

9-1-1996

## Sovereignty in the New World Order: The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition

William C. Jr. Plouffe

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tjcil>



Part of the [Law Commons](#)

---

### Recommended Citation

William C. Plouffe, *Sovereignty in the New World Order: The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition*, 4 Tulsa J. Comp. & Int'l L. 49 (1996).

Available at: <http://digitalcommons.law.utulsa.edu/tjcil/vol4/iss1/4>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Journal of Comparative and International Law by an authorized administrator of TU Law Digital Commons. For more information, please contact [daniel-bell@utulsa.edu](mailto:daniel-bell@utulsa.edu).



# SOVEREIGNTY IN THE “NEW WORLD ORDER”: THE ONCE AND FUTURE POSITION OF THE UNITED STATES, A MERLINESQUE TASK OF QUASI-LEGAL DEFINITION\*

*William C. Plouffe, Jr.†*

## I. INTRODUCTION

In the last several decades, the world has experienced numerous political changes and upheavals. Examples of these include, but are not limited to: the ongoing Middle East crises, the Vietnam War, the breakup of two European nations (Czechoslovakia and Yugoslavia), the Cuban Missile Crisis, the formation of the European Union (formerly the Common Market), the fall of South African apartheid, the reunification of Germany, the Beijing riots, the dissolution of the Soviet Union and the Warsaw Pact, and the subsequent ending of the Cold War. In many political events, the United States has been looked to and has responded as, in varying degrees, a world leader. The apparent reasons the world looks to the United States as a world leader are its economic and military strength, but not, as evidenced by its critics, its moral character.<sup>1</sup>

Despite the acknowledged leadership of the United States, a number of its recent actions in the area of foreign affairs have caused genu-

---

\* With the most profound apologies to T.H. White for libeling his classic work, *THE ONCE AND FUTURE KING*.

† B.A., North Adams State College, *summa cum laude*, 1980; B.S., Worcester State College, *summa cum laude*, 1981; M.A., University of Massachusetts, 1993; J.D., University of Tulsa College of Law, *with Honors*, 1996.

1. See, e.g., William Pfaff, *A New and Radical Argument for U.S. Interventions*, *CHI. TRIB.*, Jan. 7, 1990, at C3; Charles Burrell, *Our Pearl Harbor Attack on Panama*, *NEWSDAY*, July 29, 1990, at 5.

ine concern to the academic, legal, and political communities, both national and international. These actions include: (1) the invasion of Panama and subsequent arrest of General Manuel Noriega, (2) the near-invasion of Haiti and subsequent ouster of General Raoul Cedras, (3) the kidnapping and arrest of Dr. Machain-Alvarez from Mexico, (4) the invasion of Grenada, and (5) the mining of Nicaragua's harbors. Although there are a number of other incidents which could be categorized with these incidents, this paper will limit its scope to those events listed as some of the more well-known acts by the United States. Other prominent incidents (e.g., the Bay of Pigs invasion, the Dominican Republic action, and the overthrow of Allende in Chile in the 1960s) will not be examined due, in part, to their age.

On September 11, 1990, President George Bush announced to Congress, the nation, and the world the coming of a "New World Order."<sup>2</sup> He continued to use the phrase in his subsequent speeches, including his address at the United Nations in 1991.<sup>3</sup> Supposedly fundamental to this New World Order was "[a] world where the rule of law supplants the rule of the jungle. . . . A world where the strong respect the rights of the weak."<sup>4</sup> The announcement of this New World Order brought varying responses in academia, media, and politics, foreign and domestic. Some thought President Bush's phrase alluded to a world where the United States was the sole authority imposing its own sense of justice.<sup>5</sup> Some (at least the Nicaraguans, after winning in the World Court against the United States concerning the mining of its harbors) thought it was a joke.<sup>6</sup> Most had no idea what it meant,<sup>7</sup> including a number of United States government officials.<sup>8</sup> Many were never able to figure it out.<sup>9</sup> However, meaning can be gleaned from actions, even when official policy may state otherwise.<sup>10</sup>

---

2. Mary Curtius, *Evoking the Memory of Wilson and 'A New World Order'*, BOSTON GLOBE, Sept. 12, 1990, at 14.

3. See William Safire, *The New New World Order*, N.Y. TIMES, Feb. 17, 1991, §6, at 14.

4. Curtius, *supra* note 2.

5. *What New World Order for the World?*, ST. LOUIS POST-DISPATCH, Sept. 16, 1990, at 2B.

6. Joel Achenbach, *'New World Order', What's it Mean, Anyway?*, WASH. POST, Feb. 2, 1991, at D1.

7. See William Neikirk, *Americans Finding Precious Little New Order in Their World*, CHI. TRIB., Feb. 6, 1991, at 13C.

8. See Don Oberdorfer, *Bush's Talk of a 'New World Order': Foreign Policy Tool or Mere Slogan?*, WASH. POST, May 26, 1991, at A31.

9. See Thomas C. Palmer, Jr., *Ordering the New World Order*, BOSTON GLOBE, Mar. 15, 1992, at 67.

10. See Robin Wright, *World View; Old Ways Falling But 'New World Order' is Still Murky*, L.A. TIMES, June 25, 1991, at 1.

Was President Bush merely spouting political verbiage for the consumption of the masses?<sup>11</sup> Was President Bush announcing to the world that the United States would assume the role of a benevolent overseer of world peace?<sup>12</sup> Was he using it to mask United States violation of another nation's sovereignty, in this case merely to protect oil supplies from being controlled by a nation outside the sphere of influence of the United States?<sup>13</sup> Did he "inadvertently" bring to the public's attention the actual formation and/or existence of a true New World Order?<sup>14</sup>

It should be noted that the phrase "New World Order" is not unique and has been used numerous times throughout recent history. President Woodrow Wilson used it in 1918.<sup>15</sup> A Peruvian Finance Minister used it in 1986.<sup>16</sup> Mikhail Gorbachev used it in 1990 just prior to President Bush using it.<sup>17</sup>

Whatever President Bush's intent may have been, many people seized upon the concept of a New World Order to question the recent actions of the United States in the area of foreign affairs. Particularly, the respect the United States may, or may not, have for the sovereignty of other nations. When these previously listed actions are considered in conjunction with the announced principle of a New World Order, emanating from the United States, visions of world tyranny come to mind. Such visions are, fortunately, only given serious consideration by the ultra-right,<sup>18</sup> or the ultra-left,<sup>19</sup> depending upon your own particular perspective.

What is more troubling is that the actions of the United States appear to be foreshadowing a change of attitude on the part of the United States towards the sovereignty of other nations. Unless, of course, either: (1) the change has already occurred or (2) the attitude has always been present, but masked. Taken individually, each incident could be legitimately explained as necessary and proper, under those particular circumstances. However, taken together, these incidents paint a disturbing picture which leads the rational mind to reconsider the

---

11. See Oberdorfer, *supra* note 8.

12. See *What New Order for the World?* *supra* note 5.

13. See *Next: A New World Order?*, NEWSDAY, Mar. 3, 1991, at 31.

14. For an interesting modern discussion of "world order" compare Stanley Hoffman, *Reports of the Conference on Conditions of World Order*, DAEDALUS, June 22, 1995, at 1, with Paul W. Schroeder, *The New World Order: A Historical Perspective*, WASH. Q., Spring 1994, at 25.

15. See Curtius, *supra* note 2.

16. See Safire, *supra* note 3.

17. See *id.*

18. See Joe Klein, *A Plausible Hothead?*, NEWSWEEK, May 29, 1995, at 45.

19. See Jacob Heilbrunn, *The Next Cold War*, THE NEW REPUBLIC, Nov. 20, 1995, at 27.

previously and frequently dismissed claims of many of the smaller and/or socialistic nations regarding the imperialistic practices of the United States.

## II. INTERNATIONAL LAW

Practitioners and students of international law are aware that international law is a nebulous affair at best. Where, under most domestic legal systems, enacting (legislature), enforcing (police), and adjudicating (courts) agencies exist, the international community has only relatively unsubstantial reflections of these institutions. There is no international police force;<sup>20</sup> there is no international code of law binding all nations;<sup>21</sup> there is no effective international legislative body, as resolutions of the United Nations are generally considered non-binding upon nations;<sup>22</sup> and nations can withdraw from the jurisdiction of the International Court of Justice at will<sup>23</sup> as did the United States when it was aggrieved at the apparent turn of events before the International Court of Justice after Nicaragua sued the United States for mining its harbors.<sup>24</sup> However, what substance there is of international law is universally acknowledged to arise from four sources: (1) treaties, (2) customary international law, (3) general principles of law, and (4) the limited use of judicial decisions and the work of highly qualified publicists.<sup>25</sup>

International law is commonly divided into two categories: public international law and private international law. Public international law encompasses the relations involving states. Private international law usually focuses upon the economic relationship between private parties of different nationalities. As this paper addresses the relationship between the United States and the international community, private international law will not be considered.

---

20. INTERPOL is primarily an information gathering and disseminating agency without traditional police powers.

21. However, the *U.N. Charter*, as a multi-lateral treaty, ostensibly including all nations, could be construed as such.

22. See Oscar Schacter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994).

23. Article 36 states in pertinent part:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court . . . .

3. The declarations referred to above may be made unconditionally or on condition of reciprocity . . . or for a certain time.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 36.

24. See Letter of Secretary of State George P. Schultz to the United Nations, dated October 7, 1985 reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 297 (1991) (notifying the United Nations that the United States was terminating its recognition of the compulsory jurisdiction of the International Court of Justice).

25. See *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* art. 38.

### A. *Sovereignty*

Sovereignty was not formally recognized in scholarship until the Sixteenth Century.<sup>26</sup> However, customary international law is the source of this most basic principle of international law. Before the notion of sovereignty can be discussed, the idea of statehood must be examined, as sovereignty only applies between states.<sup>27</sup>

A state has been defined as an entity which has a specific territory, a permanent population, its own government, and the capacity to engage in formal relations with other such entities.<sup>28</sup> Given this generally accepted definition and that the parties to be discussed in this paper are all members of the United Nations (thus recognizing their status as states), there is no question that the condition of statehood exists for all the pertinent parties.

Sovereignty has been equated with the concept of independence,<sup>29</sup> especially between sovereign states.<sup>30</sup> Sovereign states, by definition, are free from the authority of other states. This independence is fundamental to the principle of sovereign equality of all nations.<sup>31</sup>

The term "sovereignty" has been subjected to extensive discussion as to its meaning and manipulation, especially by politicians. Professor Oppenheim traced the development of the concept of sovereignty since the Sixteenth Century, acknowledging that sovereignty was considered to be the "absolute and perpetual power within a State."<sup>32</sup> Initially, sovereignty was not generally recognized as divisible. With the arrival of the Twentieth Century, it was generally recognized that the necessities of international peace required the partial relinquishment of sovereignty to some form of international authority.<sup>33</sup> However, within the

26. See 1 OPPENHEIM'S INTERNATIONAL LAW §§ 67-70 (H. Lauterpacht ed. 8th ed., 1955)[hereinafter 1 OPPENHEIM].

27. Article 2 states in pertinent part:

1. The Organization is based on the principle of the sovereign equality of all its members.

Article 4 states in pertinent part:

1. Membership in the United Nations is open to all . . . peace-loving states . . . .

U.N. CHARTER arts. 2, 4.

28. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987). The Montevideo Convention, Dec. 26, 1933, art. 1, 165 L.N.T.S. 19.

29. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 80 (3rd ed., 1979); 1 OPPENHEIM, *supra* note 26, § 123.

30. See 1 OPPENHEIM, *supra* note 26, § 123; U.N. CHARTER art. 2, ¶ 4.

31. See U.N. CHARTER art. 2, ¶ 1; BROWNLIE, *supra* note 29, at 287; 1 OPPENHEIM, *supra* note 26, § 115.

32. 1 OPPENHEIM, *supra* note 26, §§ 67-70.

33. *Id.* § 67.

ambit of relations between nations themselves, sovereignty with respect to other nations has not been diminished.

Oppenheim presented a simplified description of sovereignty as having two principle elements: territorial sovereignty (*dominium*) and personal sovereignty (*imperium*).<sup>34</sup> Territorial sovereignty is the supreme authority over all persons, items, and acts within that state's territory. Personal sovereignty is supreme authority over all of that state's citizens, at home and abroad.

In contrast, Brownlie has differentiated "sovereignty" from "jurisdiction" in that sovereignty refers to the status of statehood while jurisdiction refers to the rights and powers of a state over a particular territory.<sup>35</sup> Thus, concerning the division of Germany after World War II, although Germany, as a nation, had no practical powers or rights (i.e., jurisdiction), Germany still had international legal status as a nation (i.e., sovereignty).<sup>36</sup> It should be clearly understood that, according to Brownlie, jurisdiction can be *de jure* or *de facto*. This distinction was acknowledged by the British House of Lords in a case of extradition from Israel to Great Britain.<sup>37</sup> Although a nation might not have any legitimate sovereign authority over a territory, it could certainly have jurisdiction, legitimately or illegitimately. The distinction between *de jure* and *de facto* jurisdiction is an implicit recognition of the presence, or lack, of legitimate sovereignty.

Comparing Oppenheim and Brownlie, it appears that Brownlie has acknowledged the political realities of the world while Oppenheim has not. However, Brownlie's recognition of *de facto* jurisdiction, as an element of sovereignty, is not an acknowledgment of *de facto* jurisdiction as morally or legally legitimate. Indeed, the United Nations Charter acknowledges the fundamental importance of a state's territorial integrity.<sup>38</sup>

Under Brownlie's explanation, the corollaries of sovereignty include: (1) a *prima facie* exclusive jurisdiction over a territory and a permanent population; (2) the duty of non-intervention in the jurisdictions of other sovereign nations; and (3) the duties imposed by treaties and customary international law.<sup>39</sup> Oppenheim strongly acknowledged the duty of a state NOT to violate the territorial sovereignty of another state.<sup>40</sup> Oppenheim, like Brownlie, acknowledged that a state's territo-

---

34. *See id.* § 123.

35. *See* BROWNIE, *supra* note 29, at 109-10.

36. *See id.* at 111.

37. *See* Schtraks v. Israel [1964] App. Cas. 556.

38. *See* U.N. CHARTER art. 2, ¶ 4.

39. BROWNIE, *supra* note 29, at 287.

40. 1 OPPENHEIM, *supra* note 26, §§ 125, 127.

rial sovereignty can be limited by customary international law and treaties.<sup>41</sup>

### B. Jurisdiction

Whether or not the reader accepts the idea that jurisdiction is a part of, or separate from, sovereignty, the fact remains that the two concepts are so closely intertwined that they cannot be considered separate from each other in an analysis of sovereignty. For the purpose of analysis, a violation of jurisdiction constitutes a violation of sovereignty.

Generally, jurisdiction is defined as the legal authority and power over a party or claim.<sup>42</sup> Jurisdiction has been recognized to include three elements: jurisdiction to prescribe or legislate,<sup>43</sup> jurisdiction to enforce,<sup>44</sup> and jurisdiction to adjudicate.<sup>45</sup> Jurisdiction to prescribe generally denotes the enactment of laws. Jurisdiction to enforce is the actual executive action taken to induce compliance with the law (i.e., the police function). Jurisdiction to adjudicate is the actual determination of the guilt of the party. It should be noted that some authorities consider the jurisdictions to adjudicate and enforce as overlapping.

Under international law, five bases for jurisdiction are recognized: (1) the territorial principle, (2) the nationality principle, (3) the protective principle, (4) the passive personality principle, and (5) the universality principle.<sup>46</sup> For this paper, the concept of territorial jurisdiction will provide the fundamental framework for the analysis of sovereignty.

#### 1. Territorial Principle

The territorial principle states that the legal system of the nation where the crime was committed has jurisdiction to address the matter.<sup>47</sup> The territorial principle is considered to be "the indispensable foundation for the application of . . . legal rights that a state possesses."<sup>48</sup> The strength and importance of territorial sovereignty is illustrat-

41. *See id.* § 127.

42. *See, e.g.,* BROWNLIE, *supra* note 29, at 110; M.N. SHAW, *INTERNATIONAL LAW* 393 (3rd ed., 1991). *See generally* 1 OPPENHEIM, *supra* note 26, §§ 143 et seq.; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 401 (1987).

43. *See, e.g.,* BROWNLIE, *supra* note 29, at 298; 1 OPPENHEIM, *supra* note 26, § 144; SHAW, *supra* note 42, at 397; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).

44. *See, e.g.,* BROWNLIE, *supra* note 29, at 298; 1 OPPENHEIM, *supra* note 26, § 144; SHAW, *supra* note 42, at 398; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 431 (1987).

45. *See, e.g.,* BROWNLIE, *supra* note 29, at 298; 1 OPPENHEIM, *supra* note 26, § 144; SHAW, *supra* note 42, at 399; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 (1987).

46. *See, e.g.,* BROWNLIE, *supra* note 29, at 300-04; SHAW, *supra* note 42, at 400-11. *See generally* RESTATEMENT (THIRD) OF FOREIGN AFFAIRS § 402 (1987).

47. *See, e.g.,* BROWNLIE, *supra* note 29, at 300-302; 1 OPPENHEIM, *supra* note 26, § 143.

48. SHAW, *supra* note 42, at 400.



ed by the universally recognized grant of jurisdiction over foreign nationals within a state's borders.<sup>49</sup>

There are two principles which extend a nation's jurisdiction beyond its borders and modify the territorial principle: subjective territoriality and objective territoriality. Subjective territoriality creates jurisdiction when the crime was started within the state claiming jurisdiction and was completed elsewhere. Objective territoriality states that jurisdiction is proper when at least one essential part of the crime has been committed within a state's territory. The classic example of this is the firing of a gun across an international border, killing a person.<sup>50</sup>

The most famous case in the extension of jurisdiction beyond a nation's territory is *The Lotus Case*.<sup>51</sup> This case involved the collision of a French steamer (the *Lotus*) with a Turkish vessel, causing the loss of the Turkish vessel and the deaths of a number of Turkish nationals. After the collision, the French watch officer on duty at the time of the accident was arrested and charged by Turkish authorities when the *Lotus* reached Turkey. The French protested and the Permanent Court of International Justice ruled that Turkey had not violated international law because, in part, of the effect of the collision upon Turkish territory—the Turkish vessel sailing under the Turkish flag was considered part of Turkish territory.<sup>52</sup> However, the decision in *The Lotus Case* has been criticized and, according to one international legal scholar, has been overruled by the *High Seas Convention*.<sup>53</sup>

#### a. The United States and Extra-Territorial Effects

The United States has, much to the chagrin of other nations, attempted to extend its international jurisdiction through the enactment of domestic laws. A good example of this is *The Sherman Anti-Trust Act*.<sup>54</sup> Such actions by the United States have prompted numerous complaints from other nations.<sup>55</sup> Even though the United States

49. See *id.* at 401; see also 1 OPPENHEIM, *supra* note 26, § 145.

50. See, e.g., BROWNLIE, *supra* note 29, at 300-01; SHAW, *supra* note 42, at 401.

51. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

52. See BROWNLIE, *supra* note 29, at 302 (reciting the *Lotus* decision).

53. SHAW, *supra* note 42, at 403. The High Seas Convention, Apr. 29, 1958, art 11(1), 450 U.N.T.S. 82, 88.

54. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1994).

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (1994).

55. See CARTER & TRIMBLE, *supra* note 24, at 732-33 (citing L. Collins, *Blocking and*

amended that Act in 1982 ostensibly to limit its international effect,<sup>56</sup> other laws of the United States have had, in the view of many other nations, an unacceptable international effect and have prompted strong criticism.<sup>57</sup> In contrast, the United States has acquiesced to the ruling of a foreign court (the United Kingdom) when the court refused to acknowledge the legal force of President Reagan's Executive Orders freezing the assets of Libya after a series of terrorist attacks.<sup>58</sup> However, whether this was a decision to accommodate a long standing ally and trading partner in a unique situation or a recognition of the impropriety of United States actions under international law is a question for debate, with the final decision leaning heavily against the latter.

## 2. Nationality Principle

The nationality principle establishes jurisdiction over a nation's citizens for acts committed outside the borders of that nation.<sup>59</sup> The rationale is if each citizen enjoys the rights and protection of their sovereign state, they must submit to its justice.<sup>60</sup>

## 3. Protective Principle

The protective principle permits a national jurisdiction over aliens who have committed extraterritorial acts that jeopardize the security of that nation.<sup>61</sup> This principle stems from the universally recognized right of a state to defend itself, codified in the *United Nations Charter*.<sup>62</sup> This principle will also receive examination in this paper under the rationale of "national security" which has been advanced on more than one occasion by the United States as justification for its foreign activities.

### a. National Security

"Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American

---

*Clawback Statutes: The U.K. Approach*, 1986 J. BUS. L. 452, 454).

56. 15 U.S.C. § 6a (1994).

57. See *European Communities: Comments on the United States Regulations Concerning Trade with the U.S.S.R.*, 21 I.L.M. 891 (1982) (commenting that the actions of the United States violated, *inter alia*, the territorial principle).

58. See *Libyan Arab Foreign Bank v. Bankers Trust Co.*, 26 I.L.M. 1600 (1987).

59. See BROWNLIE, *supra* note 29, at 303.

60. See SHAW, *supra* note 42, at 403-04.

61. See *Id.* at 410; See BROWNLIE, *supra* note 29, at 303.

62. U.N. CHARTER art. 51.

Union."<sup>63</sup> But self defense, under the *United Nations Charter*, is limited to responding to armed attacks.<sup>64</sup>

However, the concept of "national security" has been recently defined to include many other factors besides the defense of territorial borders. For example, it has been recognized by statute that national security includes protecting United States citizens abroad.<sup>65</sup> National security has also been defined to include access to natural resources, such as oil, in foreign nations.<sup>66</sup> Indeed, many Arabs view control of their oil as fundamental to American policy.<sup>67</sup> The national security of the United States has been argued to include world order, where "[t]he degree of peril" involving other nations may effect the security of the United States.<sup>68</sup> And national security has even, according to some politicians, included the fostering of "democratic" ideals upon other nations.<sup>69</sup>

However self defense and national security are defined, they must be analyzed with respect to the threat posed. One author lists threats in accordance with the degree of danger:

Annihilation,  
Devastation,  
Domination,  
Subversion,  
Intimidation,  
Deprivation,  
Manipulation,  
Humiliation,  
Aggravation.<sup>70</sup>

The immediacy of the threat must be factored in conjunction with the degree of danger.<sup>71</sup>

Ideally, before the reason of "national security" is used to justify an action, there should be a threat of sufficient immediacy which corresponds to the degree of action taken in response to the "threat" and the

63. Frederick S. Tipson, *National Security and the Role of Law*, in NATIONAL SECURITY LAW 21 (John Norton Moore et al. eds., 1990) (quoting THE FEDERALIST No.41).

64. U.N. CHARTER art. 51.

65. See Omnibus Diplomatic Security & Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986).

66. See David D. Newsom, *America Engulfed*, FOREIGN POL'Y, Summer 1981, at 17.

67. See Lisa Beyers, *Saddam Hussein as the Lesser of Two Evils*, TIME, Oct. 15, 1990, at 54.

68. See Inis L. Claude, Jr., *Theoretical Approaches to National Security and World Order*, in NATIONAL SECURITY LAW 31 (John Norton Moore et al. eds., 1990).

69. See *infra* part III A & D, for reasons offered by the United States for violating the sovereignty of Haiti and Grenada.

70. Tipson, *supra* note 63, at 17.

71. See *id.*

response must be rational and proportional.<sup>72</sup> Further, any response should be within the boundaries of international law.

#### 4. Passive Personality Principle

The passive personality principle allows jurisdiction where an act committed outside the victim's nation harms him, even though the act may have been legal in the jurisdiction where it was committed. The most famous case involving this principle is the *Cutting Case*.<sup>73</sup> In *Cutting*, a Mexican national was defamed by a United States citizen who was subsequently arrested and convicted upon entering Mexico. This principle is not universally recognized, although the United States has recently used it as a justification for its actions.<sup>74</sup> The United States has formally recognized this principle by statute in certain circumstances, such as hostage taking.<sup>75</sup>

#### 5. Universality Principle

The universality principle states that jurisdiction is allowed for all nations, wherever the crime was committed.<sup>76</sup> This principle has been acknowledged to include piracy, hijacking, and war crimes.<sup>77</sup> There has been significant discussion about terrorism being subject to the universality principle, but it has failed to receive recognition as yet.

##### a. International Human Rights

In the modern era, some would argue that the issue of international human rights should be encompassed within the universality principle. In the *United Nations Charter*, human rights are recognized as providing a certain degree of authority for enforcing international human rights.<sup>78</sup> The International Court of Justice has also recognized the status of international human rights.<sup>79</sup> Moreover, numerous conventions and resolutions have been enacted recognizing international human rights.<sup>80</sup>

---

72. See *id.* at 21.

73. See *e.g.* BROWNLIE, *supra* note 29, at 303; SHAW, *supra* note 42, at 408.

74. See SHAW, *supra* note 42, at 409 (referring to *United States v. Yunis*, 681 F. Supp. 896 (D.D.C.1988)).

75. See 18 U.S.C. § 1203.

76. See SHAW, *supra* note 42, at 411; see also BROWNLIE, *supra* note 29, at 304.

77. See SHAW, *supra* note 42, at 411-14.

78. See U.N. CHARTER arts. 55, 56.

79. See *Advisory Opinion on the Presence of South Africa in Namibia* 1971 I.C.J. 16, 57 (June 21); *Barcelona Traction Case (Belg. v. Spain)* 1970 I.C.J. 3, 32, 512-15 (Feb. 5).

80. See, *e.g.*, *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810 (1948); *Convention Against Torture*, 24 I.L.M. 535 (1985); *The International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171; *The Convention on the Rights of the*

Since human rights are a question of international law,<sup>81</sup> the principle of sovereignty is not necessarily a bar to intervention within another nation's domestic affairs regarding the protection of international human rights. However, each state must first be allowed an opportunity to exhaust its domestic remedies.<sup>82</sup> Who is to judge when a violation of human rights justifies intervention? Is this an *ex post facto* judgment after an intervention has already occurred? If so, what happens when the violating nation is powerful and will not recognize the jurisdiction of the International Court of Justice (i.e., the United States)?

C. *Territorial Sovereignty and The Duty to Other Nations*

The *United Nations Charter* states, *inter alia*:

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security . . . . in conformity with the principles of justice and international law . . . .

. . . .

Article 2

The Organization and its Members . . . shall act in accordance with the following Principles.

. . . .

1. . . . the principle of the sovereign equality of all its Members.

. . . .

4. 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 . . . .<sup>83</sup>

Thus, the duty on the part of all nations to respect territorial sovereignty has been codified. This duty has also been recognized as binding under the principles of customary international law.<sup>84</sup>

D. *The Exceptions*

Given the requirement of a specific territory as a precondition for statehood and sovereignty under international law, territorial sovereignty is the foundation for any discussion concerning the violation of sover-

Child, 28 I.L.M. 1456 (1989); European Convention for Human Rights, Nov. 4, 1950, 312 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970).

81. See SHAW, *supra* note 42, at 238 (citing *Tunis & Morocco Cases* 1923 P.C.I.J. (ser. B) No. 4.)

82. See *id.* at 239.

83. U.N. CHARTER arts. 1 & 2 (emphasis added).

84. See 1 OPPENHEIM, *supra* note 26, §§ 124, 125; see also SHAW, *supra* note 42, at 278-79.

eignty. Although modern social, economic, and political factors (e.g., technology, multinational corporations, transboundary environmental concerns, the United Nations) have apparently reduced the territorial exclusivity of the modern state, "[t]erritorial sovereignty remains as a key concept in international law."<sup>85</sup> Indeed, a close examination of the five principles for jurisdiction previously discussed shows that the last four principles—nationality, protective, passive personality, and universality<sup>86</sup>—are mere exceptions to the first principle of territoriality.<sup>87</sup> Territorial sovereignty can also be limited by treaty or customary international law.<sup>88</sup>

### E. *The Right to Use Force*

The *United Nations Charter* guarantees the right of a member nation to use force in self defense, individually or collectively, if they are subject to an armed attack.<sup>89</sup> The use of force is inherent in the principle of national security.<sup>90</sup> The right to use force is, however, qualified by the mandate that peaceful means must first be exhausted.<sup>91</sup>

These restrictions are mirrored throughout international organizations. For example, the *Organization of American States Charter* goes even further in stating: that "[t]he 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."<sup>92</sup>

When force is used, it must only be used in the event of extreme necessity. The use of such force must be in proportion to the wrong to be prevented. These principles have been recognized by the United States since the time of the *Caroline Case* in 1837.<sup>93</sup> Furthermore, concern for a nation's sovereignty is the paramount consideration in any use of force.<sup>94</sup>

85. SHAW, *supra* note 42, at 277.

86. See discussion *infra* part I.B.

87. See discussion *infra* part I.B.

88. See 1 OPPENHEIM, *supra* note 26, § 143.

89. U.N. CHARTER art. 51. See also *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 4, 14, 94 (June. 27).

90. See discussion *infra* part I.B.

91. See U.N. CHARTER art. 33.

92. ORGANIZATION OF AMERICAN STATES CHARTER art. 17.

93. See CARTER & TRIMBLE, *supra* note 24, at 1219-24 (discussing the facts of the *Caroline Case* and the subsequent correspondence between the United States and British governments).

94. See Oscar Schacter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1645 (1984).

A number of international legal authorities consider civil strife to be a purely domestic matter, beyond the purview of international law and potential intervening nations.<sup>95</sup> However, it has been acknowledged that intervention in such civil disturbances is common in the modern world.<sup>96</sup> There have also been acknowledgments, in certain circumstances, concerning the legitimacy of intervention in civil wars.<sup>97</sup>

#### F. *Associated Principles*

##### 1. The Monroe Doctrine

President James Monroe announced the Monroe Doctrine to Congress on December 2, 1823:

[A] principle in which rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Power . . . . [W]e should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety . . . .<sup>98</sup>

The Monroe Doctrine is a formal political statement that the United States considers itself to be the primary influence within the American continents. Indeed, Oppenheim acknowledged that the Monroe Doctrine has since been expanded such that the "United States claims a kind of political hegemony over all the States of the American continent."<sup>99</sup> This expansion was proclaimed by President Roosevelt in 1905, when he stated that the Monroe Doctrine permits the "right of unilateral intervention in Latin America to maintain order."<sup>100</sup> However, even though Oppenheim stated that the Monroe Doctrine is a political, as opposed to a legal, doctrine,<sup>101</sup> international law is, on many occasions, merely equivalent to what the political winds will accept.

95. See Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 140 (citing A. J. THOMAS & A. THOMAS, THE DOMINICAN REPUBLIC CRISIS 1965 (1967)).

96. See Schacter, *supra* note 94, at 1620, 1641-43.

97. See Thomas G. Weiss, *The United Nations and Civil Wars*, WASH. Q., Autumn 1994, at 137.

98. FRANCES H. STEPHENS, WE THE PEOPLE 43 (1987).

99. 1 OPPENHEIM, *supra* note 26, at 315.

100. Alan Berman, *In Mitigation of Illegality: The U.S. Invasion of Panama*, 79 KY. L.J. 735 n.7 (1991) (citing A. THOMAS, NON-INTERVENTION — THE LAW AND ITS IMPORT IN THE AMERICAS 30, 52-53 (1956)).

101. See 1 OPPENHEIM, *supra* note 26, at 316.

## 2. The Brezhnev Doctrine

The Brezhnev Doctrine is one of limited sovereignty whereby one socialist state has the *duty* to intervene in the affairs of another socialist state where the second state has strayed from the socialist path. The damaging influence in such situations would be the enemies of Socialism.<sup>102</sup>

Thus, comparing the Brezhnev Doctrine with the Monroe Doctrine, certain differences and similarities can be deduced. First, where the Monroe Doctrine is apparently limited by geography, the Brezhnev Doctrine suffers no such infirmity. Second, where the Brezhnev Doctrine stresses the protection of Soviet political principles, the Monroe Doctrine does not (at least in its original formulation). However, in practice, the actions of the United States, to preserve democracy in the American sphere of influence, have, on occasion, taken on aspects of the Brezhnev Doctrine.<sup>103</sup> But, at least one scholar rejects such a comparison and similarities between the Monroe and Brezhnev Doctrines.<sup>104</sup>

## 3. The Ker-Frisbie Doctrine

The Ker-Frisbie Doctrine is the product of two cases decided by the Supreme Court. In *Ker v. Illinois*,<sup>105</sup> Ker was kidnapped by a private security agent from Peru and taken to Illinois where he was tried and convicted under various criminal statutes. Although there was apparently an extradition treaty and documents for Ker's extradition, they were not used. The Court, in affirming Ker's conviction, addressed the specific terms of the treaty and found that none of the terms had been violated. The Court, however, ignored the issues of sovereignty and territorial integrity.

In *Frisbie v. Collins*,<sup>106</sup> Michigan police officers kidnapped Frisbie from Chicago and brought him to trial in Michigan. The Court declined to overturn Frisbie's conviction, thus, placing the imprimatur of the state upon interstate abduction where the person was extraditable through normal channels, even if the proper procedure was ignored.

Thus, under the Ker-Frisbie Doctrine, jurisdiction could be gained through illegal acts, such as kidnapping, even if the effect is to reward

---

102. See Charles T. Baroch, *The Soviet Doctrine of Sovereignty*, 1970 A.B.A. STANDING COMM. ON EDUC. ABOUT COMMUNISM 19.

103. See discussion *infra* part I.B. (the justifications offered by the United States for the actions in Haiti, Grenada, and Panama).

104. See John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 114-15 (1986).

105. 119 U.S. 436 (1886).

106. 342 U.S. 519 (1952).



police lawlessness,<sup>107</sup> but not if the violation was so severe as to shock the conscience.<sup>108</sup> However, on remand<sup>109</sup> and in another case,<sup>110</sup> the same circuit ruled a short time later that the *Toscanino* exception does not apply where there is no official U.S. involvement. Interestingly, the *Restatement (Third) of Foreign Relations* states that the arrest of a person within the borders of a foreign state, without that state's consent, is illegal.<sup>111</sup> The Reporters' Note 3 indicates that such an abduction is permissible as long as the nation from which the abduction occurred does not protest.

### III. THE ACTIONS OF THE UNITED STATES

#### A. *The Invasion of Grenada*

##### 1. Facts

Grenada is a tiny Caribbean island with a population of slightly more than 100,000. In 1974, Great Britain granted Grenada its independence, yet Grenada still remained a Commonwealth nation. Early in October of 1983, there was a military coup which installed a new military regime.<sup>112</sup>

The United States invaded Grenada on October 25, 1983, with 1,900 soldiers extensively supported by air and naval powers. This number was later expanded to 6,000. Approximately 400 troops from other Caribbean nations joined the action.<sup>113</sup> The action required no more than a few days to subdue the Cuban contingent, numbering 1100 soldiers and workers. Casualties were minimal. Subsequent reports indicated that no United States citizen had been harmed by the new regime prior to the invasion.<sup>114</sup> Why then did this occur?

Grenada had just experienced a military coup which had installed a socialist regime and there were approximately 1,000 United States citizens allegedly trapped on the island,<sup>115</sup> including 700 medical stu-

---

107. See *United States v. Toscanino*, 500 F.2d 267, 272 (2d Cir. 1974).

108. See *id.* at 273.

109. See *United States v. Toscanino*, 398 F. Supp. 916, 917 (2d Cir. 1975).

110. See *Lujan v. Gengler*, 510 F.2d 62, 63-66 (2d Cir. 1975).

111. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 cmt. b (1987).

112. See Kenneth W. Banta, *Spice Island Power Play; After Bloody Takeover, A U.S. Force Steams Into Range*, TIME, Oct. 31, 1983, at 78.

113. See Ed Magnusen, *D-Day in Grenada; The U.S. and friends take over a troubled Caribbean Isle*, TIME, Nov. 7, 1983, at 22.

114. See *Situation in Grenada*, 20 UN MONTHLY CHRON. 15, Dec. 1983, at 16; Walter Isaacson, *Weighing the Proper Role; Grenada and Lebanon Illustrate The Uses and Limits of Power*, TIME, Nov. 7, 1983, at 42.

115. The United States Embassy on Grenada received a diplomatic note from the new Grenada government prior to the invasion stating that American citizens were in no danger and would be allowed to leave. Apparently the United States State Department chose to ignore the note. See Isaacson, *supra* note 114, at 42.

dents. The primary justifications offered by the United States for the invasion included: (1) the protection of United States citizens,<sup>116</sup> (2) United States national security,<sup>117</sup> (3) a request from the Organization of East Caribbean States for the United States to invade,<sup>118</sup> and (4) concern about Grenada's status as a Cuban-Soviet satellite being a threat to democracy.<sup>119</sup> The United States Department of State, Office of the Legal Advisor, in a letter to the American Bar Association's Section on International Law and Practice, dated February 10, 1984, presented three reasons to justify the invasion of Grenada: (1) invitation of the lawful government authorities of that state, (2) authority of a regional organization to maintain international peace and security, and (3) the right to protect a state's own nationals.<sup>120</sup>

## 2. Response

The worldwide response to the invasion of Grenada was intense. The American media criticized it.<sup>121</sup> Numerous nations denounced it as a violation of international law.<sup>122</sup> Most notably, the United Nations General Assembly in its resolution characterized the invasion of Grenada as a "flagrant violation of international law and of the independence, sovereignty and territorial integrity of that state, . . . [and] deplores the death of innocent civilians resulting from the armed intervention."<sup>123</sup>

## 3. Analysis

Given the small size of Grenada, it cannot be realistically argued that Grenada, or its new government, posed a military threat to the United States. Further, given that Grenada had an extremely small military, it was highly unlikely that the nation could have been considered

116. See *Situation in Grenada*, *supra* note 114, at 15; see also Isaacson, *supra* note 114, at 42.

117. See Isaacson, *supra* note 114, at 42. Fears of a new large airport on Grenada as a possible refueling stop for planes en route to Nicaragua were also cited as justifications for the action. Lou Cannon, *Strategic Airport, Hostage Fears Led to Move*, WASH. POST, Oct. 26, 1983, at A1. However, such a claim is questionable given the close proximity of Cuba which could, and apparently did, serve the same purpose. See *id.*

118. See *Situation in Grenada*, *supra* note 114; see also Isaacson, *supra* note 114, at 42.

119. See Isaacson, *supra* note 114; see also *Situation in Grenada*, *supra* note 114, at 19.

120. See Marian Nash Leich, *U.S. Practice*, 78 AM. J. INT'L L. 655, 662 (July 1984).

121. See generally *Goliath in Grenada*, N.Y. TIMES, Oct. 30, 1983, at D18; see also Abram Chayes, *Grenada Was Illegally Invaded*, N.Y. TIMES, Nov. 15, 1983, at A35.

122. See Michael J. Berlin, *The Invasion of Grenada; Cuba & Mexico Ask U.N. Action Against U.S.*, WASH. POST, Oct. 26, 1983, at A9. See, e.g., Peter Osnos, *British Saw Invasion as Unjustified, Dangerous*, WASH. POST, Oct. 29, 1983, at A14; see also Anthony Robinson, *The Invasion of Grenada: USSR and China Unite in Protest Against 'Violation'*, FIN. TIMES, Oct. 27, 1983, at 4.

123. U.N. Doc. A/38/PV.43. *Text of the U.N. Resolution*, N.Y. TIMES, Oct. 29, 1983, at 4.

to be an imperialistic threat to its Caribbean neighbors. Thus, self defense, individual or collective, is not an acceptable justification.

However, under the levels of threat to national security, it is apparent that Grenada might have constituted an aggravation to the United States. Nevertheless, aggravation is not a proper justification for a military invasion. Further, even assuming that there was a threat to United States national security, the invasion went beyond the bounds of necessity and proportionality.

Regarding the protection of United States citizens, there *might* have been a potential threat. However, no United States citizen had been injured and the new Grenada government had offered to allow United States citizens to leave. Why was this offer not accepted by the United States? Even if this reason legitimately supported the military action by the United States, the action went beyond the scope of protecting citizens when the current government was removed.

The request of the Organization of East Caribbean States, as a justification for the invasion, is also insufficient.<sup>124</sup> As Joyner indicates, the present grounds in this situation, do not justify an invasion based on the request of one of its members. Further, since the United States, Jamaica, and Barbados participated in the invasion and were not members of the Organization of East Caribbean States,<sup>125</sup> the use of such an invitation is extremely suspect.<sup>126</sup>

The request of the lawful government authorities of the nation in question, as justification for the invasion, is also suspect. What constitutes the lawful governing authority of a nation when a change of government has occurred by force and other governments do not recognize the change?<sup>127</sup> In this matter, there was a *de facto* government in place. Drawing an uncomfortable analogy, there is an argument that the American Revolution was unjustified. Thus, the American government is subject to removal by military force. In either case, the new *de facto* government was the government of Grenada. Given the announced reason by the United States (the threat of Grenada to democracy as a Soviet satellite), it appears that the use of the invitation of the "legitimate" government was merely a pretext for the invasion. Indeed, this reason fits comfortably within the Brezhnev Doctrine.<sup>128</sup>

---

124. See Joyner, *supra* note 95, at 136.

125. See Treaty Establishing the Organization of Eastern Caribbean States, June 18, 1981, 20 I.L.M. 1166, 1167 (1981).

126. See Joyner, *supra* note 95, at 136-37.

127. See generally 1 OPPENHEIM, *supra* note 26, at 126 (discussing the aspects of recognition of governments and acknowledging that non-recognition, alone, is not sufficient to deny a government international legal status).

128. See discussion *infra* part II.F.

Additional criticism of the United States is that peaceful means were not employed prior to the invasion. Under the *United Nations Charter*<sup>129</sup> and the *Organization of American States Charter*,<sup>130</sup> peaceful means must be attempted first. The United States violated its obligations to employ such methods. Indeed, the *Organization of American States Charter* prohibits the use of force, except in self defense.<sup>131</sup>

As one author stated, ten years later, although the "Reagan administration officials did not consider the United States strictly bound by international legal norms, neither did they wish U.S. actions to be viewed as flagrant derelictions of international law."<sup>132</sup> This statement illustrates that, as is true in all politics, image is more important than substance. Thus, there was no justifiable reason for the United States' invasion of Grenada. The invasion constituted a violation of international law under the *United Nations and Organization of American States Charters*<sup>133</sup> regarding the sovereignty of another nation.

129. U.N. CHARTER art. 33, ¶ 1.

130. ORGANIZATION OF AMERICAN STATES CHARTER art. 20.

131. ORGANIZATION OF AMERICAN STATES CHARTER art. 18.

132. Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 817 (1993).

133. Article 18 states as follows:

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. . . .

Article 20 states as follows:

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.

Article 21 states as follows:

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 . . . .

Article 23 states as follows:

All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter . . . .

ORGANIZATION OF AMERICAN STATES CHARTER.

Article 2 states as follows:

3. All Members shall settle their international disputes by peaceful means . . . .

4. 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 . . . .

Article 33 states as follows:

1. The parties to any dispute, . . . shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, . . . or other peaceful means.

U.N. CHARTER.

## B. *The Invasion of Panama*

### 1. Facts

The Central American nation of Panama had approximately 35,000 American citizens residing within its borders at the time of the invasion.<sup>134</sup> General Manuel Noriega, the self proclaimed Panamanian "Maximum Leader",<sup>135</sup> had a long history with the United States including a lucrative stint as a CIA informer.<sup>136</sup> The relationship continued, although the CIA was apparently well aware of Noriega's violations of human rights.<sup>137</sup>

Political problems with Noriega brewed for years, primarily focusing upon his activities in the drug trade.<sup>138</sup> However, the "last straw" was the killing of a United States Marine Lieutenant and the subsequent brutalization of a Naval Lieutenant and his wife who had witnessed the event.<sup>139</sup> Prior to the invasion, the United States had attempted numerous other "solutions" concerning Noriega which included propaganda, economic sanctions, and a failed coup.<sup>140</sup>

Further, there had been numerous reports of human rights violations in Panama under Noriega.<sup>141</sup> However, one report indicated that such human rights violations would likely continue even after Noriega's departure.<sup>142</sup>

On December 20, 1989, the United States invaded the nation of Panama, employing 24,000 soldiers.<sup>143</sup> The justification for the large number of troops employed included the necessity to protect the large numbers of American citizens present in Panama. During the invasion, despite the number of United States troops, apparently some American civilian hostages were taken and killed.<sup>144</sup>

Other incidents raising questions of international law, besides the invasion itself, occurred during the action. For example, United States personnel sacked the Nicaraguan Embassy and when Noriega sought political asylum in the Vatican City Embassy, the United States pro-

---

134. See David Adams, et al., *The Invasion of Panama*, NEWSWEEK, Jan. 1, 1990, at 12.

135. See *After Panama; American Interventionism*, THE NEW REPUBLIC, Jan. 22, 1990, at 9.

136. See Jonathan Alter, *For Bush, the Best of a Bad Bargain?*, NEWSWEEK, Jan. 1, 1990, at 23.

137. See, e.g., Robert E. White, *Call Off the Spies*, WASH. POST, Feb. 7, 1996, at A19.

138. See Berman, *supra* note 100, at 740.

139. See Adam et al., *supra* note 134, at 12.

140. See George Church, *Showing Muscle With the Invasion of Panama*, TIME, Jan. 1, 1990, at 20.

141. See *Report Alleges Human Rights Abuses in Panama*, N.Y. TIMES, Apr. 24, 1988, at 8.

142. Dennis McAuliffe, Jr., *Human Rights Abuses in Panama Said to Rise; Report Sees Problem Outlasting Noriega*, WASH. POST, Apr. 24, 1988, at A26.

143. See Stephen Manning, *The U.S. Invasion of Panama*, SCHOLASTIC UPDATE, Feb. 9, 1990, at 8.

144. See Adams et al., *supra* note 134, at 14.

ceeded to bombard the embassy with round-the-clock hard rock music. Neither of these associated actions met the mandates of international law<sup>145</sup> and, further, placed a cloud around the legitimacy of the invasion itself.

The justifications offered for the invasion included: 1) that Noriega himself declared that a "state of war" existed with the United States,<sup>146</sup> 2) the right of self defense,<sup>147</sup> 3) that Noriega's actions threatened the interests of the United States, i.e., the Panama Canal,<sup>148</sup> 4) to bring Noriega to trial in the United States concerning drug trafficking,<sup>149</sup> to restore democratic government in Panama,<sup>150</sup> and to protect the lives of United States citizens.<sup>151</sup>

## 2. Response

Even though the invasion apparently had significant political support at home, its validity under international law was questioned in the media.<sup>152</sup> In Latin America, even though most nations despised Noriega,<sup>153</sup> the invasion was unanimously criticized as a violation of international law.<sup>154</sup> The United Nations and the Organization of American States also condemned the invasion.<sup>155</sup> The Organization of American States voted 20-1 expressing its "regret" that the invasion occurred.<sup>156</sup> The legitimacy of the United States invasion was further questioned when the new U.S. installed leader of Panama announced to the United Nations that Panama had *not* requested a United States invasion, contradicting the apparent assertions of the Bush Administration, dozens of nations continued the criticism of the invasion and the United States.<sup>157</sup>

---

145. See *After Panama, American Interventionism*, *supra* note 135, at 9.

146. See Manning, *supra* note 143, at 8.

147. See *id.*

148. See *id.*; Adams et al., *supra* note 134, at 21; Alter, *supra* note 136, at 23.

149. See Manning, *supra* note 143, at 8; see also Church, *supra* note 140, at 20.

150. See Manning, *supra* note 143, at 8; see also *After Panama, American Interventionism*, *supra* note 135, at 9; see also Alter, *supra* note 136, at 23; Church, *supra* note 140, at 20.

151. See Adams et al., *supra* note 134, at 21; see also *After Panama, American Interventionism*, *supra* note 135, at 9; see also Alter, *supra* note 136, at 23.

152. See William M LeoGrande, *Panama, The Invasion is Beginning to Look Like George Bush's Grenada: A Successful Low Cost Strike to Rid Our Neighborhood of a Pest*, L.A. TIMES, Dec. 28, 1989, at B7; see also Diego Ribadeneira, *Resentment of US Spread in Panama City*, BOSTON GLOBE, Jan. 1, 1990, at 1; see also Pfaff, *supra* note 1, at C3; *Repairing the Damage in Panama*, BOSTON GLOBE, Jan. 5, 1990, at 14.

153. See Church, *supra* note 140, at 20.

154. See Michael S. Serrill, *The Post Invasion Blues*, TIME, Jan. 29, 1990, at 28.

155. See *After Panama, American Interventionism*, *supra* note 135, at 9.

156. See Adams et al., *supra* note 134, at 12.

157. See Ethan Schwartz, *World Criticism of U.S. Invasion Mounts*, WASH. POST, Nov 22,

### 3. Analysis

Generally, when a nation presents a declaration of war, it is safe to assume that military hostilities are imminent. However, was Noriega's claim that a state of war existed between the United States and Panama a legitimate excuse for an invasion? It cannot be realistically argued that Panama militarily threatened the United States. Thus, self-defense is not a legitimate justification.

It is more likely that Noriega's claim was just political posturing. In contrast, what if certain political statements made by numerous United States Presidents were taken just as seriously by the world as the United States took Noriega's statement? The result would, no doubt, have led to many more international crises.

Concerning the protection of the United States citizens in Panama, there may have been some legitimate concerns.<sup>158</sup> But there are also questions. If there was a genuine state of war between Panama and the United States and if there was a legitimate threat to United States citizens, why were the numerous civilians not evacuated from Panama prior to the invasion? As is shown by the length of time that the dispute with Noriega spanned, there was more than sufficient time to conduct such an evacuation. Further, rescue missions of nationals must be bound by the requirements of proportionality and necessity,<sup>159</sup> neither of which were present.<sup>160</sup>

The United States claim that the Panama Canal was at risk was refuted by Pentagon officials, who freely conceded that the Panama Canal was not at risk.<sup>161</sup> Further, what other United States interests were at stake which would justify a full-scale military invasion which toppled a recognized government? None. Although it may be claimed that the United States had justification to invade, regarding the integrity of the Panama Canal treaties, this claim has been soundly refuted.<sup>162</sup>

Finally, even the treaty between the United States and Panama forbids the United States from interfering in the internal affairs of Panama.<sup>163</sup> Further, this same treaty establishes a joint board to ensure the security of the Panama Canal, which the United States failed to use.

---

1989, at A29.

158. See Ved P. Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists*, 84 AM. J. INT'L L. 497 (1990).

159. See Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L. 503, 506 (1990).

160. For example, a few deaths and injuries do not meet the requirement of proportionality. *Id.* at 513. See also Nanda, *supra* note 158, at 495-96.

161. See Adams et al., *supra* note 134, at 12.

162. See Nanda, *supra* note 158, at 500; see Berman, *supra* note 100, at 761-64.

163. See Panama Canal Treaty, Sept. 7, 1977, U.S.-Panama, art. IV, T.I.A.S. No. 10,300.

The restoration of a democratic government in Panama is also suspect.<sup>164</sup> Not only did the United States, at least tacitly through its inaction, approve of Noriega's position as a dictator; the United States was likewise responsible, if not just indirectly, for his position and continuation. As indicated by the history of events, the United States seriously considered Noriega a problem only when he, exercising the rights of a sovereign, began to reject American influence. It was at that point that the status of Panama, as a non-democracy, began to have significance, if only as a pretext. Numerous authorities refute the legality of this reason.<sup>165</sup>

Thus, use of this reason is, like the same justification for the invasion of Grenada, almost identical to the Brezhnev Doctrine.<sup>166</sup> Indeed, the media quickly seized upon the analogy, comparing Bush's possible New World Order of the United States to being an international policeman to maintain democracy.<sup>167</sup> One correspondent even likened the New World Order, whether in Panama or Kuwait, as world domination.<sup>168</sup> The criticism was even more pointed when a former Ambassador to Panama indicated that the use of force by the United States to dispose an undesirable foreign leader is a common United States practice.<sup>169</sup>

What many view as the primary reason for the invasion, the arrest of Noriega to answer drug trafficking charges in the United States, is of questionable value under international law,<sup>170</sup> but well within the boundaries of United States law. Although some may argue that the apprehension of Noriega was merely ancillary to the invasion, from the previous discussion illustrating the invalidity of the invasion on the other claimed grounds, it is evident that the seizure of Noriega was merely an ostentatious kidnapping.<sup>171</sup>

Under United States law and the Ker-Frisbie Doctrine, the manner of bringing a suspect before the courts is irrelevant.<sup>172</sup> Jurisdiction, trial, and conviction will be upheld.<sup>173</sup>

---

164. For example, according to several authors, the restoration of democracy has never been accepted as a legitimate reason for invasion. See Nanda, *supra* note 158, at 500 n.33 (citing Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1985).

165. See, e.g., Berman, *supra* note 100, at 772-79.

166. See *infra* Part I. F of this article.

167. See Church, *supra* note 140, at 20.

168. See Steve Chapman, *Does Bush Want U.S. Domination or a New World Order?*, CHI. TRIB., Mar. 17, 1991, at C3.

169. See John M. Goshko & Al Kamen, *A New US Willingness to Use Force*, WASH. POST, Jan. 5, 1990, at A8.

170. See Nanda, *supra* note 158, at 501.

171. See Berman, *supra* note 100, at 779-82.

172. See *infra* Part I.F.

173. See *United States v. Alvarez-Machain*, 504 U.S.655 (1992).



However, under international law, the matter is somewhat different. Customary international law requires that proper procedures be used to bring a suspect to trial from a foreign nation and that kidnapping is not proper.<sup>174</sup> In such a situation, the entire question of sovereignty is at issue as the kidnapping nation is exercising their sovereign powers within the boundaries of the offended nation.

Practically, there are a number of examples which illustrate the illegality of these actions. Nazi Germany acknowledged that such kidnappings are illegal.<sup>175</sup> South Africa, during the time of apartheid, acknowledged that such kidnappings were illegal.<sup>176</sup> Great Britain, the source of American common law, ruled that such kidnappings were illegal.<sup>177</sup> In all three of these examples, the courts of each nation ruled that the kidnapped person was to be returned. Further, the United States position is severely undermined by its criticism of other nations engaging in this behavior.<sup>178</sup>

One authority who supported the invasion of Panama implicitly recognized that the proffered reasons were invalid by stating that offered rationales are irrelevant, but the act should be evaluated independently.<sup>179</sup> This same author was of the opinion that the human rights violations justified the invasion.<sup>180</sup> However, this argument is questionable given that human rights violations in Panama, and many other "friendly" nations, have been ignored as long as those nations adhere to United States interests.

The United States' invasion violated the *United Nations Charter*<sup>181</sup> in that it was beyond the boundaries of necessity and proportionality and attacked the government itself. This invasion also violated *Organization of American States Charter*<sup>182</sup>, employed military force and intervened in the internal affairs of a sovereign nation.

---

174. See SHAW, *supra* note 42, at 393.

175. See Lawrence Preuss, *Kidnapping of Fugitives From Justice on Foreign Territory*, 29 AM. J. INT'L L. 502 (1935).

176. See Jacques Semmelman, *Decisions of Regional and Foreign Courts*, 87 AM. J. INT'L L. 133 (1993) (examining the South African case of *State v. Ebrahim*, 31 I.L.M. 888 (1992)).

177. See *Ex parte Bennett*, 3 All E.R. 138 (1993), 3 W.L.R. 90 (1993). For a discussion of the case, see 89 AM. J. INT'L L. 142 (1995).

178. See Sidney Zion, *If Israel Put a Bounty on Arafat*, N.Y. TIMES, Jan. 15, 1990, at A17; see also Kenneth E. Sharpe, "Bounty Hunters" and the Drug War, CHIC. TRIB., Apr. 26, 1990, at C27.

179. See Anthony D'Amato, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?* 84 AM. J. INT'L L. 516 (Apr. 1990).

180. See *id.* at 520.

181. See Berman, *supra* note 100, 752-54.

182. See *id.* at 756-61.

### C. *The Mining of Nicaragua's Harbors*

#### 1. Facts

Nicaragua is a small nation in Central America. In 1979, there was a revolt which resulted in an essentially military government.<sup>183</sup> Subsequently, the Nicaraguan government was responsible for numerous human rights violations.<sup>184</sup> Further, the Nicaraguan government forged close ties with the Soviet-bloc including shipments of arms. They began destabilizing activities in neighboring nations such as El Salvador.<sup>185</sup>

During the Reagan Administration in the 1980s, the United States was essentially involved in a "secret war" supporting the Contra's, a pro-United States guerilla group, in an effort to topple the unfriendly Sandinista government.<sup>186</sup> One part of this "secret war" was the mining of Nicaragua's harbors which involved the Central Intelligence Agency(CIA).<sup>187</sup> As a result of the mining, not only were three Nicaraguan vessels sunk, but a dozen freighters from various other nations (including the Soviet Union, Japan, and Great Britain) were damaged with injuries to crew members.<sup>188</sup>

When Nicaragua asked the United Nations Security Council for a resolution denouncing the mining, the United States was forced to use its veto to prevent the resolution from passing.<sup>189</sup> Subsequently, Nicaragua filed suit in The International Court of Justice on April 9, 1984.<sup>190</sup> However, three days before the suit was filed, the United States stated that it would not accept the jurisdiction of the Court.<sup>191</sup> Subsequently, the United States withdrew from the case and refused to recognize the jurisdiction of the International Court of Justice.<sup>192</sup> Despite this refusal to recognize jurisdiction, Nicaragua prevailed before the International Court of Justice<sup>193</sup> as well as in the forum of world opinion.

---

183. See Moore, *supra* note 104, at 44-45.

184. See *id.* at 117 n.293 & 121 n.324 and accompanying text.

185. See generally *id.*

186. See George Church, *Explosion Over Nicaragua*, TIME, Apr. 23, 1984, at 16.

187. See *id.*; see also Steven Strasser et al., *The CIA's Harbor Warfare*, NEWSWEEK, Apr. 16, 1984, at 45.

188. See Robert A. Kittle, *An Exercise in Delicate Harassment*, U.S. NEWS & WORLD REP., Apr. 23, 1984, at 23.

189. See Church, *supra* note 186, at 16.

190. See Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

191. See Pico Iyer, *Trouble With the Law*, TIME, Dec. 10, 1984, at 42.

192. See Letter of Secretary of State George P. Schultz to the United Nations, (Oct. 7, 1985), reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, 297 (1991) (notifying the United Nations that the United States was terminating its recognition of the compulsory jurisdiction of the International Court of Justice).

193. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (Jun. 27).

The culpability of the United States was highlighted in 1986, when a military cargo plane was shot down while delivering arms and ammunition to the Contras. The sole surviving crewman was captured and confessed that the CIA (of the United States) was responsible for this and other such missions.<sup>194</sup> However, none of these facts are meant to mitigate any clear violations of international law by Nicaragua.<sup>195</sup> The purpose of this article is to examine the actions of the United States.

## 2. Response

The media lambasted the United States for the mining of Nicaragua's harbors, one critic referring to it as "harebrained."<sup>196</sup> Even the allies of the United States, including France and Great Britain, expressed their dismay in the actions of the United States concerning the mining.<sup>197</sup> Domestically, even staunch Republicans in the Congress criticized the actions.<sup>198</sup> This resulted in resolutions passed in both Houses calling for the ending of the mining.

The United States was also strongly criticized for its refusal to acknowledge the jurisdiction of the International Court of Justice for two reasons: first, the United States had accepted jurisdiction ever since the Court's inception; and second, the United States was compared to Iran, which refused to acknowledge the decision of the International Court of Justice when it decided *for* the United States in the *Hostage Case*.<sup>199</sup> International legal authorities expressed grave concern as to the consequences of this action of the United States.<sup>200</sup>

## 3. Analysis

The essential issue of this matter is not just limited to the mining of Nicaragua's harbors but encompasses the total response to Nicaragua's actions by the United States. Generally, was the United States justified in assisting El Salvador in their troubles with Nicaragua and, specifically, was the mining of Nicaragua's harbors, as an illustrative example of United States actions, justified?

---

194. See Peter Ross Range & Steven Emerson, *A Doomed Arms Drop; Is the CIA Breaking the Law in Nicaragua?*, U.S. NEWS & WORLD REPORT, Oct. 20, 1986, at 6.

195. See Moore, *supra* note 104, at 79-85.

196. See Tom Wicker, *Covert Means Fiasco*, N.Y. TIMES, Oct. 10, 1989, at A29.

197. See Church, *supra* note 186, at 16.

198. See *id.*

199. See Iyer, *supra* note 191, at 42; see also *World Courts' Black Eye for Uncle Sam*, U.S. NEWS & WORLD REP., May 21, 1984, at 13.

200. See, e.g., Chayes, *supra* note 190; see also Alfred P. Rubin, *Nicaragua, The World Court, and the United States*, THE CHRISTIAN SCI. MONITOR, July 15, 1986, at 13.

There is little doubt that one nation, in the role of an ally, can come to the aid of another nation under attack.<sup>201</sup> Thus, the United States, as an ally of El Salvador, would be generally permitted to assist under the principle of collective self-defense.<sup>202</sup> But does insurgency, in the form of guerilla warfare, constitute such an attack? The actual decision by the International Court of Justice in this matter<sup>203</sup> clearly shows that such activity will trigger a nation's right to employ defensive measures, indicating that such activity is an attack. But do defensive measures include the right to mine harbors (i.e., to enter the boundaries of the alleged violator and take what amounts to essentially offensive action)?

Did the actions by Nicaragua justify the actions of the United States in the manner taken? Moore says yes, but he concentrates his argument on the preservation of world order.<sup>204</sup> However, implicit in Moore's argument is the role assumed by the United States as the world policeman for democracy. This undeniably implicates the Monroe and Brezhnev Doctrines, which Moore vehemently argues are not accurately applied to the Nicaragua situation. Moore, with some validity, argues that a nation is entitled to an effective defense.<sup>205</sup>

Should an effective defense, in turn violate international law? According to Oscar Schacter, a third nation does not have the right to carry on a counter-intervention within the boundaries of a nation where civil war is not occurring.<sup>206</sup>

In response, James P. Rowles points to the lack of evidence that the government of Nicaragua was responsible for the actions in El Salvador. If sufficient evidence did exist to justify the acts of the United States, why did the United States not present it to the International Court of Justice and accept judgment? Further, Rowles notes that submission of a dispute to the neutral analysis of a third party is fundamental to justice.<sup>207</sup> The United States, by refusing to acknowledge the jurisdiction of the International Court of Justice, unilaterally placed itself above the law.

Moore argues that America was not using the Brezhnev Doctrine but responding to insurgency.<sup>208</sup> Further, Moore claims that the United

---

201. See 2 OPPENHEIM'S INTERNATIONAL LAW § 77 (H. Lauterpacht ed., 7th ed., 1952).

202. See Schacter, *supra* note 94, at 1642.

203. See Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 4 (Jun. 27).

204. See Moore, *supra* note 104, at 43.

205. See *id.* at 43.

206. See Schacter, *supra* note 94, at 1643-44.

207. See James P. Rowles, "Secret Wars," *Self Defense and the Charter — A Reply to Professor Moore*, 80 AM. J. INT'L L. 568 (1986).

208. See Moore, *supra* note 104, at 111.

States did not seek the overthrow of the Sandinista government.<sup>209</sup> Moore's claim is patently invalid as shown by the stated desire of United States to install democratic governments in Latin America (i.e., Grenada, Panama, etc.).

One critic rather pointedly noted that for George Bush's New World order to become a true reality, the world's only remaining superpower, the United States, must support the International Court of Justice and international law.<sup>210</sup> Violations of the sovereignty of weaker nations and refusal to acknowledge the jurisdiction of the International Court of Justice do not create images of a just New World Order, but rather nightmares of world domination. From a practical perspective, one author suggests that only through the use of the superior ideology and humane behavior, (i.e., read this as adherence to international law) and not using violent methods (e.g., the mining of harbors), will the West (the United States) be able to prevail over tyranny.<sup>211</sup>

The decision of the International Court of Justice itself, on the merits,<sup>212</sup> stated that the United States violated international law by its actions. Critiques of the decision, such as those presented by Moore, are merely attempts to soften the political repercussions of the acts and of the decision.<sup>213</sup>

#### D. *The Haiti Affair*

##### 1. Facts

Jean Bertrand Aristide, a former Catholic priest, was President of Haiti until approximately eight (8) months after the 1990 election. Aristide, a former favorite of the United States, lost United States support after criticizing the United States. At that time, September of 1991, in response to economic reforms which alienated the business elite of Haiti, the military mounted a successful coup led by General Raoul Cedras.

Throughout the reign of Cedras, there were numerous reports of human rights abuses. The reports were given additional weight when Cedras ordered over one hundred human rights observers from the United Nations and the Organization of American States to leave the

---

209. See *id.* at 112.

210. See The Brendan Brown Lecture, *The United States and the World Court in the Post "Cold War" Era*, 40 CATH. U.L. REV. 251, 259 (1991).

211. See Loch K. Johnson, *On Drawing a Bright Line For Covert Operations*, 86 AM. J. INT'L L. 284 (1992).

212. *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 4 (Jun. 27).

213. Compare John Norton Moore, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 151 (1987) and Richard Falk, *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 106 (1987).

country.<sup>214</sup> Aggravating the situation was the enormous number of refugees fleeing Haiti who sought sanctuary in the United States—reportedly as many as two to three thousand per day.<sup>215</sup> Political posturing between both nations only increased the tension.<sup>216</sup>

During this period of dispute with Haiti, the United States pressured the United Nations to grant official sanctioning of a Haiti invasion.<sup>217</sup> The political record indicates, however, that the United States was seeking the approval from the United Nations as a means to lend additional credibility to the action,<sup>218</sup> implying that the invasion might still have occurred even without the approval. This implication is reinforced by the fact that United States forces were prepared to deploy before the approval was gained from the United Nations.<sup>219</sup> Indeed, one United States Embassy spokesman stated that an invasion could not be ruled out even before the United Nations granted approval,<sup>220</sup> thus, giving a not-so-veiled threat to Cedras *and the United Nations*.

Despite the invasion cancellation, on September 19, 1994, the United States landed a significant military force in Haiti. Even though the invading forces announced that "This is not war,"<sup>221</sup> such a military maneuver into a sovereign foreign nation could only be considered an invasion, despite the fact that former President Carter's last-minute diplomatic efforts most likely prevented more serious bloodshed.<sup>222</sup>

The United States offered a number of justifications for the invasion. At one point, the White House used the Monroe Doctrine to justify the action.<sup>223</sup> The United States also used the authorization of the United Nations to invade as justification for the action.<sup>224</sup> The threat of the increasing number of refugees was also used as grounds to justify the invasion.<sup>225</sup> Even the conservative Senator, Robert Dole, reject-

---

214. See George Church, *Threat and Defiance*, TIME, July 25, 1994, at 20.

215. See Herbert Buchsbaum, *Operation: Restore Democracy*, SCHOLASTIC UPDATE, Nov. 4, 1994, at 6.

216. See Church, *supra* note 214.

217. See Daniel Williams & Julia Preston, *U.S. Requests Open-Ended Resolution From U.N. Backing Invasion of Haiti*, WASH. POST, July 22, 1994, at A10.

218. See *id.*

219. See Ann Devroy & Bradley Graham, *U.S. Units Ready To Invade But Clinton Is Said To Be Weeks From Decision*, WASH. POST, July 17, 1994, at A21.

220. See Randall Mikkelsen, *Embassy Asks Haiti Leaders to Step Down*, CHIC. SUN-TIMES, July 24, 1994, at 36.

221. See Buchsbaum, *supra* note 215.

222. See Bruce W. Nelan, *The Road to Haiti*, TIME, Oct. 3, 1994, at 32. See also Fred Barnes, *Oh, All Right Then, US Intervention in Haiti*, THE NEW REPUBLIC, Oct. 10, 1994, at 11.

223. See Samuel Francis, *The Dumbest Possible Reason For Occupying Haiti*, WASH. TIMES, Oct. 4, 1994, at A21.

224. See *Many of Haiti's Neighbors Oppose U.S. Backed Invasion*, ROCKY MOUNTAIN NEWS, July 29, 1994, at 43A.

225. See Hugh de Santis & Kenneth J. Dillon, *Review Lessons of 1915 U.S. Invasion Had*

ed that argument.<sup>226</sup> The economic embargo was considered to be a prime reason for the refugee problem, as opposed to the position of the White House that the refugees were a result of Cedras' policies.

Other offered reasons included United States national interests and the securing of democracy in Haiti.<sup>227</sup> President Clinton, in an address to the nation on September 15, 1994, presented four reasons to justify the action: (1) international human rights—to stop the atrocities; (2) national security—to preserve the borders of the United States; (3) to preserve stability in the region; and (4) to ensure democracy.<sup>228</sup>

## 2. Response

The domestic response to the invasion of Haiti was not positive.<sup>229</sup> Although the media reported that there was a significant positive response to the occupation of Haiti, it was tempered with the idea that the positive aspects were that a full-scale invasion did not occur and that the action had the support of the United Nations.<sup>230</sup> However, some media outlets reported that Haiti's neighbors stated that the use of force against Haiti was not justified,<sup>231</sup> but that was before the United Nations approval.

Interestingly, Jeane Kirkpatrick, former Ambassador to the United Nations, was of the opinion that Haiti was not a threat to international or United States peace and security.<sup>232</sup> Essential to Kirkpatrick's call for no invasion, was the notion of the sovereignty of nations. One newspaper compared the invasion of Haiti to the Soviet invasion of Czechoslovakia in 1968.<sup>233</sup> In that situation, like the United States obtaining approval from the United Nations, the Soviets obtained the approval of the Warsaw Pact prior to invading Czechoslovakia. This same article noted that the notorious Russian ultra-nationalists approved of the invasion of Haiti; thus, providing these same Russians, if they

---

*Little Effect on Haiti*, FT. WORTH STAR-TELEGRAM, July 12, 1994, at 19.

226. See Norman Kempster, *Haiti Invasion Would Be Legal, White House Says*, CHI. SUN-TIMES, July 18, 1994, at 8.

227. See Devroy & Graham, *supra* note 219.

228. See *U.S. Interests in Haiti*, 5 U.S. DEP'T STATE DISPATCH 38 (Sept. 19, 1994).

229. See Jack Nelson & Stanley Meisler, *Clinton To Argue For Haiti Invasion*, S.F. CHRON., Aug. 2, 1994, at A1; see also Church, *supra* note 214, at 20; see also Buchsbaum, *supra* note 215, at 6.

230. See Howard Lafranchi, *Why Outcry Not Heard From Latin Neighbors On Haiti*, CHRISTIAN SCI. MONITOR, Sept. 22, 1994, at 1.

231. See *Many of Haiti's Neighbors Oppose U.S. Backed Invasion*, *supra* note 224.

232. See Jeane Kirkpatrick, *How Haiti Fits Into a New Foreign Policy*, INDIANAPOLIS STAR, Aug. 22, 1994, at A06.

233. See Dimitri Simes, *One Man's Bully May Be Another Man's Protector*, BUFFALO NEWS, Oct. 2, 1994, at F7.

obtain political power and position, with international precedent to take similar actions.

### 3. Analysis

One author expressed her position that the intervention in Haiti was appropriate under two grounds: (1) an emerging right to democracy in conjunction with (2) a justification based upon human rights violations.<sup>234</sup> These same reasons were used in conjunction with the advancement of American interests and security.<sup>235</sup>

However, these supporters of the intervention in Haiti fail to consider certain matters, such as international law. For example, it is well established that it is illegal under international law to intervene in order to advance particular political systems.<sup>236</sup> Further, it cannot be seriously argued that United States national security was threatened by Haiti. Under Tipson's level of threats the United States suffered, at the most, minimal financial deprivation supporting the refugees.<sup>237</sup> Thus, military intervention would hardly be appropriate under these circumstances because they would be beyond the mandates of necessity and proportionality.

The claim that Haiti constituted a threat to stability in the region is suspect. Haiti's problems were strictly internal. The only effect which went beyond its borders were the refugees. Although, under the *United Nations Charter*,<sup>238</sup> it is legal to intervene where there is a threat to international peace, refugees can hardly be considered such a threat.

The strongest reason advanced by the United States for its intervention was the human rights violation. *Emerging* principles of international law tend to recognize this reason as legitimate justification for intervention.<sup>239</sup> However, given the insubstantiality of the other offered reasons; given the pressure the United States brought against the United Nations to obtain authorization; and given the lack of action by the United States against other nations which may have a greater quantity and quality of human rights violations; (especially where the violators of human rights are "friendly" to United States policies) the legitimacy of this reason is in question.<sup>240</sup>

---

234. See Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329 (1995).

235. See Tony Smith, *In Defense of Intervention*, FOREIGN AFF., Nov./Dec. 1994, at 34.

236. See Oscar Schacter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

237. See *supra* Part II. E of this article.

238. See U.N. CHARTER arts. 39, 41-42.

239. See *supra* Part II E of this article.

240. For example, the notoriously repressive regimes of the Shah of Iran and Saddam



Moreover, intervention to protect human rights has yet to receive full acceptance in the international community as there is still the thorny question of sovereignty, which is paramount in any consideration of intervention with the use of force.<sup>241</sup> The *United Nations Charter* only permits the use of force in self defense or in response to a threat to international peace.<sup>242</sup> Similarly, the *Organization of American States Charter* prohibits the use of force, except in a case of self defense.<sup>243</sup>

Even more illuminating, the Pentagon refuses to release certain reports which criticize the Haiti operation and simply compares the situation to the fiasco in Somalia.<sup>244</sup> Despite the "approval" of the action by the United Nations, there appears to be little dispute that certain norms of international law were violated by the action taken in Haiti. However, this situation merely underscores the fact that international law is, in practice, more a function of politics than of law.

### E. *The Kidnapping of Dr. Alvarez-Machain*

#### 1. Facts

In 1985, a DEA agent was murdered in Mexico.<sup>245</sup> Dr. Alvarez-Machain was suspected of being an accomplice to the murder. As a result, on April 2, 1990, the DEA engineered the kidnapping of Dr. Alvarez-Machain. He was abducted at gunpoint, from Guadalajara, Mexico, and brought to the United States.<sup>246</sup> During the abduction, Dr. Alvarez-Machain was shocked a number of times and injected with a drug which made him dizzy.<sup>247</sup>

There was an extradition treaty in effect between the United States and Mexico at the time of the kidnapping.<sup>248</sup> On April 18 and May 16, 1990, the government of Mexico presented the United States with diplomatic notes requesting information on the participation of the United States in the kidnapping and demanding the return of Dr. Alvarez-Machain.<sup>249</sup>

Dr. Alvarez-Machain filed a motion to dismiss based upon the circumstances of his abduction being a violation of international law,

---

Hussein of Iraq were strongly supported by the United States until they turned away from United States policy.

241. See Schacter, *supra* note 94, at 1645.

242. See UNITED NATIONS CHARTER arts. 39, 51.

243. See ORGANIZATION OF AMERICAN STATES CHARTER art. 21.

244. See Mark Thompson, *The Past as Prelude*, TIME, Sept. 19, 1994, at 32.

245. See *United States v. Caro-Quintero*, 745 F. Supp. 599, 601-02 (1990).

246. See *id.* at 603-04.

247. See *id.* at 603.

248. See *Caro-Quintero*, 745 F. Supp. at 606 (citing 31 U.S.T. 5059, T.I.A.S. No. 9656).

249. See *id.* at 604.

and the corresponding lack of jurisdiction. The district court refused to dismiss on the claim of outrageous conduct by the United States, but granted the dismissal on the grounds that the treaty had been violated.<sup>250</sup> The United States appealed and the circuit court of appeals affirmed.<sup>251</sup>

The United States then appealed the matter to the Supreme Court.<sup>252</sup> The Supreme Court reversed the decision, relying heavily on the Ker-Frisbie Doctrine.<sup>253</sup> Using a strict interpretation of the treaty, the Court found that the treaty did not specifically prohibit such abductions<sup>254</sup> and that such a prohibition could not be interpreted into the treaty.<sup>255</sup> The decision of the Supreme Court was notable for its failure to address issues of international law, such as sovereignty.

## 2. Critique

The first critique of the decision was leveled in the dissent: "most courts throughout the civilized world will be deeply disturbed by the 'monstrous' decision the Court announces today."<sup>256</sup> Justice Blackmun publicly criticized the decision.<sup>257</sup> The criticism mounted forcing the United States to attempt to repair the damage.<sup>258</sup> The press crucified the Supreme Court.<sup>259</sup> Many scholars denounced the decision.<sup>260</sup> There appears to be little question that the abduction violated international law.

One author, while acknowledging that international kidnapping violates international law, suggested that an exception should be made where the harboring state sponsored the suspect's crimes, such as ter-

---

250. *See id.* at 601.

251. *See United States v. Alvarez-Machain*, 946 F.2d 1467 (1991).

252. *See United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

253. *See id.* at 660-662, 670.

254. *See id.* at 666.

255. *See id.* at 667.

256. *See id.* at 687 (Stevens, J., dissenting).

257. *See Justice Blackmun Addresses ASIL Annual Dinner*, in A.S.I.L. NEWSLETTER, Mar. 1994.

258. *See, e.g.*, Alan J. Kreczko, *The Alvarez-Machain Decision*, 3 U.S. DEP'T OF STATE DISPATCH 614 (Aug. 3, 1992).

259. *See, e.g.*, *Court Rules U.S. Can Kidnap Suspects From Other Nations*, ATLANTA J. AND CONST., Jun. 16, 1992, at A8.

260. *See, e.g.*, Michael J. Glennon, *International Kidnapping: State Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992); *see also* Halle Fine Terrion, *United States v. Alvarez-Machain: Supreme Court Sanctions Governmentally Orchestrated Abductions As Means To Obtain Personal Jurisdiction*, 43 CASE W. RES. L. REV. 625 (1993); *see also* Jonathan Gluck, *The Customary International Law of State Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612 (1994).

rorism.<sup>261</sup> Obviously such was not the case in Mexico, as terrorism was not involved.

However, the criticism was not unanimous. For example, one scholar attempted to defend the decision on the grounds that the decision was not whether abductions were legal, but whether denying jurisdiction was proper.<sup>262</sup> Unfortunately, this argument appears to ignore the "legitimizing" effect the decision had upon such future abductions.

#### IV. COMMENTARY

##### A. *Purposes For the New World Order*

One academic presents two justifications for a New World Order: (1) the problem of an expanding population and (2) the problem of diminishing natural resources.<sup>263</sup> Although this article was written in the late 1970s, today, few people would dispute the accuracy of his claims. But these claims do not comport with the reasons offered by the United States for its actions, as previously discussed.

Clearly, employing the Monroe-Brezhnev Doctrine would not be an appropriate manner of addressing these idealistic concerns. Thus, the actions of the United States betray underlying purposes. But these purposes are not difficult to discern. As Presidents Reagan, Bush, and Clinton have announced, the "encouragement" of democracy was, at least in part, justification for the actions in Central America. But what other political specters haunt these decisions?

##### B. *The American Vision: Theory & Practice*

President Bush's announcement of a New World Order was "world where the rule of law supplants the rule of the jungle. . . . [a] world where the strong respect the rights of the weak."<sup>264</sup> This statement, *prima facie*, appears to be highly idealistic. But its implicit corollary, in practical terms, is not; meaning that only when the weak adhere to the policies and politics of the United States will they be protected.

Henry Kissinger criticized the American idealism of a New World Order and noted "the new world order cannot be built to American specifications."<sup>265</sup> Scholars have followed that view, stating for any New World Order to be successful, the United States, itself, must first

261. See Scott S. Evans, *International Kidnapping in a Violent World: Where the United States Ought to Draw the Line*, 137 MIL. L. REV. 187 (1992).

262. See Malvina Halberstam, *International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992).

263. ROBERT COOLEY ANGELL, *THE QUEST FOR WORLD ORDER* 1-2 (1979).

264. See Curtius, *supra* note 2, at 14.

265. See Henry Kissinger, *False Dreams of a New World Order*, WASH. POST, Feb. 26, 1991, at A21.

comply with international law.<sup>266</sup> Thus, the leadership of the United States is essential, given its economic and military power.<sup>267</sup> Although some call for strong United States leadership, this "leadership" may have to be tempered. As one commentator stated: the United States may have to relinquish its role of dominating certain international organizations.<sup>268</sup>

The United States attitude on sovereignty was made remarkably apparent by President Reagan's comment concerning the Israeli raid in Tunisia in 1985 as a "legitimate response" and "understandable," even though the raid violated the sovereignty of another nation, and the United Nations Security Council condemned it by a vote of 14-0.<sup>269</sup> It should be noted that President Reagan subsequently modified his statement. A writer has asked, what would the response of the United States be if Nicaragua bombed the White House to punish those who were responsible for the mining of its harbors?<sup>270</sup> Further, others ask what would the United States response be if Mexico kidnapped and tried the DEA agents who were responsible for the kidnapping of Dr. Alvarez-Machain? Indeed, a number of authorities note that the United States, when exporting its jurisdiction, must also export its substantive law of civil and human rights.<sup>271</sup>

One scholar notes that intervention in the affairs of minor powers does not enhance the national security of the United States, as they pose no threat to American security.<sup>272</sup> So why does the United States insist on invading such minor powers as Grenada, Haiti, and Panama and use the reason of national security as justification?

The situations presented in this article all have common themes: (1) a disregard for the sovereignty of less powerful nations (most certainly the United States would never have attempted any of these actions against the Soviet Union); (2) the placement of United States interests over those of other nations (even where the United States

---

266. See, e.g., John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 76 (1992).

267. See Zbigniew Brzezinski, *Order, Disorder, and U.S. Leadership*, 15 WASH. QUARTERLY 2 (1992).

268. See, e.g., David Brinkley, *The World For the OAS, 50 Years of Irrelevancy May Be Over*, L.A. TIMES, Nov. 6, 1994, at 2 (examining United States domination of the Organization of American States).

269. See Joseph Harsch, *Mr. Reagan's Response to the Tunisia Raid*, THE CHRISTIAN SCI. MONITOR, Oct. 8, 1985, at 15.

270. See *id.*

271. See generally John H. Barton & Barry E. Carter, *The Uneven, but Growing, Role of International Law* in RETHINKING AMERICA'S SECURITY 279 (Graham Allison & Gregory Treverton eds., 1992).

272. See John J. Mearsheimer, *Disorder Restored* in RETHINKING AMERICA'S SECURITY 236 (Graham Allison & Gregory Treverton eds., 1992).

interest (e.g., a suspected murderer or kidnapper) is comparatively minor to the foreign interests (e.g., territorial sovereignty)); and (3) the advancement of United States "democratic" politics in other nations, despite the internationally recognized mandates of national self-determination and sovereignty. Each of these three common themes violates every traditional notion of international law and sovereign equality. In each situation, the United States exercised its power despite prohibitions in international law.

One prominent international law professor demonstrated that the United States was actually substituting power for authority,<sup>273</sup> authority being the mandate granted by recognized law. Thus, argued the professor, if the United States continues to rely on its power, substituting fear for respect, the United States may very well suffer the fate of Athens when it did the same, e.g. conquered by Sparta. However, as long as the United States is the sole superpower, this fear most likely will not be realized.

If the United States were to recognize the authority of international law (e.g., accept jurisdiction of the International Court of Justice, even when it may lose) and relinquish some of its power, there may be an advancement towards an idealized New World Order. But, the question remains, even if an idealized New World Order is the goal, would the United States be willing to relinquish some of its power to an international police force?<sup>274</sup> Probably not.

As one commentator stated: "Chances are that the new world order will only last until the first time it interferes with some U.S. crusade. International law? Peace and security? Universal aspirations? Screw those. We're Americans. We're supposed to get our way."<sup>275</sup> More than one critic considers the New World Order to just be an expression of American interests in a politically acceptable format.<sup>276</sup> But what are the American interests or the American way?

Is it, as Grover Cleveland once said, that the business of America is business? The New World Order, in the minds of some, is just another way to legitimize the rise of the corporation and the fall of the nation-state.<sup>277</sup> Thus, the transnational corporations could very well be the true interested parties, and not the United States. But to accept this

---

273. See Alfred P. Rubin, *Nicaragua, the World Court, and the U.S.*, THE CHRISTIAN SCI. MONITOR, July 15, 1986, at 13.

274. See David C. Morrison, *Make Peace—or Else*, 24 THE NAT'L J. 2250 (Oct. 3, 1992).

275. See Chapman, *supra* note 168.

276. See, e.g., Charles Krauthammer, *The Lonely Superpower: How To Bear America's New World Burden*, THE NEW REPUBLIC, July 29, 1991, at 23

277. See Viven A. Schmidt, *The New World Order, Incorporated; The Rise of Business and the Decline of the Nation-State*, DAEDALUS, Mar. 22, 1995, at 75.

thesis would lend credibility to the claims of the far right and the far left, which would never be accepted in polite academia.

Numerous authors acknowledge American national security interests have undergone a change in recent years. More than one author has claimed that the primary interest of America is economic strength.<sup>278</sup> The rationale for such a position is that once economic power is lost, military strength will falter.

At least two authorities link the economic competitiveness of the United States with the security of the nation.<sup>279</sup> These authors present the very distinct possibility that the current evolution of the international system may give rise to new, unascertained threats to American national security and that the new international system may not be friendly to American interests. But does the United States have the right to maintain the *status quo* in the face of changes wrought upon the international economy by a numerical, but obviously not military, majority of the world?

Whatever explanation the reader accepts, there is no dispute that there is a conflict between the "New World Order" and the traditional notions of sovereignty, as guaranteed by the *United Nations Charter*.<sup>280</sup> Thus, it appears that for this idealized New World Order to exist, there will have to be changes to the traditional notion of sovereignty. However, if this New World Order is not so idealistic, then no changes will be needed at all. As demonstrated by the United States in each of the situations presented in this paper, all that is needed is a competent public relations staff and a position as the sole global superpower.

Even if the goal was the idealistic version, it is unlikely that any nation, to include the United States, would relinquish a primary position of global military and economic power. One American Under Secretary of Defense for Policy has advocated the preservation of the "unique international role" of the United States militarily.<sup>281</sup> Such a position is surely not advanced from international altruism. Perhaps, as a balancing force, the Soviet Union was a force for "good" in the development of "true" international law.

---

278. See generally Peter G. Peterson & James K. Sebenius, *The Primacy of the Domestic Agenda* in RETHINKING AMERICA'S SECURITY 57 (Graham Allison & Gregory Treverton eds., 1992).

279. See Michael Bortus & John Zysman, *Industrial Competitiveness and National Security* in RETHINKING AMERICA'S SECURITY 136 (Graham Allison & Gregory Treverton eds., 1992).

280. See *The UN in Search of a New Identity*, SWISS REV. OF WORLD AFF., July 3, 1995.

281. See Paul D. Wolfowitz, *The New Defense Strategy*, in RETHINKING AMERICA'S SECURITY 195 (Graham Allison & Gregory Treverton eds., 1992).

### C. *Problems for the United States*

No matter what the rationales for or goals of the actions of the United States, its posture will make implementation difficult. One author notes that the chief obstacle to implementing any form of world order is nationalism.<sup>282</sup>

The actions of the United States have been focused on the interests of the United States (i.e., American nationalism). Although the United States has offered claimed international ideals, too often, under public scrutiny, such claims have become illusory. Thus, any "New World Order" which the United States is trying to impose, whatever its form or purpose, will be difficult to implement, at least until the United States presents greater respect for the sovereignty of other nations and international law.

## V. THE FUTURE

The past and present are relatively clear. The Monroe-Brezhnev Doctrine has been and is, quite evidently, alive and well in the United States. But does this mean that the President and the Secretary of State now qualify as Machiavellian Princes of Darkness? I hope not. In the world of "realpolitik" there will always be the necessity of taking certain actions where the conscience of the nation would be shocked.

But, the United States must be extremely careful. As one author has so accurately acknowledged, if the United States continues to rely on its military power, with its corresponding disregard for sovereignty, then the "fundamental maxims of American policy [will change] 'from liberty to force.'"<sup>283</sup> Such a change may not trouble politicians in the short term, but what will the effect be in the long term?

Will the United States be able to draw Excalibur from the stone, assume the seat on the Siege Perilous, and bring to the world King Arthur's justice? Probably not. For as long as the United States holds the position of sole superpower; the American position can be best summed up by the comment of that great American philosopher, Alfred E. Newman: "What, me worry?"<sup>284</sup>

---

282. See ANGELL, *supra* note 263, at 9.

283. ROBERT W. TUCKER & DAVID C. HENDRICKSON, *THE IMPERIAL TEMPTATION: THE NEW WORLD ORDER AND AMERICA'S PURPOSE* 210-11 (1992).

284. Cover of *Mad Magazine*.