 732-6, for instances of individual standing generated by certain instruments of international arbitration.

[348] Regarding the international criminal responsibility of individuals, see *supra,* ch. 2, pp. 43, 45, 51, 53.

[349] See, eg, *ibid.* pp. 60 *et seq.*

[350] The exercise of jurisdiction would probably be declined where outrageous means are used to procure the person of a defendant: — *United States* v. *Toscanino*, 21 *AILC*, p. 88. But it is not clear how widely the decision's precedential authority is acknowledged. See, eg, *United States* v. *Yunis* (No. 3), 88 *ILR*, p. 182; A.F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, continued", 84 *AJIL*, 1990, p. 472.

[351] *Cf.* Art. 2, Definition of Aggression, *supra,* n. 61; Asrat, *supra,* n. 61, pp. 104 *et seq.*

tory norms of international law incorporated in the US Constitution.

The US invasion of Panama constituted *prima facie* a breach of the norm formulated in Art. 2(4) of the UN Charter which, for our purpose here, includes the core substance of Art. 20 of the OAS Charter. The position of the UN Charter norm in the US Constitution should make it self-executing in the sense of enabling individuals to rely on it at least for purposes of defence. Such individual resort to the norm would only help in its affirmation without affecting the rule of standing in international law: The individual resorts to the norm not in virtue of any standing in international law, but in the exercise of his right to invoke the protection of a basic provision of the Constitution. He would consequently be in no essentially different position from that of others who resort to the protection of basic and non-international law provisions of the Constitution.

Where international law provisions construed to be self-executing could be invoked as the law of the land for purposes of defence, it would be hard to view other international law provisions of the law of the land as unavailable when they could serve or bear on the legal defence of a party in a case. The self-executing issue of international law provisions in the context of defence might then appear to be of limited significance.[352] In Noriega's case, the District Court considered that the provisions of international law that he relied on did not create "a private right of action".[353] Such a right of action would probably have been necessary had Noriega sought to contest the breach of those international law provisions, or to submit other claims on the basis of their breach.[354] But there would appear no need for a private right of action when the breach of those provisions is raised for the sole purpose of a legal defence, especially in a criminal case.[355]

[352] The question of "self-executing" has been characterized as "one of the most confounding in treaty law". — *United States* v. *Postal*, 91 *ILR*, p. 522. It has also been indicated that the decided cases did not "disclose a clear definition of the term". — *Ibid.*, n. 21. This would not be surprising. Except where it is textually unambiguous, the self-executing character of international law provisions is elicited by interpretation, as evidenced by the *Postal* case itself. And interpretation could hardly avoid the vagaries of circumstances.

In other respects, as the law of the land, a non-self-executing norm of international law could not be a dead letter. It has the potential for producing legal effects, one of which would be affording a valid defence in due cases. This potential would persist, albeit not acknowledged by courts, and help loosen the grip of *male captus, bene detentus* on the exercise of jurisdiction. It could therefore be seen that as cases where claims were sought to be judicially asserted, the *Frolova* case, *supra,* n. 304, and the *Tel-Oren* case, *supra,* n. 311, among others, could not be authority against the said potential.

[353] *Noriega, supra,* n. 1, p. 1533.

[354] See, eg, Vázquez, *supra,* n. 307, pp. 719-20.

It may be recalled that under the terms of the *jus cogens* norm formulated in Art. 2(4) of the UN Charter, a presumption of illegality would attach to any unilateral use of force on the international plane. [355A] The duty of justifying the breach of the norm would accordingly fall on the party resorting to such force. If, together with the *jus cogens* norm, the presumption could be considered as incorporated in the US Constitution, there would be more reason to allow a defendant to raise the issue of the illegality of an international use of force. In the event, the defendant would not be required to prove his allegation; it would be up to the party that breached the *jus cogens* norm to justify its breach. The extent and depth of proof seen fit for the justification would depend on the limits that judicial practice would set for inquiring into political questions.

Further, the holding of the District Court that Noriega, in the absence of protest by Panama, had no standing to challenge violation of international law did not address the purpose of the challenge. Noriega was not acting on behalf of Panama but himself; he was not suing but seeking to extricate himself from an impending personal catastrophe; he had no State to afford him diplomatic protection and was in this regard a de facto Stateless person who was invoking the protection of the law under which he was forcibly placed.[356] In other respects, even if Panama had been in a position to protest about the invasion and the forcible removal of Noriega to the US, the protest in all likelihood would not have helped the defence.[357] The question of the legality of the invasion and attendant acts would have raised the political question doctrine that courts studiously avoid.[358] Moreover, since the standing of a Panamanian government before US courts and the effect to be given to its acts are dependent on its recognition by the US, a withdrawal of recognition would have radically affected the value of a protest made by that government.[359] It appears, therefore, that Noriega's resort, for purposes of his own defence, to certain violations of international law by the US would not need to be activated by a prior Panamanian protest about such violations.

In dismissing the jurisdictional issues—violation of international law

[355] See *ibid.*, p. 721. *Cf. Restatement (Third)*, *supra*, n. 38, § 906, where it is stated that "[a] private person,...injured by a violation of an international obligation by a state, may...assert that violation as a defense".

[355A] *Supra*, ch. 4, n. 163.

[356] See *supra*, n.156; p. 174.

[357] Mexico's protest in the *Alvarez-Machain* case had not helped. — See *supra*, ch. 2. pp. 66 *et seq.*

[358] Eg, *Noriega*, *supra*, n. 1, pp. 1538-9; Henkin, (*Foreign Affairs...*), *supra*, n. 302, pp. 143 *et seq.*

[359] See *supra*, pp.188 *et seq.*

and others—submitted by Noriega, both the District Court and the Court of Appeals chose to treat their extraordinary assumption of personal jurisdiction within the traditionally habituated context. The Courts thus missed the opportunity of construing legal provisions and precedents in a manner commensurate with the extraordinary nature of the case. Also, they deprived Noriega of the possibility of raising and taking advantage of any doubt about the propriety of exercising jurisdiction over him.

In breaking out of the traditional context of appraising jurisdictional issues, the District Court need not have ruled on the legality of the US invasion of Panama and ancillary acts. In the interest of safeguarding judicial integrity, it could have required the submission of sufficient evidence and arguments to enable it form a general picture of the invasion's legal complexion.[360] It could then have been able to assess its general findings and decline jurisdiction where it felt its exercise would augur ill for judicial integrity. The Court could thus have preserved its own judicial domain without impinging on the domain of the Executive branch. As regards Noriega, the inquiry thus conducted by the Court might have enabled him to raise sufficient doubt about the legality of his arrest; and as a defendant in an extraordinary criminal prosecution, the doubt would have weighed in his favour.

5.4 Summation of Essentials

Our study has been concerned with the jurisdictional aspects alone of the *Noriega* case. The US exercise of its penal authority over Noriega, who was a foreign head of State or had an equivalent status, was manifestly unique. The US military invasion of Panama that had him removed from office and forcibly brought before the District Court in Miami, Florida, made the case even more unique. Although the invasion was accompanied by the general censure of the world community, the US did not regret its action; it prosecuted, convicted, and imprisoned Noriega[361] who became a living reminder of the unlawful violation of Panama's territor-

[360] The District Court stated at one stage that "the Government's asserted rationales for the invasion are not beyond challenge and need not be blindly accepted by this Court". (*Supra,* n. 1, p. 1537) But it did not seek to give effect to this statement. Instead, it denied Noriega standing to raise violations of international law and concluded that it "does not reach the question of whether...treaties were violated by the United States military action in Panama". (*Ibid.,* p. 1534)

[361] Noriega was convicted of and imprisoned for those offences that were proved against him in accordance with the established provisions of the US legal system. The trial leading to his conviction, sentencing, and imprisonment is not considered in this study.

ial integrity and political independence.

Seen with the benefit of the lesson derived from the events that culminated in the invasion, the US attitude towards Panama did not appear to have freed itself from its embedded hegemonic tradition.[362] When Noriega, cultivated by and in the service of the US intelligence communities, grew uncomfortably intractable, and at the same time became more personally vulnerable, the US did not appear to have had qualms about resorting to its traditional methods of handling its Panamanian difficulties. As the US perceived the satisfactory conduct of its policy on Panama to be hampered by its erstwhile agent, about whose drug-related criminal activities it could not have been unaware,[363] it proceeded to remove him by force and ensure the secure establishment of a more dependable substitute government. The removal of Noriega from office was to all appearances the principal if not the only palpable reason of the US military invasion of Panama.[364]

The invasion constituted a compound breach of a fundamental international law norm which by incorporation would appear to have also become a fundamental norm of the US Constitution. Despite the gravity of the breach, the US considered its forcible exercise of adjudicative jurisdiction over Noriega to be merely a law enforcement process. Neither the District Court nor the Court of Appeals seemed willing to see any inconsistency in such law enforcement process being made possible by the violation of a basic constitutional provision that preserved its peremptory status until a contrary US intention became manifest. The exercise of judicial authority was partly buttressed by the jurisdictional maxim *male captus, bene detentus*. But in view of the kind of norm that needed violation for effecting the arrest of Noriega, that maxim could not have governed legitimately.[365] Further, it would not appear that the rule of the standing of the individual in international law was relevant for dismissing Noriega's contentions of breaches of international law. It would neither appear that the Due Process Clause of the Constitution and the supervisory authority of the courts were satisfactorily held to be inapplicable in the case. The unique case of Noriega would generally appear to confirm the judiciary's extreme caution when faced with issues that involve Executive prerogatives.

[362] See *supra,* ch. 3, pp. 76 *et seq.* for the discussion of the special relations between the US and Panama.

[363] See, eg, Albert, *supra,* n. 3, pp. 36 *et seq.*; Kempe, *supra,* n. 2, pp. 119, 122, 162 *et seq.*

[364] See *supra,* ch. 4 for the discussion of the legal nature of the invasion.

[365] *Cf. supra,* ch. 2, pp. 70 *et seq.*

The US invasion of Panama that occasioned the *Noriega* case was an unfortunate precedent; it was retrogressive; it eroded the UN authority as well as the worth of any US pronouncements on unlawful international use of force by other States. The invasion and the prosecution of Noriega, moreover, had apparently no marked effect on drug trafficking and money laundering in Panama.[366]

The courts could have safeguarded the Judiciary from getting involved in the Executive's exercise of foreign policy by force. The *Noriega* case had grounds on which they could have relied to decline jurisdiction without formally condemning the invasion. Although the District Court maintained that the "rationales for the invasion...need not be blindly accepted",[367] it did not give itself the opportunity of finding out if it should not so accept them: By denying Noriega the right to assert violation of international law for his personal defence, the Court closed the way by means of which it might have gained some insight into the justificative value of those rationales.

It will be appropriate to close this summation by referring to the dissent of Brandeis in *Olmstead* v. *United States*,[368] which the District Court had cited but not followed. The dissenting Justice had observed:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

However notorious and costly the *Noriega* case was, the courts could have encouraged better standards of governmental conduct by declining to exercise jurisdiction. That judicial measure would have been harsh and might have been unpopular; it would, nonetheless, have affirmed the continuing integrity of the breached legal norm. As to popularity, it need not

[366] See, eg, *CIA World Factbook 1997*, where it is stated under Illicit Drugs that Panama is a "major cocaine transhipment point and major drug money-laundering center"; *The Record of the Association of the Bar of the City of New York*, Vol. 47, 1992, p. 686, where narcotics activity is reputed to have increased after the invasion; J. Weeks and P. Gunson, *Panama, Made in the USA*, 1991, p. 104.

[367] *Noriega*, *supra*, n. 1, p. 1537.

[368] 72 L. Ed., p. 944.

be the prime concern of courts in a democratic system.

In submitting that jurisdiction should have been declined in the *Noriega* case, this study does in no sense underestimate the nefariousness of the drug-related offences charged in the indictment, and the brazen cupidity that made their commission possible. But it is hardly tenable that legal retribution should be sought at the expense of the normative pillars of the international and national legal orders.

PART IV

THE HONECKER CASE IN COMPARATIVE PERSPECTIVE

Chapter 6 The Honecker Case and Jurisdiction

The case of Erich Honecker considered in this chapter is intended to give a limited comparative perspective to the jurisdictional issues that constitute the burden of the present study. No attempt will therefore be made to pursue a close examination of the case and of others with which it has jurisdictional affinity. The chapter constitutes Part IV of our study.

Erich Honecker, former chairman of the Council of State and general secretary of the SED[1] of the former German Democratic Republic (GDR), was charged under the law of the Federal Republic of Germany (FRG) with various counts of homicide that were alleged to have been committed in the GDR and authorized under his leadership. He was, however, spared the full process of a trial on account of his grave illness, which the Supreme Constitutional Court of Berlin decided was a sufficient ground for discontinuing the case.[2] The question of personal and subject matter jurisdiction of the FRG in his case was not, therefore, judicially determined. Nonetheless, his case is taken here as a symbol of the jurisdictional essence that informs the criminal cases brought against other GDR officials.

Particular issues that have a special bearing on the jurisdiction of the FRG courts are considered under four sections: The Former GDR, The FRG Jurisdiction, The Honecker Case, and Conclusion.

6.1 The Former GDR

6.1.1 Subject of International Law

The former GDR was an entity that possessed the necessary international law requirements of statehood. It was recognized as a State by others; it was also admitted to the membership of the UN.[3]

[1] The Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands – SED). See, eg, H. Weber, "The Socialist Unity Party", in *Honecker's Germany*, D. Childs, ed., 1985, pp. 1-4.

[2] *Honecker Prosecution Case*, 100 *ILR*, p. 393.

[3] Both the FRG and the GDR were admitted to UN membership on 18 September 1973. – *Basic Facts about the United Nations*, 1983, UN Publication, Sales No. E.83.I. 8, p.127.

Of particular note is the treaty relationship between the FRG and the GDR. Seeking to establish the bases of their relations in an international instrument, the two States concluded a treaty[4] in which they referred to themselves as "the High Contracting Parties" and "the two German States", and undertook in Art. 1 to "develop normal, good-neighbourly relations with each other on the basis of equal rights". The parties were to be guided by the international law effects of certain attributes of statehood, such as "sovereign equality of all States, respect for their independence, autonomy and territorial integrity";[5] they were to "proceed on the principle that the sovereign jurisdiction of each of the two States is confined to its own territory...[and to] respect each other's independence and autonomy in their internal and external affairs."[6]

The legal capacity[7] of the GDR to conclude a treaty with the FRG was manifested again in the Unification Treaty[8] which paved the way for the unity of Germany and the consequential demise of the GDR. As a duly recognized subject of international law, which was affirmed by the FRG Federal Constitutional Court,[9] the GDR was competent to bear rights and obligations, and to will itself out of legal existence.

6.1.2 The ICCPR in the GDR Law

The GDR did not result from a revolution; the socialist system that it espoused for the conduct of its internal and external affairs has been characterized as one imposed from above.[10] In line with its governing

[4] Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic of 21 December 1972, 12 *ILM*, 1973, p.16. The treaty entered into force on 21 June 1973. See, eg, *FRG-GDR Relations Case*, 78 *ILR*, 1988, p. 156.

As defined in Art. 2(1)(a) of the Vienna Convention on the Law of Treaties, a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".— 1155 *UNTS*, p. 331.

[5] Treaty on the Basis of Relation, *supra*, n. 4, Art. 2.

[6] *Ibid.* Art. 6.

[7] Art. 6, VCLT, *supra*, n. 4.

[8] 30 *ILM*, 1991, p. 457.

[9] *FRG-GDR Relations Case*, *supra*, n. 4, p. 165, where the Court held that "[i]n international law terms the GDR is a State and as such a subject of international law".

[10] See, eg, I. Christopher, "The Written Constitution –The Basic Law of a Socialist State?", in *Honecker's Germany, supra*, n. 1, p. 16; G-J. Glaessner, *The Unification Process in Germany: From Dictatorship to Democracy*, 1992, pp. 107-8.

ideology, law in the GDR was "considered subordinate to politics".[11] There was therefore no commitment to the rule of law,[12] which may be understood here as "the counterweight to political power".[13]

Nevertheless, the routine shooting by the GDR border guards of persons attempting to cross over to the FRG territory has brought to the limelight the status that the GDR had assigned to internationally acknowledged human rights norms. As a background for later discussions, brief mention need particularly be made here of the domestic incorporation of the International Covenant on Civil and Political Rights (ICCPR)[14] and of the legal strength enjoyed by the right to life[15] and the right to leave any country, including one's own.[16]

The GDR law did not recognize the right to emigrate; it was rationalized, apparently with official blessing, that

> social conditions under socialism [had] for the first time guaranteed stable social welfare, security and free and unimpeded development of the personality, and to allow a citizen to emigrate to the West was tantamount to delivering him up to an imperialist, aggressive and anti-social system of exploitation... .[17]

Attempts at unauthorized border crossings were consequently met with the "freest use of firearms"[18] by the border guards. Despite such domestic inhospitality attending freedom of movement, among other rights, the GDR sought to incorporate the ICCPR into its legal order and ratified

[11] Christopher, *supra*, n. 10, p. 22. A GDR minister of justice has reportedly explained the notion of socialist legality in terms of "'the dialectic unity of strict adherence to the laws and partiality in their application'". – K.A. Adams, "What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards", 29 *SJIL*, 1993, p. 293.

[12] See, eg, Adams, *supra*, n. 11, p. 293.

[13] A. Watts, "The International Rule of Law", 36 *GYIL*, p. 23.

[14] 999 *UNTS*, p. 171.

[15] *Ibid.*, Art. 6(1).

[16] *Ibid.*, Art. 12(2).

[17] G. Brunner, "Freedom of Movement", in *Before Reforms. Human Rights in the Warsaw Pact States 1971-1988*, G. Brunner ed., 1990, p. 217. See also Adams, *supra*, n. 11, p. 292, where the author indicates: "The fact that no East German border guard was tried by an East German court for murder, homicide, or negligent homicide, implies that according to the official East German understanding of the law, shooting at individuals crossing the border was commensurate with warding off attacks on the socialist state."

[18] Brunner, *supra*, n. 17, p. 212. See also p. 216 about the severe penalties that threatened the illegal crossing of the border; Adams, *supra*, n. 11, p. 292.

that instrument on 8 November 1974.[19] The ratification was not, however, confirmed by the People's Chamber (Volkskammer) as required by the Constitution. Some have therefore considered the Covenant to have lacked domestic application.[20] But the Federal Supreme Court did not attach significance to this absence of legislative confirmation and the failure to make the changes in the domestic law necessitated by the Covenant. The Court was satisfied that the Covenant had "entered into force in both German States on 23 March 1976", and that default in making the required adjustments in its domestic law did "not alter the obligations of the GDR under international law".[21]

6.1.3 Relations with the FRG

Although the Federal Constitutional Court of the FRG had affirmed the international legal status of the GDR,[22] it had maintained that the latter State "belong[ed] to Germany and [could] not be treated in its relations with the Federal Republic as a foreign country".[23] This statement was preceded by others which maintained that the German Reich continued to exist even if "as a complete State, it lack[ed] organization and especially institutional organs, and [was] therefore unable to act for itself"; that "[t]he establishment of the Federal Republic did not mean the creation of a new West German State but a part of Germany reorganized; and that the FRG, without being its legal successor, was 'identical with the State of the "German Reich, albeit in respect of its territorial extent only "partly identical"'.[24]

As a further affirmation of the special relations reputed to govern the two German States, the Court indicated that the FRG had expressly refrained from formally recognizing the GDR, and continued:

[19] See, eg, *The Border Guards Prosecution Case,* (FRG, Federal Supreme Court), 100 *ILR*, p. 381; H. von Mangoldt, "The Communist Concept of Civil Rights and Human Rights under International Law", in *Before Reforms*, *supra*, n. 17, p. 33, where 1973 is indicated as the year of ratification.

[20] Eg, Mangoldt, *supra*, n. 19, p. 34.

[21] *The Border Guards*, *supra*, n. 19, p. 381. Even in a case of shooting to death at the border of the two German States that had taken place before the GDR ratification of the ICCPR, the Federal Supreme Court held the justifying GDR provisions to be incompatible with the standards of the Universal Declaration of Human Rights. – S. Hobe and C. Tietje, "Government Criminality and Human Rights. Restrictions upon State Sovereignty for Criminal Acts Committed by State Officials as an Aspect of German Unification", 37 *GYIL*, 1994, p. 390.

[22] The *FRG-GDR Relations Case*, *supra*, n. 4.

[23] *Ibid.*, p. 162.

[24] *Ibid.*, p. 161.

> If the FRG's behaviour towards the GDR in connection with its policy of *détente* and especially the conclusion of the Treaty is seen as *de facto* recognition, then it is *de facto* recognition of a special kind.[25]

The Court also referred to other provisions of the Treaty, which could well have constituted the contents of other bilateral treaties, to emphasize the special relations of the parties.[26]

Another instance of the nature of the special relations said to exist between the two German States could be noticed in the decision of the Federal Constitutional Court in the *Single German Nationality (Teso) Case*. The Court held there that

> [t]he acquisition of citizenship of the German Democratic Republic by the complainant had the effect that he acquired at the same time German nationality within the meaning of Articles 16(1) and 116(1) of the Basic Law.[27]

Such manner of acquisition of nationality has been argued not be in conflict "with the duties of the Federal Republic of Germany arising from either customary international law or its treaty obligations in relation to the German Democratic Republic".[28] It has been argued, in part, that 'the German Democratic Republic was aware of the differing view taken by the Federal Republic "on the nationality question", as is clear from the Preamble to the Treaty [on the Basis of Relations]. The German Democratic Republic knew that the Federal Republic starts from the premise of the existence of two States in Germany which are not foreign countries in relation to each other.'[29]

In other regards, the asserted special feature of the FRG-GDR relations had an anomalous aspect. For instance, although the FRG did not formally recognize the GDR, it nonetheless acknowledged the entitlements to immunity of the person holding the highest public office in the GDR.[30] In this respect, the Federal Supreme Court held:

[25] *Ibid.*, p. 166. See also *Single German Nationality (Teso) Case*, 91 *ILR*, p. 233, where the Federal Constitutional Court held that "before and after the conclusion of the Treaty on the Basis of Relations, the Federal Government repeatedly stated that the conclusion of that Treaty could not be regarded as a recognition under international law of the German Democratic Republic by the Federal Republic of Germany".

[26] The *FRG-GDR Relations Case*, *supra*, n. 4, p. 166.

[27] *Supra*, n. 25, p. 221.

[28] *Ibid.*, p. 224.

[29] *Ibid.*, p. 233. See the criticism of the Court's approach to the treaty interpretation in J.A. Frowein, "Federal Republic of Germany", in *The Effect of Treaties in Domestic Law*, F.C. Jacobs and S. Roberts eds., 1987, pp. 82-4.

[30] See *supra*, ch. 5, pp. 187 *et seq.*, about the effects of non-recognition.

> The jurisdiction of Federal courts does not extend to persons who are exempted from that jurisdiction by virtue of the general rules of international law...To this category of persons belong Heads of State of other States, and therefore also the Chairman of the Council of State of the GDR.[31] ...
>
> As Head of State the Chairman of the Council of State enjoys those privileges and exemptions to which a Head of State is entitled, the foremost of which is immunity. This means that no criminal proceedings may be instituted against him.[32]

In another case involving the criminal law of the FRG, the Federal Supreme Court held that a citizen of the GDR "was to be regarded as a foreigner"[33] for the purpose of that law.

In closing this section, it may be summed up that the FRG construed in light of its own law and relational perspective GDR's rightful attributes of statehood, and proceeded to exercise jurisdiction over certain matters that took place in the GDR and that under standard circumstances might not have been amenable to the exercise of foreign sovereignty. But the GDR has ceased to exist, leaving the FRG the sole judge over its affairs. The exercise of jurisdiction over GDR matters would, hence, be subject only to those legal constraints that the competent organs of the FRG may decide in applying the relevant domestic rules of law.[34]

6.2 The FRG Jurisdiction

After the unification of Germany, the FRG exercised judicial authority over public employees of the former GDR for acts that were performed in that State and that were now alleged to be criminal. The exercise of jurisdiction is founded on the Unification Treaty.[35] The treaty provisions

[31] *Re Honecker*, 80 *ILR*, p. 365.

[32] *Ibid.*, p. 366.

[33] *Espionage Prosecution Case*, 94 *ILR*, p. 73. *Cf.* The *Teso* Case, *supra*, n. 25, pp. 221 *et seq.*

[34] Inasmuch as the GDR cases fall under the sovereign governance of the FRG legal order, it would not be surprising that—as indicated by Hobe and Tietje—they "are frequently dealt with in German legal literature from a domestic point of view". – *Supra*, n. 21, p. 387.

[35] *Supra*, n. 8. It has been argued that the FRG "has not only a mandate due to its national constitutional order or as a consequence of the reunification as laid down in the Unification Treaty but also a public international law obligation to react to the criminal acts of government officials of the former GDR". – Hobe and Tietje, *supra*, n. 21, p. 400.

that for our purpose here bear on jurisdiction are Articles 1, 3, 8, 9, 18, and 19.

Art. 1 provides:

> (1) Upon the accession of the German Democratic Republic to the Federal Republic of Germany in accordance with Article 23 of the Basic Law taking effect on 3 October 1990 the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia shall become Länder of the Federal Republic of Germany...
>
> (2) The 23 boroughs of Berlin shall form Land Berlin.

Art. 3 provides for the entry into force of the Basic Law of the FRG to the territory of the GDR when the accession of the latter to the FRG becomes effective. Similarly, Art. 8 provides for the extension of the federal law to the GDR where "its area of application" is not otherwise restricted. Art. 9 provides for the continued validity of the GDR law that is compatible with the Basic Law. Art. 18 provides for the continued validity of the GDR court decisions, and Art. 19 provides for the continued validity of the GDR administrative acts that are compatible with the principles of the rule of law.

The determination of the validity or otherwise of any particular legal basis for the exercise of FRG jurisdiction in regard to certain attributes of the former GDR would then be within the competence of the proper domestic organs. In order to arrive at that determination, those organs would need to select and interpret the legal provisions—constitutional, statutory, or international—that are taken to provide the basis for jurisdiction. As a domestic matter, any interpretation given to an applicable international law provision would be domestic. Such would be the case concerning the Unification Treaty provisions and issues of sovereign immunity.

Once adjudicatory jurisdiction over matters relating to the former GDR gets established, the applicability of the FRG law comes to the fore. It has been indicated in one instance that

> [t]wo entirely different legal systems and even more, two entirely different concepts of law are confronted with each other; thus although the West-

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The said public international law obligation might be considered as such within the domestic context were it to derive from domestic law. But where the obligation could not incontrovertibly rest on customary international law or treaty, it will not be an effect producing international law obligation.—*Cf. supra*, ch. 2, pp. 43, 46 *et seq.*, about universal jurisdiction.

> German legal system due to the relevant provisions of the Unification Treaty prevails with only few exceptions, it is questionable and has frequently been brought into question whether the West-German legal order also provides the correct standards for dealing with the GDR's past.[36]

It has also been indicated in another instance that

> [t]he Federal Republic of Germany has a strong commitment to both natural law and the rule of law as organizing principles of its society. Although the Unification Treaty represents a societal commitment to how legal transition should take place, the structure of the Basic Law empowers individual judges, like Judge Seidel, to answer not only questions of law but also broader questions of justice...Like the International Military Tribunal, Judge Seidel is in a position to determine what that justice is because his side won in the struggle for unification. Judge Seidel's application of natural law to the former border guards is subject to the same question asked of Nuremberg: Is it anything more than victor's justice? Although East Germany voluntarily acceded to the Federal Republic of Germany, that accession was not clearly an acceptance of the natural law tradition of West Germany, ... If natural law bends to the needs of political compromise and practical necessity, it is difficult to see how it can justly be applied to individuals who are relatively powerless within the political system.[37]

As we will have occasion to refer to the points raised in the foregoing excerpt, it has been necessary to make a lengthier citation. But it will suffice to observe here first, that the analogy, however remote, with the International Military Tribunal at Nuremberg would appear misplaced. A particular outcome of a military victory could not be placed on the same plane as an outcome of a peaceful self-determination that the case of the former GDR constituted. Second, what has been indicated earlier may be reiterated in regard to both of the above citations: Subject to the constraints embodied in international instruments,[38] the question of the legality of FRG's exercise of jurisdiction over GDR matters is under the exclusive determination of its competent organs.

It has also been indicated in connection with Articles 18 and 19 of the Unification Treaty

> that the rule of law governs the territory of the former GDR...This means that within the scope of the principle of non-retroactivity also criminal acts

[36] Hobe and Tietje, *supra,* n. 21, p. 387. See also *supra,* n. 11, about socialist legality.
[37] Adams, *supra*, n. 11, p. 313.
[38] Eg, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS, p. 221.

> of the past are subject to judicial review because the State governed by the rule of law cannot afford injustice.[39]

Here, too, the declaration of what constitutes the rule of law and its violation, and the evaluation of what act or omission amounts to injustice, would be within the exclusive competence of the FRG.

In addition, it has been argued that

> the violation of the core of certain basic human rights gives States original State jurisdiction and thus extends the principle *aut dedere aut judicare* in its classic form to acts other than international crimes.[40]

It is certainly desirable to have gross violations of human rights duly punished. But where the international law obligation of States to exercise adjudicative jurisdiction in cases of human rights is restricted to such of their violations as come under customary international law or treaties, there would obviously be no such obligation in instances of other breaches of human rights.[41] The maxim *aut dedere aut judicare* could not, then, feasibly support its extension to such other cases. This does not mean, however, that States cannot incorporate in their domestic legislation mandatory jurisdiction for breaches of those human rights that are not covered by international provisions, but that nonetheless might be considered to entail an *erga omnes* obligation. In case of an objection to the exercise of such domestic jurisdiction—whatever its nature—by any legally competent State, the *erga omnes* quality of the breached human right could stand the jurisdiction exercising State in good stead.[42] On the other hand, there would be no such concern where there is no State, as in the united Germany, that is capable of raising the particular objection.

The FRG affirmative jurisdiction in regard to acts and omissions of the former GDR officials is also the denial of their claim to immunity from foreign processes. Immunity that is normally due takes effect unless it is overridden by a valid legal obligation or is properly waived.[43] However, where there is neither a decision by a competent international organ dis-

[39] Hobe and Tietje, *supra*, n. 21, p. 396. See Watts, *supra*, n. 13, pp. 16-21 for certain characteristics of the notion of the rule of law.

[40] Hobe and Tietje, *supra*, n. 21, p. 399.

[41] See the discussion about jurisdiction *supra*, ch. 2, pp. 46 *et seq.*

[42] *Cf.* B. Asrat, *Prohibition of Force Under the UN Charter. A Study of Art. 2(4)*, 1991, p. 185 about breaches of *erga omnes* norms and unilateral sanctions.

[43] See *supra*, ch. 1, pp. 19 *et seq.*, about the development of State immunity from one that was absolute to one that is becoming restrictive.

allowing State immunity,[44] nor a verifiable obligation that hinders States from pleading immunity before a proper national or international jurisdiction, it would appear doubtful that the breach of any human rights norm which may be credited with the status of *jus cogens* would *ipso facto* impinge directly on a recognized right to immunity from foreign jurisdiction.[45] But it has been contended that "*jus cogens* because of its inherent effect to restrict State sovereignty has direct effect on the national legal system".[46]

The *jus cogens* property of norms could well have the effect of restricting States' freedom of action and of denying the protective shield of immunity to any breach of those norms. But the issue that would be of interest here relates to the enforcement forum and the authoritative identification of norms that have attained the status of *jus cogens*. The issue of immunity might not succeed before an international enforcement forum duly empowered to consider breaches of properly identified *jus cogens* norms. But immunity will be a relevant plea before foreign domestic jurisdictions which are not invested with a proper authority to adjudicate on breaches of *jus cogens* norms. In the FRG-GDR instance, the FRG has determined the validity of its exercise of jurisdiction over certain acts and omissions attributable to the former GDR. However, as the FRG-GDR instance is *sui generis* on account of the circumstances that gave rise and surround it, it might not be feasible to argue generally that the restriction of sovereignty that in principle attends the observance of *jus cogens* norms would necessarily negate immunity.[47] The faulty adoption of a certain mode of conduct by a State and its amenability to foreign jurisdiction do not appear to uniformly stand on the same plane, as could be observed from the many breaches of fundamental international law norms that occur with impunity.

[44] See *supra*, ch. 2, pp. 49 *et seq.*, about the International Tribunals for the Former Yugoslavia and Rwanda .

[45] The shootings by the GDR border guards have been acknowledged not to have "reached the intensity (quantitatively as well as qualitatively) of *e.g.* the genocide of the Nazis or the Pol Pot dictatorship and cannot therefore be considered an international crime". – Hobe and Tietje, *supra*, n. 21, p. 397.

[46] *Ibid.*, p. 410.

[47] See *ibid.*, p. 404, where it is argued: "If immunity reflects the sovereign equality of all States and at least the core of human rights norms reflects the interest of the international community as a whole and puts serious restrictions on the sovereignty of the States, it can hardly be denied that immunity which is derived from State sovereignty must therefore also be restricted".

6.3 The Honecker Case

Erich Honecker had occupied the highest State office in the GDR and had, like others holding similar offices, the right to immunity from foreign domestic jurisdiction. His entitlement to immunity derived from the State immunity of the GDR. Although his grave illness cut short his trial in Berlin and obviated the necessity of ruling on any claim to jurisdictional immunity that he could have raised, issues of immunity that were pleaded in the trial of other GDR officials will be discussed here as reflecting on him and his case.

6.3.1 The Charges

Honecker was charged on 12 May 1992 with 68 counts of homicide. The charge stated that he

> between 12 August 1961 and 5 February1989, as Chairman of the State Council and of the National Defence Council of the former German Democratic Republic (GDR), committed homicide jointly with four co-defendants....in particular by ordering, as a member of the National Defence Council, the extension of the installations securing the border with West Berlin and of the barriers on the border with the Federal Republic of Germany (FRG) in order to make them impassable, [and]...he adopted between 1962 and 1980 numerous measures and decisions to strengthen the border still further by constructing metal fences for the siting of directional splinter mines and by creating fields of fire alongside the border installations in order to prevent "breaches of the border". ... at a session of the National Defence Council, [he] stated that the strengthening of the border installations by military means was to be continued even further, that a perfect field of fire had to be ensured everywhere, that when attempts were made to cross the border firearms were to be used ruthlessly, and that "comrades who had successfully used their firearms" were to be "commended".[48]

The trial was to proceed on charges that were eventually reduced to twelve counts.[49] But Honecker, who was suffering from an incurable liver cancer,[50] contested the continuation of his trial as an infringement of his right to human dignity. The Supreme Constitutional Court of Berlin upheld his appeal and his trial was abandoned. In relieving Honecker of the trial, the Court held the "inviolability of human dignity [to be] a

[48] *Honecker Prosecution Case*, *supra*, n. 2, p. 395.
[49] *Ibid.*
[50] Adams, *supra*, n. 11, p. 293, n. 97.

fundamental right under the Constitution of the *Land* of Berlin",[51] and the "requirement that the dignity of man be respected and protected...[to be] ...the expression of an objective system of values infused with the principle that human dignity is inviolable [and] intended to give a person effective protection against action of public authorities which infringe his dignity".[52] The Court accordingly affirmed that "the continued detention in custody of a man suffering from a serious and incurable illness and close to death [was] incompatible with the requirement that human dignity be respected".[53]

6.3.2 Immunity

Although Honecker was at one time judicially acknowledged to possess the status of a head of State and to be entitled to the privileges and immunities attaching to that office,[54] he was nonetheless subjected to the FRG jurisdiction after the German unification. It has been argued in support of the exercise of jurisdiction by the FRG that the GDR had not stipulated in the Unification Treaty the immunity of its former officials.

> Rather, in the Unification Treaty by enlarging the field of application for the law of the former FRG the way has been paved for criminal prosecution. ...waiver of immunity must be made by an explicit statement...[which is] missing in the Unification Treaty. ...the whole structure and contents of this Treaty allows for the conclusion that there was a widespread interest of the

[51] *Honecker Prosecution Case*, *supra*, n. 2, p. 397.

[52] *Ibid.*, p. 398.

[53] *Ibid.*, p. 399. See D.P. Kommers, who indicates that "[t]he Basic Law places human dignity at the center of its scheme of constitutional values. Article 1 (1) declares: 'The dignity of man is inviolable. To respect and protect it is the duty of all state authority.'"—*The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed., 1997, p. 298. See also pp. 312-3 about the legal controversy generated in Germany by the concept of human dignity, which is compared with the American debate on the due process clause of the US Constitution.

In his declaration of 21 May 1991 made at Moscow, Honecker had protested against the arrest of former GDR officials and the order for his own arrest as unlawful and as an act that criminalizes GDR's politics.—See *Erich Honecker om dramatiska händerlser*, (translated from the German Zu dramatischen Ereignissen by Per-Eli Sandén)1992, pp. 92-4. His protest was effectless in practical terms. He had gone to Russia to avoid arrest, but when Russia would no longer protect him, he resorted to the protection of the Chilean Embassy. Later, agreement was reached through diplomatic channels that he should go back to Germany and stand trial.—Hobe and Tietje, *supra*, n. 21, p. 391.

[54] *Re Honecker*, *supra*, n. 31, pp. 365-6.

> GDR in an all-encompassing review of any criminal acts of government officials.[55]

The fundamental change of political attitude that took place in the former GDR and paved the way to the German unification might well have been infused with expectations of retributive justice against delinquent former officials. A clear expression of such expectations in the Unification Treaty might have obviated pleas of immunity.[56] But in the special German situation, it would appear that the successor State gained competence to do what the defunct State could have done in regard to the prosecution of its former officials. The whole matter of the prosecution of former GDR officials and the issue of immunity would thus appear to have solely become the internal concern of the united Germany, and to have fallen under the sovereign authority of its domestic legal order. In such circumstances, waiver of immunity, which for better certainty is normally expressed in explicit terms, would not be of great moment.

It has been argued further that "in cases of such flagrant violations of the core of human rights norms, sovereign immunity is restricted even if the act does not reach the level of an international crime".[57] In view of the analysis in the preceding paragraph, the ruling on the jurisdictional effect of violations of certain human right norms was under the exclusive authority of the FRG domestic law. We shall, nonetheless, briefly address the substance of the argument.

Even though it was acknowledged that "the GDR did not incorporate into the internal legal order any human rights norms relevant to the legal question of government criminality",[58] and that its ratification of ICCPR was not confirmed by its *Volkskammer* in accordance with its constitution,[59] it has nevertheless been contended that the lack of incorporation of human rights norms did not detract from the effect of *jus cogens* norms. Accordingly,

> if *jus cogens* has [a public service] function in the international legal order, the single State's sovereignty is in this regard restricted. States may not refer to their sovereignty in order to justify violations of *jus cogens* and *jus cogens* has an all-embracing effect: rules of international and municipal law

[55] Hobe and Tietje, *supra*, n. 21, p. 403.
[56] Implied waiver of immunity would not ordinarily override the presumption of immunity attaching *ratione materiae* to official acts.
[57] Hobe and Tietje, *supra*, n. 21, pp. 405-6.
[58] *Ibid.*, p. 407.
[59] *Ibid.*, pp. 408-9.

> are null and void if they are in conflict with *jus cogens*. Without this all-embracing effect, the existence of the international society as a legal community would be in danger, as the concept of *jus cogens* demonstrates.[60]

Obviously, States would lack sound legal basis for relying on their sovereignty to avoid responsibility for any breach of *jus cogens* norms. Such breaches might well entail the nullity of the acts that contravene those norms. But in the absence of an agreed manner of enforcement, it would hardly seem practicable to consider as unavailable the procedural immunity from national or international jurisdiction that States deem to be their traditional right. Isolated resolutions of the UN Security Council within the context of international peace and security and holdings by national jurisdictions denying immunity in cases of breaches that involve *jus cogens* norms[61] would not suffice to evidence the crystallization of the overriding jurisdictional role of those norms.

Some have sought to argue that "it would be contrary to the...notion of obligations *erga omnes* to assert an obligation by States to grant immunity for violations of fundamental human rights".[62] It would be helpful to relate the demand for recognition of immunity in such cases to one that was procedural rather than substantive: the demanded immunity would not appear then to be a claim of right to breach fundamental human rights as a denial of the competence of foreign jurisdictions to adjudge any alleged breaches of human rights. A compulsory jurisdiction issuing from an authoritative decision of the UN Security Council or established by agreement[63] would be better equipped to obviate or override a claim of procedural immunity. After all, despite its ever growing interdependence and varied forms of institutional cohesion, the international community still evinces a horizontal dimension that preserves largely intact the basic attributes of States. Where the latter are not under the authoritative régime of sanctions or where they have not undertaken to submit to foreign jurisdiction, they would assert their immunity whenever adju-

[60] *Ibid.*, p. 411. See also *The Border Guards* case, *supra*, n. 19, p. 381. *Cf.* the remarks of B. Simma about *erga omnes* obligations in "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?", in *The Future of International Law Enforcement, New Scenarios – New Law?* J. Delbrück ed., 1993, pp. 135 *et seq.*

[61] See, eg, Hobe and Tietje, *supra*, n. 21, p. 411-2.

[62] A. Bianchi, "Denying State Immunity to Violators of Human Rights", 46 *AJPIL*, 1994, p. 203.

[63] See *supra*, ch. 2, pp. 49 *et seq.*, 56 *et seq.*, the international tribunals established by the Security Council, and the Rome Convention providing for the establishment of an International Criminal Court.

dicative or enforcement action is initiated against them.[64]

It may be noted that the recognition by national jurisdictions of the *jus cogens* status of an international law norm and the universal jurisdiction that it gives rise to might not necessarily mean that violations of the norm will be directly amenable to those jurisdictions. The international crime of torture analysed in the *Pinochet* case judgment of the UK House of Lords[65] may be taken as an example. Although torture was held to have been an international crime before the Torture Convention of 1984[66] and to have qualified for universal jurisdiction as a breach of a *jus cogens* norm,[67] the exercise of domestic jurisdiction over the crime was made dependent on the existence of an enabling national provision, and doubt was expressed about its effect on an otherwise available immunity. Reference may in this regard be made to Lord Browne-Wilkinson who said in his speech:

> I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as jus cogens was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.[68]

It has been indicated further that even after the Torture Convention the UK courts did not acquire jurisdiction over torture under the Convention before it was made an offence in that State.[69] It has been specified still

[64] See Articles 2(6), 24, 25, 39-42 of the UN Charter; *supra,* ch. 1, pp. 19 *et seq.* about the trend of and rationale for restricting sovereign immunity in civil matters.

[65] Judgment of 24 March 1999, http://www.parliament.the-stationery-off.../pa/ld199899/ldjudgmt/jd990324/pino1.htm

[66] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Annex GA Res. 46 (XXXIX, 1984).

[67] *Supra*, n. 65 , .../pino1. , p. 10 (Lord Browne-Wilkinson).

[68] *Ibid.*, .../pino2. , p. 6.

[69] *Ibid.*, .../pino4a. , p. 4 (Lord Hope). See also Lord Saville's opinion at /pino7. , p. 2. Lord Millet, on the other hand, has indicated that "[t]he jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial jurisdiction in respect of crimes of universal jurisdiction under customary international law." (/pino8. , p. 1) He has accordingly considered that the UK courts "did not require the authority of statute to exercise" jurisdiction in the *Pinochet* case. (/pino8. , p. 2.)

more that

> the immunity ratione materiae was lost when Chile, having ratified the Convention to which [the UK law] gave effect and which Spain had already ratified, was deprived of the right to object to the extra-territorial jurisdiction which the United Kingdom was able to assert over these offences...Senator Pinochet continued to have immunity until 8 December 1988 when the United Kingdom ratified the Convention.[70]

National jurisdictions would generally appear reserved when faced with the question of denial of immunity *ratione materiae* to former heads of State. The *jus cogens* status of an international law norm and the *erga omnes* obligation that goes with it might not be uniformly construed by national jurisdictions as bringing forth a universal jurisdiction that per se requires or at least enables the exercise of national jurisdiction. States have manifested reluctance either to prosecute or surrender[71] to an appropriate jurisdiction former heads of State whom they shield despite the notoriety of their crimes against human rights norms of *jus cogens* status.[72] In other respects, the constraints of national policy within which domestic jurisdictions operate and the attendant lack of certainty that all verifiable breaches of *jus cogens* norms will be subjected to the satisfactory processes of an appropriate jurisdiction would not favour States as dependable agents of enforcement.

As a principle consecrated by the generally unswerving practice and opinio juris of States, sovereign immunity, albeit under regulated restriction in certain instances, still appeals more to State sensitivity than

[70] *Ibid.*, .../pino5. , p. 4. Lord Saville has emphasized the consensual basis of a head of State's lack of immunity *ratione materiae* when charged with torture. In his view, "[s]ince 8 December 1988 Chile, Spain and this country have all been parties to the Torture Convention. So far as these countries at least are concerned it seems to me that from that date these state parties are in agreement with each other that the immunity ratione materiae of their former heads of state cannot be claimed in cases of alleged official torture. In other words, so far as the allegations of official torture against Senator Pinochet are concerned, there is now by this agreement an exception or qualification to the general rule of immunity ratione materiae."

[71] Lord Browne-Wilkinson has remarked in the *Pinochet* case that "it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes".—*Ibid.*, /pino2. , p. 3.

[72] Eg, ex-dictators as Idi Amin of Uganda and Mengistu Hailemariam of Ethiopia. See, eg, B. Rubin, *Modern Dictators,* 1987, pp.141-2, 144, 191 *et seq.*

human rights norms of *jus cogens* status.[73] In such circumstances, the latter would appear to have a more dependable chance of prevailing over misplaced claims of immunity when the issue of jurisdiction is considered by properly constituted international organs rather than national authorities. The tendency, however, is to charge States with the principal enforcement responsibility in those accepted or specifically agreed cases of violations of international law.[74]

The world community as presently constitued is under the aegis of the UN legal order which has the sovereign equality of States as one of its basic principles.[75] States firmly adhere to the view that the notion of sovereign equality does not allow of any unlawful intervention or other impingements on their sovereign integrity. Inasmuch as the world community appears to carefully preserve such a notion of sovereignty, not much could be tenably read into the properties of *jus cogens* norms for the purpose of establishing their precedence over sovereign immunity, which is an aspect of sovereignty.[76]

Reference may here be made to the bombings of Yugoslavia carried out by NATO forces for an avowed humanitarian purpose. The bombings, which constituted unilateral measures that were neither authorized by the UN nor fell under the exceptions of the non-use of force on the international plane,[77] would not be a satisfactory precedent for the ascendancy of fundamental human rights norms over equally fundamental concepts of sovereignty: They lacked a generally accepted valid basis in the UN Charter,[78]

[73] See, eg, *Siderman de Blake* v. *Republic of Argentina*, (965 F. 2d 699, 9th Cir. 1992), 24 AILC, 3rd, 1992, p. 338. While agreeing that "official acts of torture ...constitute a *jus cogens* violation" (p. 351), the Court held "that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA." (p. 356). See the discussion about international law as part of the supreme law of the US, *supra*, ch. 5, pp. 238 *et seq.*

[74] See *supra*, ch. 2, pp. 56 *et seq.* and relevant notes for the Rome Convention provisions.

[75] Art. 2(1) of the UN Charter. Although the Article refers to "Members", it would also relate to other States due to the equality of States under customary international law, the near universality of the UN membership, and the responsibility for the maintenance of international peace and security assumed by the UN.

[76] See *supra*, ch. 1, pp. 18 *et seq. Cf.* Bianchi, *supra*, n. 62, pp. 223-5, for a submission that is largely aspirational.

[77] See, eg, Asrat, *supra*, n. 42, pp. 97 *et seq.* and 198 *et seq.*

[78] See the US President's speech of 24 March 1999 about the airstrikes against Yugoslavia, in eg, http://www.nytimes.com/world/europe/032599clinton-address-text.htm where no mention of the UN was made. In fact, Clinton as good as replaced the universal mandate of the UN with the regionalism of NATO when he declared: "Imagine what would happen if we and our allies instead decided just to look the other way as these people were massacred on NATO's doorstep. That would discredit NATO, the cornerstone on which our security has rested for 50 years now."

and they were too isolated an instance to constitute a recognizable State practice that would be emulated in other similar events. Further, the humanitarian considerations advanced to justify the violation of Yugoslav's sovereignty have been joined with national policy interests, detracting thereby from the purported humanitarian nature of the military intervention.[79]

6.3.3 Official Acts

It has been held by the FRG courts that persons in the public service of the former GDR were not relieved of legal responsibility for the acts they had carried out there under colour of official authority. Whatever the official source that authorized the acts,[80] and whatever the public position of the person that carried them out, the acts were not recognized to possess qualities that prevented the exercise of the FRG jurisdiction. Such a view would appear to have resulted from the special situation created by the unification of the two Germanies. As indicated earlier, the GDR cases have fallen under the authority of the FRG legal order,[81] and what might be claimed as an act of State could apparently be denied that status where

[79] See *ibid.*, where Clinton said: "By acting now, we are upholding our values, protecting our interests, and advancing the cause of peace. ... Ending this tragedy is a moral imperative. It is also important to America's national interests. ... Just imagine if leaders back then [Second World War] had acted wisely and early enough, how many lives could have been saved? How may Americans would not have had to die? ... Our mission is clear—to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course, to deter an even bloodier offensive against innocent civilians in Kosovo and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo." In regard to the Serbian military capacity, the NATO commander Gen. Clark has reportedly said: "We are going to systematically attack, disrupt, degrade, devastate and, ultimately, unless President Milosevic complies with the demands of the international community, we're going to destroy these forces, with their facilities."—Quoted by the New York Time's C. Whitney, in his "NATO General Is Intimately Familiar With His Adversary", *ibid.*, /...kosovo-clark-profile.htm. The term national interest can of course be variously appraised, but in the context of Clinton's speech it does not appear to relate solely to assuring respect for the human rights of the Korsovars.

Here is not the place to discuss the basis and wisdom of the military measures claimed to be preventive. But the extensive violation of Yugoslav's sovereignty unilaterally undertaken in the name of human rights could not but make many sufficiently ill at ease as to deny the intervention any precedential value. The unilateral military venture might not hence be of assistance to those who would have fundamental human rights prevail over sovereign immunity in case of jurisdictional confrontation between the two categories of international law norms.

[80] Despite his status as Chairman of the State Council during the period he was alleged to have authorized the ruthless use of firearms against those seeking to flee to West Berlin, Erich Honecker was charged with 68 counts of homicide for such authorization. –See *supra*, n. 48.

[81] See *supra*, n. 34.

found to be incompatible with the requirements of that legal order.[82] The procedural immunity *ratione materiae* acknowledged by some others to relate to official acts has not been followed in the GDR cases.[83]

In the *Border Guards Prosecution Case*, where two border guards of the GDR were prosecuted for the homicide of a person attempting to flee to West Berlin over the Berlin Wall, the defence of act of State was rejected. The Federal Supreme Court held:

> The "act of State doctrine", which is formulated in different ways in those States which follow the common law, is not a general rule of international law within the meaning of Article 25 of the Basic Law. It relates rather to the interpretation to be given to domestic law, that is to say, whether and to what extent the acts of foreign States are assumed to be effective...Continental European, including German, legal practice does not have recourse to that doctrine...In the FRG there is no binding rule that the effectiveness of foreign acts of State may not be reviewed by the courts...In the Unification Treaty...it was not agreed that measures falling within the scope of the GDR's activities should be beyond subsequent review by the courts of the Federal Republic of Germany.[84]

Having thus discarded the *ratione materiae* basis of immunity from prosecution, the Court next decided that *ratione personae*, too, the defend-

[82] See Articles 8, 9, 18, and 19 of the Unification Treaty, *supra*, n. 8.

[83] Eg, in the *Pinochet* case Lord Browne-Wilkinson was of the opinion that "Senator Pinochet as former head of state enjoys immunity ratione materiae in relation to acts done by him as head of state as part of his official functions as head of state". –*Supra*, n. 65 , / pino2. , p. 5. Lord Hutton excepted acts of torture from "a function of a head of state" and denied the immunity to which Pinochet would otherwise have been entitled for his official acts.—*Ibid.*, /pino6. , p. 7. Lord Phillips has indicated "two explanations for immunity ratione materiae. The first is that to sue an individual in respect of the conduct of the state's business is, indirectly, to sue the state. The state would be obliged to meet any award of damage made against the individual. This reasoning has no application to criminal proceedings. The second explanation for the immunity is the principle that it is contrary to international law for one state to adjudicate upon the internal affairs of another state. Where a state or a state official is impleaded, this principle applies as part of the explanation for immunity."—*Ibid.*, /pino9. , p. 1. See also *supra*, ch. 1, pp. 31 *et seq.*

[84] *Supra*, n. 19, p. 372. See also Hobe and Tietje, *supra*, n. 21, p. 405, where the act of State doctrine is said to be "an essentially American development and not commonly recognized as a principle of international law". *Cf.* the *Unification Treaty Constitutionality Case* (Merits), 94 *ILR*, p. 60, where the Federal Constitutional Court has held: "According to German international expropriation law, expropriations carried out by a foreign State, including 'confiscations' without compensation, are regarded in principle as effective provided that the State in question has not exceeded the limits of its power. According to this principle, an expropriation is effective within the area of territorial sovereignty of a foreign State and affects property which at the moment of the expropriation was subject to the territorial sovereignty of the expropriating State." See also, *ibid.*, p. 59.

ants enjoyed no immunity. It was of the view that they were "not to be treated as representatives of a foreign State for the simple reason that the GDR no longer exist[ed]".[85] This reasoning would mean that the defendants could have been treated as representatives of the GDR, probably as members of the public forces, had that State existed, and that they could have accordingly enjoyed immunity. Immunity for their officially authorized acts would have been wrapped in that personal immunity. In the final analysis, the reasoning of the Court would seem to indicate that the defendants were denied immunity *ratione personae* and *ratione materiae* on account of the nonexistence of the GDR State. This particular effect of the nonexistence of the GDR is partly borne out by the controlling authority ascribed to the Unification Treaty as regards, among others, issues of immunity.[86]

The grounds that the Court relied on to dispose of the defence of the border guards gave support to the FRG jurisdiction over their cases. However nefarious their acts, the guards had followed orders and carried out what a dictatorial régime expected of them as a matter of duty and practice. Their accomplishments would have earned them benefits under the system that they served so unquestioningly. They were a small part of a machinery which had amply demonstrated, in connection with the border incidents, the low value it attached to human life. Still, inasmuch as the world community was under its own legal order, that machinery was under the protection of State sovereignty, which in turn was under the protection of international law and could not be violated without a valid title.

The Federal Supreme Court explained, however, that

> [a] defence which was accepted as such at the material time may be considered irrelevant on the ground that it violates a superior rule of law, only if it represents a manifestly gross violation of fundamental concepts of justice and humanity. The violation must be so serious that it infringes those legal principles concerning human worth and dignity which are common to all

[85] *Supra*, n. 19, p. 373.

[86] See, eg, *ibid.*, p. 372; the *Espionage Prosecution Case*, *supra*, n. 33, p. 77, where it is stated: "The problem of espionage activity by persons who in the opinion of the former German Democratic Republic carried out a legitimate activity for that State was clearly not settled, although the possibility presented itself. There is much to suggest that either the German Democratic Republic did not desire such a regulation or it was not feasible, and the parties therefore refrained from settling the matter by agreement." It is further stated on p. 79: "If a regulation concerning immunity from prosecution for this activity is not agreed upon, criminal prosecutions can and must take their course...'inactivity of the legislature' can only be considered as unconstitutional in exceptional circumstances, which are not present in this case."

> people...The conflict between the law as enacted and the requirements of justice must be so intolerable that such a law must yield to the requirements of justice, since it is an improper law...When appraising acts committed on the orders of the State, it must be asked whether the State has exceeded the outer limit set for it by general principles everywhere.[87]

The Court also held that human rights instruments provided additional criteria for overriding inconsistent acts of States. In that regard, it found that the International Covenant on Civil and Political Rights (ICCPR) was in force in the GDR and had encumbered that State with obligations under international law. It accordingly held:

> If, when appraising the GDR's law, there are conflicts between the human rights recognized by it under international law and the actual application of the rules relating to the border and the use of weapons, that conflict may also be taken into account when considering whether a person is acting unlawfully if, on the orders of the State, he infringes human rights protected by an international treaty.[88]

Leaving aside the question of whether the ICCPR was properly incorporated in the GDR legal system,[89] it may be indicated that foreign jurisdictions would appear hesitant to deny immunity in instances of officially authorized murder.[90]

[87] *Supra*, n. 19, p. 380. See also Hobe and Tietje, *supra*, n. 21, pp. 415 *et seq.* re the Radbruch formula which is the basis of the Court's analysis.

[88] *Supra*, n. 19, p. 381.

[89] *Ibid.* Admittedly the ICCPR was not confirmed by the GDR legislature as required by the Constitution. But for the special circumstances enveloping the unity of the two German States, the effect of this absence of confirmation would hardly have been amenable to a judicial determination by the FRG courts. *Cf.* p. 383 where the Court noted the unsettled nature of the right to leave a country.

[90] See, eg, the *Pinochet* case, *supra*, n. 65, /pino4a. , p. 9, where Lord Hope indicated that even in regard to crimes committed in breach of recognized international law norms of *jus cogens* status, "there is as yet no general agreement that they are outside the immunity to which former heads of state are entitled from the jurisdiction of foreign national courts". On p. 4 (.../pino5.), he held that "Pinochet has immunity ratione materiae from prosecution for the conspiracy in Spain to murder in Spain". See also .../pino2., p. 7, where Lord Browne-Wilkinson indicated that "no one has advanced any reason why the ordinary rules of immunity should not apply [to charges of murder] and Senator Pinochet is entitled to such immunity". *Cf.* Hobe and Tietje, *supra*, n. 21, p. 397, where it is stated: "Despite the gravity of some of the criminal acts committed by GDR officials one must, however, hold that none of them does in fact amount to such an international crime in the sense of the ILC-Draft 'Code of Crimes against Peace and Security of Mankind', that is genocide, torture, crimes against peace, crimes against humanity and apartheid."

6.4 Conclusion

Particular attention has been devoted in this chapter to the consideration of the jurisdictional issues raised in the prosecution of certain border guards of the former GDR. As the border guards were prosecuted and eventually convicted for acts they were authorized to carry out, and as Honecker had stood at the apex of the authorizing machinery, the consideration necessarily reflected on the jurisdiction of his aborted case. Had his prosecution not been abandoned on account of his grave illness, Honecker would in all likelihood have been subjected to the full process of a criminal trial.

The principal purpose of the chapter was to see the kind of jurisdictional comparisons that could be made between the Honecker and Noriega cases. Honecker lost office as a result of an internal political action; Noriega lost office as a result of an external military operation. Honecker could have been tried in the former GDR for offences punishable there; Noriega also could have been tried in Panama under its laws, but he was tried in the US for drug-related offences. Honecker was subjected to the jurisdiction of a united Germany; Noriega was subjected to a totally foreign jurisdiction. Honecker's plea to jurisdiction could conceivably have rested on immunity *ratione materiae*, but it was held that no provision for such immunity had been made in the Unification Treaty. Noriega's plea to jurisdiction could conceivably have rested on immunity *ratione personae*[91] had there been an office that awaited him and a State that demanded his return. The peculiarities of each case would indicate that there was no special need for an explicit waiver of immunity. Had such explicit waiver been made, it would not have been of great import in either case. Honecker had wholly fallen under the FRG legal order that governed the cases of the former GDR, and that presumed non-immunity in the absence of a contrary provision in the Unification Treaty; even if there had been a provision of immunity, its fate would have appeared uncertain in view of the attitude manifested by the courts when faced with serious violations of fundamental human rights. With regard to Noriega, he was replaced, as planned, by those who cooperated with the US in its invasion of Panama and his removal to the US, and who therefore had no need for specifically declaring a waiver of immunity.

There is no affinity between the criminal cases of Honecker and Noriega, but both gave rise to issues of jurisdictional immunity that have sim-

[91] As Noriega had used his public office to facilitate criminal activities that he pursued for his personal gain, he could not find protection in the act of State doctrine. See *U.S.* v. *Noriega*, 746 F. Supp. 1506 (S.D.Fla. 1990), pp. 1521 *et seq.*

ilar underlying rules. In addition, it has been submitted in the case of Noriega that even if he was not entitled to plead head of State immunity *ratione personae*, the manner in which he was brought within the US could have been given sufficient weight and the exercise of jurisdiction duly declined.[92] The manner in which Honecker was brought within the jurisdiction of Germany, albeit the result of much political pressure, could not compare with the egregious use of unlawful force that the US allowed itself for apprehending Noriega.

Finally, in regard to the GDR cases, it should be observed that the exercise of jurisdiction over acts committed in the former GDR by the authorized officials of that State might probably have been inconceivable without the special circumstances created by the Unification Treaty. Those special circumstances have pervasively affected the interpretation of, and decision on, the legal provisions related to issues of jurisdiction in the GDR cases. This being the case, these German national decisions would not appear suitable as a referential precedent for other States, and might not be taken as such by them, when seeking to determine questions of jurisdiction and immunity.

[92] *Supra*, ch. 5, pp. 247 *et seq.*

Chapter 7 Concluding Note

The *Noriega* and *Honecker* criminal cases brought to the fore the exercise of domestic jurisdiction in the face of claims to jurisdictional immunity due to heads of State or persons of equivalent position. In addition, the *Noriega* case raised the issue of the propriety of exercising jurisdiction that was acquired as a result of a gross violation of international law attended by an unconscionable loss of life, physical injury and destruction of property.

The claim of Noriega to jurisdictional immunity was, however, neither supportable *ratione personae* nor *ratione materiae*. But, in the interest of the proper administration of criminal justice, the violated fundamental norm of international law and the grave consequences occasioned by that violation would appear to have strongly militated against the exercise of jurisdiction.

With regard to Honecker, the subjection of his case in the special circumstances of the unification of Germany to the sovereign governance of the FRG legal order, deprived his apparent entitlement to immunity *ratione materiae* of the force that it might have otherwise commanded. But in contrast to the *Noriega* case, the exercise of the FRG jurisdiction was discontinued, or what in effect amounts to the same, jurisdiction was declined due to the grave illness of the defendant.

The US military invasion of Panama in December 1989 was an unjustified violation of the basic international legal norm that prohibits the use of force in international relations. As analysed in the present study, the justificatory grounds advanced by the US did not possess the necessary legitimate merits. Not only were the US military measures without valid legal bases, they also lacked the approbation of the world community. Normatively deficient and bereft of condonation by others, the measures were and remained solely unilateral, reminiscent of the pre-UN Charter era. They did not, hence, constitute an accepted precedent that detracted from the effect of the prohibition of force on the international plane. The violation of the prohibition naturally affected the prohibition's continued strength, but the US measures were not such as gave rise to a definite relaxation of the strictly prescribed limits of self-help generally held to be the rule. States that might wish to prosecute persons residing outside their jurisdictions, could not as yet[1] validly follow the US example and use force to bring them within their territorial sovereignty.

Persons sought for purposes of prosecution in a particular jurisdiction might have absconded from there or might have habitually resided in another jurisdiction. The proper method of acquiring jurisdiction over such persons would normally be through the process of extradition. With regard to absconders, they might have obtained asylum in States that have interest in affording them protection. This would usually be the case of fugitive ex-dictators and other persons wanted by States against which or in whose territory they are alleged to have committed various types of grave crimes. Where there is no extradition treaty, or the terms of such treaty are not implemented in good faith, guidance might be sought in the rules that relate to genuine refugees and their asylum.

Under its general definition, a refugee is a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence...is unable or, owing to such fear, is unwilling to return to it.[2]

With regard to this definition alone, which does not appear to cover explicitly other conceivable grounds of persecution, a person who could come within its scope "has the right to seek and to enjoy in other countries asylum from persecution".[3] But the right to seek and to enjoy asylum does not relate to a

> person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

[1] See the possibility of reversion to pre-UN Charter practice in, eg, B. Asrat, *Prohibition of Force Under the UN Charter. A Study of Art. 2(4),* 1991, pp. 46-7.

[2] Art. 1(A)(2), Convention Relating to the Status of Refugees (1951), 189 *UNTS*, p. 137, as amended by Art. 1(2), Protocol Relating to the Status of Refugees (1967), 606 *UNTS*, p. 267.

[3] Art. 14(1), Universal Declaration of Human Rights, UNGA Resol. 217 (III), 10 December 1948. *Cf.* Art. 12(2), ICCPR, which provides for the freedom "to leave any country, including [one's] own". --999 *UNTS*, p. 171.

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.[4]

The right to seek asylum in due cases would not, however, appear to entail the duty of States not parties to the Refugees Convention to grant asylum. Parties to the Convention, on the other hand, would be under certain obligations as regards expulsion and return (refoulement).[5]

States might give haven to all sorts of persons other than those entitled to the status of refugee. This would be an attribute of their territorial sovereignty. But at issue would be the question of whether this attribute could hold equally true with regard to persons who are ineligible under general international law to seek and enjoy asylum. Of the enumerated grounds that negate the right to seek asylum, those that relate to crimes against peace, war crimes and crimes against humanity, and to acts contrary to the purposes and principles of the United Nations must curtail the competence of States to grant asylum.[6] Inasmuch as certain acts and omissions have been made crimes under those specified categories for the protection of the international public order, it would be fundamentally anomalous for States to act at cross purposes with that protection by knowingly harbouring offenders who, like pirates, could rank as *hostes humani generis*. Particular reference by way of a comparative instance may be made to the Security Council resolutions regarding acts of international terrorism directed against international civil aviation.

The Security Council has indicated in connection with the destruction of Pan Am Flight 103 and UTA Flight 772 that it was

> [d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States... .[7]

The Council urged Libya, where the persons alleged to be responsible for the terrorist acts against those Flights were deemed to be found, to fully and effectively cooperate in the process of bringing them to justice.[8]

[4] Art. 1(F), the Refugees Convention, *supra*, n. 1. See also Art. 1(2), Declaration on Territorial Asylum, UNGA Resol. 2312 (XXII), 14 December 1967.

[5] See Articles 31-33 of the Refugees Convention, *supra*, n. 1; Art. 3, Declaration on Territorial Asylum, *supra*, n. 3.

[6] See *supra*, ch. 2, pp. 44 *et seq.*, re international crimes that are amenable to universal jurisdiction.

[7] Preambular para. 1, UNSC Resol. 731 (1992), 21 January 1992.

[8] *Ibid.*, operative para. 3. See also preambular para. 4, UNSC Resol. 883 (1993), 11 November 1993, where the Security Council stated that it was "[c]onvinced that those responsible for acts of international terrorism must be brought to justice".

When Libya failed to comply with the resolution, the Security Council determined that the failure constituted a threat to international peace and security and imposed sanctions against that State.[9]

It would then appear that persons alleged to have committed those offences that negate the eligibility for asylum should be denied the benefit of that humanitarian institution.[10] Any State that affords asylum to such persons would not be protecting them from undue persecution, as defined in the Refugees Convention, but from the justice they deserve. In addition, the protection of alleged offenders would be inimical to the peaceful relations of the protecting State and others seeking to exercise a proper adjudicative jurisdiction over the fugitives.[11] Nevertheless, States that intend to bring to justice those types of fugitives would not be entitled to resort to force against the asylum State. As indicated earlier, the norm prohibiting the use of force in international relations has not been markedly affected by the US invasion of Panama that accomplished the apprehension and arrest of Manuel Noriega. The US self-help measures did not establish an acknowledged precedent that others could follow without incurring legal liability.

Where a State that gave asylum to a person who did not come within the terms of the Refugees Convention was unwilling to surrender him to the State qualified to demand his extradition, there would arise a dispute between those States. If any resolution of that dispute is sought, it would need to go through the process of peaceful settlement of disputes. For the many States that are contractually related under the terms of the Refugees Protocol, Art. IV provides:

> Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.[12]

In other cases the dispute would need to be peacefully resolved in the manner indicated under Chapter VI of the UN Charter. The peaceful

[9] UNSC Resol. 748 (1992), 31 March 1992.

[10] See, eg, Art. 14(2), Universal Declaration of Human Rights, where it is indicated that the right to asylum "may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

[11] See, eg, preambular para. 4, Declaration on Territorial Asylum, which provides "that the grant of asylum by a State to persons entitled to invoke [it]...is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State".—*Supra*, n. 3.

[12] Supra, n. 2.

process might be so drawn out as to fail in yielding quick results; it might also necessitate compromises. Matters that unduly become objects of such compromises would be the casualties of the peaceful process. Still, the long-term preference for these casualties to those that attend a violent resolution of international disputes would not normally pose a serious difficulty.

The peaceful settlement of international disputes is still the rule. The unilateral use of force on the international plane is still the exception. In such circumstances, the acquisition of adjudicative jurisdiction over an alleged offender by the unlawful use of force could hardly fail to militate against the exercise of that jurisdiction.

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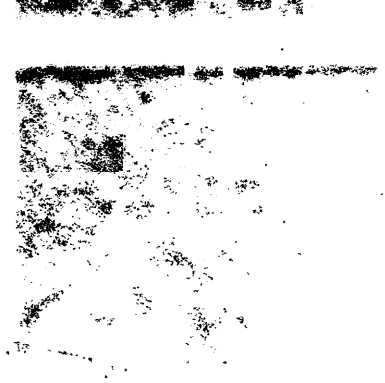
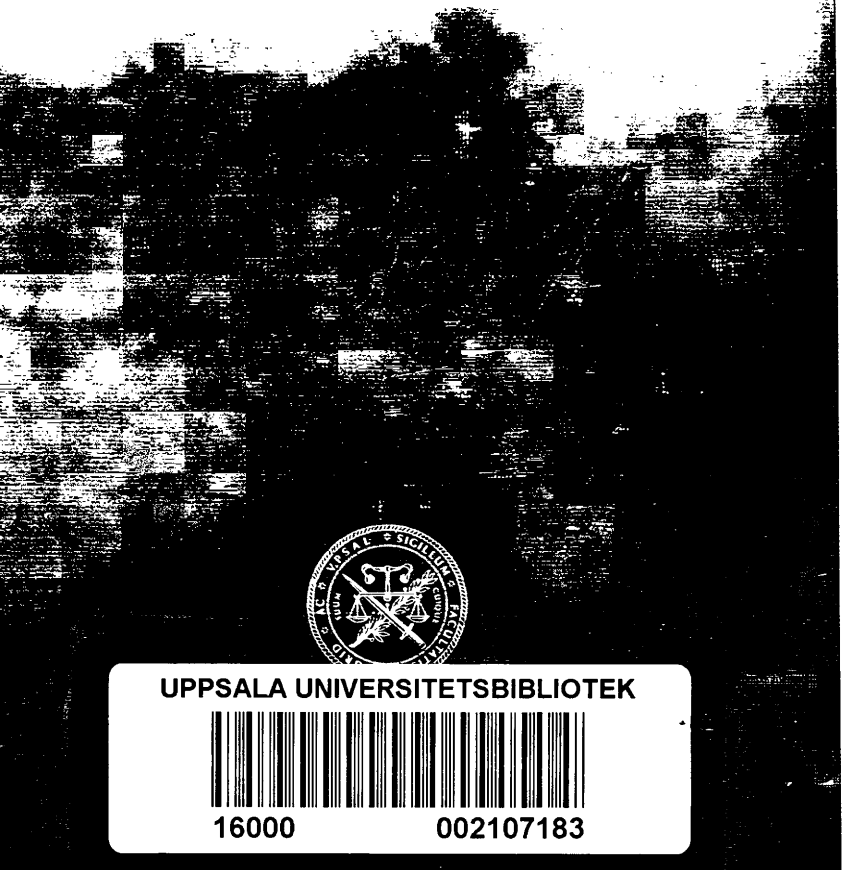


The effective exercise of the US criminal jurisdiction over Manuel Noriega was made possible by the breach of a fundamental international law norm that prohibits the unjustified or unauthorized unilateral resort to force on the international plane.

Against a backdrop of basic rules of jurisdictional immunity and jurisdictional competence, and certain aspects of US-Panama historical relations that principally bear on intervention, the author of this book considers the jurisdictional issues involved in *USA v. Noriega*, and the propriety of exercising jurisdiction in the case. The book also makes a limited comparative reference to the German criminal case of Honecker.

Previous work of the author: *Prohibition of force Under the UN Charter. A study of art. 2(4)*



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