PANAMA AND THE MYTH OF HUMANITARIAN INTERVENTION IN U.S. FOREIGN POLICY: NEITHER LEGAL NOR MORAL, NEITHER JUST NOR RIGHT

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"If way to the Better there be, it exacts a full look at the worst."
Thomas Hardy,"De Profundis," 1902

I. INTRODUCTION

War may well be a continuation of diplomacy by other means, but war should never be a substitute for it. Yet, the most profound legacy of the Reagan and Bush administrations is not merely the death of diplomacy, but its vitual internment as a tool of U.S. foreign policy. President Reagan, a former actor, is a veteran of war movies rather than any war, and his reliance on force in Lebanon,[1] Libya[2] and Grenada[3] had a

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1. On October 23, 1983, the U.S. and French military facilities in Beirut, Lebanon, were bombed in an Islamic Jihad suicide mission that killed 241 American and 58 French soldiers. *See Key Sections of Pentagon's Report on Attack on the Marines*, N.Y. Times, Dec. 29, 1983, at A11. It was the first time since the Tet offensive in Vietnam that the United States had suffered such severe military casualties.

2. During the night of April 14, 1986, the two Libyan cities of Tripoli and Benghazi were the target of a U.S. air raid. The raid was commenced in "retaliation" for Libya's promotion of international terrorism. Under the customary law of retortion and reprisal, the bombing raid did not follow any particular wrongful Libyan act, but served more generally as a cautionary tale against wrongdoing. For an analysis of the custom of reprisal and retortion in international law, see Fiona McKinnon, *Reprisals As a Method of Enforcing International Law*, 4 Leiden J. Int'l L. 221 (1990). *See also* Julius Stone, Agression and World Order 43, 94-8 (1958).

3. *See* Hedrick Smith, *1,900 U.S. Troops With Caribbean Allies Invade Grenada and Fight Leftist Units; Moscow Protests: British Are Critical*, N.Y. Times, Oct. 26, 1983; *Text of Reagan's Announcement of Invasion of Grenada*, N.Y. Times, Oct. 26, 1983, at A16. *But see The Priming of the*

predictable showmanship quality. However, if President Reagan seemed driven to extremes by an imperative to put the United States back in the saddle again, he was restrained enough by a sense of caution when it came to terrorists; he did not, for the most part, confuse the acts of a few with the many. "We want to retaliate," Reagan explained, "but only if we can put our finger on the people responsible and not endanger the lives of millions."[4] Even when he announced the invasion of Grenada, Reagan stressed the extraordinary and unique nature of the United States' violent use of force. "Let there be no misunderstanding. This collective action has been forced upon us by events that have no precedent in the east Caribbean and no place in any civilized society."[5]

President Bush's equally free-wheeling, but erratic use of military intervention to settle international scores, was more puzzling in light of his diplomatic pretensions.[6] In the Persian Gulf Crisis of 1990, Bush placed his finger on the pulse of the world. He rightly reckoned that the general public, watching Iraqi tanks rolling across a defenseless Kuwait on CNN, would be outraged and demand that "something be done." By appealing to the United Nations (U.N.) Security Council, Bush masterfully reconciled liberal outrage over barbarous conduct with feasible multilateral action.[7] Even before the first coalition forces landed in the Middle East, the effort to dislodge Iraq from Kuwait's territory was filled with frenetic activity on the part of many states and international organizations.[8] Not so with Panama. The U.S. invasion of Panama in 1989 was secretly planned for months, if not years, before it took place.[9] In the final conflict, U.S. military forces used lethal firepower against a largely unarmed populace to an extent not seen on the American continent

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Grenada Grenade, Economist, Oct. 29, 1983, at 17.

4. *Terror Firma*, 191 New Republic, Nov. 19, 1984, at 7.

5. *Text of Reagan's Announcement of Invasion of Grenada*, *supra* note 3.

6. Prior to becoming President, Bush's diplomatic career included ambassadorships to China and the United States Mission to the United Nations.

7. For a detailed account of the events leading up to the liberation of Kuwait in the Second Gulf Crisis, see Bob Woodward, The Commanders (1991).

8. *See also* Triumph Without Victory; The Unreported History of the Persian Gulf War (U.S. News & World Report eds., 1992). But see Jean Edward Smith, Bush's War, 1-95 (1992), a more critical account alleging that President Bush "escalated American aims and made war all but inevitable," but also admits that "Bush's coalition diplomacy was impressive." *Id.* at 254.

9. *See* John Dinges, Our Man in Panama: The Shrewd Rise and Brutal Fall of Manuel Noriega 303-05 (1991). *See also* Michael R.Gordon & Andrew Rosenthal, *Fighting in Panama: The Planning; U.S. Invasion: Many Weeks of Rehearsals*, N.Y. Times, Dec. 24, 1989, at 1:1. For the proposition that the U.S. invasion was several years in planning, see Bernard E. Trainor, *Fighting in Panama: Strategy; Gaps in Vital Intelligence Hampered U.S. Troops*, N.Y. Times, Dec. 21, 1989, at A21.

since the Spanish American War. Unlike the media blitz that accompanied the Persian Gulf Crisis, the Panama conflict was effectively blacked out.[10] A week later, when the dust finally settled, twenty-three U.S. soldiers[11] and hundreds, if not thousands, of Panamanians[12] lay dead, with hundreds more wounded;[13] property damage was estimated in the millions,[14] and thousands of mostly poor people were left homeless.[15]

Ironically, this lawless carnage now passes for international statecraft in our enlightened age. Even England, birthplace of some of the world's greatest diplomats, is not immune to such wrathful Zeitgeist. Debating what to do about Yugoslavia's violent disintegration, no less a bulwark of tradition than *The London Times* pondered: "The real question is whether to take military action, as the Americans did in Panama in December 1989. Anything short of such intervention looks like a weak gesture."[16] Indeed, the revival of military intervention as a foreign policy tool is the most notable international relations feature of the past decade. For those of a certain age, it is startling to see the gunboats back after so long a hiatus, but psychologically, what is more shocking is the gunboat's newly-revived popularity.

Because most recent interventions have been widely regarded as "successful," in that the persons and/or nations at issue were compelled to act as we wished them to, the act of military intervention has become the handy tool of the 1990s for solving all problems, no matter how complex. This new reliance on might to make right has led to interventions by U.S. forces being proposed, sometimes by the most unlikely persons, to cure every international squabble from the ethnic massacres in newly-named Bosnia Herzagovina, to the elections in wretched little Haiti, the island of perpetual sorrow, a swollen welt of

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10. Kevin Buckley, Panama: The Whole Story 233 (1991).

11. *Id.* at 239.

12. Buckley, *supra* note 10, at 264-65. *See* Mark A. Uhlig, *In Panama Counting the Invasion Dead is a Matter of Dispute*, N.Y. Times, Oct. 28, 1990, at 4:2. For Southcom's official statement of Panamanian casualties, see *Facts on Panamanian Casualties*, Information Paper, U.S. Southern Command Public Affairs Office, Nov. 15, 1990.

In addition, U.S. forces took nearly 5,000 Panamanians prisoner. Dinges, *supra* note 9, at 312-13.

13. Buckley, *supra* note 10, at 264-65.

14. Some reports have put the property damage amount as high as a one billion dollars. *See, e.g.*, Nathaniel Sheppard, Jr., *Panamanians Bristle Over Armed Troops*, Chi. Trib., June 18, 1992, at C2.

15. In the El Chorillo slum surrounding the Commandancia, fires from the bombing reportedly "razed almost 2,000 dwellings, making 15,000 residents homeless." Buckley, *supra* note 10, at 240.

16. Peter Riddell, *The Politics of Atrocity*, London Times, Aug. 7, 1992.

misery so far from God, so close to the Panama Canal.

Intervening in Panama ostensibly in the name of moral principle, President Bush marched under a number of colorful but well-worn banners: human rights, democracy, fidelity to treaties, and justice.[17] The short-hand phrase for these flags of convenience is humanitarian intervention, and its doctrine is a powerful idea, especially for liberal, Western States possessing open constitutional systems regulated by democratic processes.[18] This doctrine is all the more true if such states also enjoy some measure of prosperity, military prowess and relative security. If the citizens of such states also have some consciousness of their constitutional liberties and of their domestic political rights and duties, and if their groundings in Kantian categorical imperatives are strong,[19] support for humanitarian intervention becomes a natural, almost intuitive response, rather than a self-conscious or self-serving choice. For such citizens, helping others in danger or dire need is simply the right thing to do.

Intervention, of course, is an expressive word that can mean many different things--from giving unsolicited or unwanted advice, sending foreign aid to a state's internal enemies, or airlifting refugees, to freezing funds, seizing assets, sending in peacekeeping forces, sending in the fleet to menace or blockade, or going to war.[20] Generally, the idea behind

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17. *See infra* text accompanying note 51.

18. *See* Fernando R. Teson, Humanitarian Intervention: An Inquiry Into Law And Morality (1988). Teson defines humanitarian intervention as "the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressors." *Id.* at 1. This is a narrow, but very precise, statement. For purposes of this paper, "proportionate" and "rational" are adjectives of particlular interest.

19. From Kant's categorical imperative arises what is best expressed as an international ethic. Helping others should be the end and not a means to another, different end. Fernando Teson elucidates the Kantian position:

> Just as individuals may not use human beings as mere means to an end, so foreigners, and especially foreign governments, may not use the persons that form another state by disrupting their free civil association in order to pursue the foreigners' own ends such as glory, exercise of political power, material enrichment, or the aggrandizement of territory.

Fernando R. Teson, *The Kantian Theory of International Law*, 92 Colum. L. Rev. 53, 71-72 (1992).

20. A good definition, dating from a time when things were more simple, is Henry Hodges': "Intervention is an interference by a state or states in the external affairs of another state without its consent, or in its internal affairs with or without its consent." Henry G. Hodges, The Doctrine Of Intervention

intervention is to effect some change in the status quo in a state different than one's own,[21] usually through a coercive action which may or may not be legal, the ends of which may or may not justify the means. Even if pursued in a just cause, the enterprise is fraught with risks. Yet, it is hard to refuse people who need help, and even harder when the costs to the intervening state seem relatively low in light of the potential good to be gained. Danger indeed invites rescue,[22] especially if one is brave and free.

In most domestic legal systems, such intervention to help an injured party is permitted, even privileged.[23] However, this privilege is subject to an important caveat: the privilege to use force to defend another is subject to the same limitations on that person's right to defend himself.[24] In Anglo-American common law, the right of the defender, if any, is a purely derivative one. Moreover, the exigencies of emergency and peril can be confusing; even if one is just breaking up a street fight, it may be impossible to determine first-hand who is the aggressor and who is the victim, and even these statuses are subject to change as the tussle continues.[25] In domestic law, therefore, the intervenor acts at his peril, and the law charges him with knowledge of his actions. He is liable for any impermissible use of force and for any damage he may cause, no matter how well-intentioned. If the intervenor has chosen well, and smites the evildoer, he becomes a hero and is publicly regarded as having done a good thing. His photograph appears in tabloids and he may get an award or at least the momentary, but effusive, good-will of the community. If he misapprehends the situation and makes the victim's plight even worse, he may wind up arrested or in court or both and be considered a "jerk" or a "boob."[26]

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1 (1915).

21. "The situations that arouse our discontent are ones existing, as a rule, far from our own shores." George F. Kennan, *Morality and Foreign Policy*, Foreign Aff. 205, 209 (Winter 1985/1986).

22. As Judge Cardozo wrote so compellingly: "The cry of distress is the summons of relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal." Wagner v. International Ry. Co., 133 N.E. 437, 437 (1921).

23. "Every man has the right of defending any man by reasonable force against unlawful force." Sir John William Salmond, Law of Torts 44 (1934). *See also* Restatement (Second) of Torts §§ 63-76.

24. *See* Prosser & Keeton On Torts 130 (W. Page Keeton and others eds., 1984).

25. It is far easier to rescue a relative or friend whom one knows well. First, it is simply easier to identify the party; second, consanguinity traditionally lends legitimacy to such protective efforts on behalf of "blood," or some other notion of kinship or community. Part of the privilege in belonging to a group, whether a family, a tribe, or a state, is the expectation of such protective assistance.

26. His photograph may still appear in the tabloids, albeit disparagingly.

In international relations, the situation is clearly analogous although infinitely more complex.[27] This Article's scope encompasses only forcible intervention; that is, intervention by armed force, which includes violent acts that would normally be considered war, or at least condemned as aggression, were they not tempered by the ostensible nobleness of their cause.[28] As the intentionally narrowed international laws of self-defense have expanded to include defense of others and concepts of humanitarian intervention, the doctrine of intervention to assist the self-determination struggle of others has found champions in Anthony D'Amato,[29] Michael Reisman,[30] and other prominent international law scholars.[31] Yet, in practice, the invocation of self-defense and humanitarian intervention by the United States has a dark side, and the invasion of Panama comprises its most shadowed corner.[32]

Professors D'Amato and Reisman, who formerly urged restraint against intervention's clarion call,[33] now are issuing the call to arms themselves. The brandished arms are supposedly for the topplement of tyranny and the defense of democracy, although not necessarily for the defense of the democratic social processes that people seek. D'Amato and Reisman seem to ignore, to the detriment of their argument, that the

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27. This is not to say that humanitarian intervention, an *international* legal phenomenon, is the "scraggly tail on elegant, fully developed theories intended to explain the dynamics of *national* legal phenomena." Thomas M. Franck, The Power of Legitimacy Among Nations 8 (1990). The urge to make the comparison is simply irresistible.

28. The force of arms, slings, swords, bows and arrows of the English writ, and much worse.

29. *See* Anthony D'Amato, International Law: Process and Prospect 226 (1987); Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 Am. J. Int'l L. 516 (1990).

30. *See* W. Michael Reisman, *Editorial Comment: Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866 (1990); W. Michael Reisman, *Editorial Comment: Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 Am. J. Int'l L. 642 (1984).

31. *See* Tom J. Farer, *An Inquiry Into the Legitimacy of Humanitarian Intervention, in* Law and Force In the New International Order 185-99 (Lori Damrosch & David Scheffer eds., 1991). *See also* Teson, *supra* notes 18, 19; Fernando Teson, Humanitarian Intervention and the United Nations (Richard Lillich ed., 1973).

32. *See* discussion of lawless carnage of Panamanian invasion, *supra* notes 12-15 and accompanying text. *See also* Michael Akehurst, *Humanitarian Intervention, in* Intervention in World Politics (Hedley Bull ed., 1984), who concludes that there are no persuasive grounds justifying humanitarian intervention in any situation.

33. *See, e.g.*, W. Michael Reisman, *Polaroid Power: Taxing Business For Human Rights*, 4 Foreign Pol'y 101 (1971).

United States intervenes not so much to ensure liberty, but because it is in fact intimidated by the disorder true liberty often entails. The former Soviet Union is a case in point. As the evil empire unravels, its peoples are willing something akin to democracy upon themselves, with greater and lesser degrees of success.[34] The change has not been unviolent. As one scholar notes, "[T]he Soviet Union provides the most powerful example of what is in fact quite a common problem: social chaos arising from resurgent ethnic divisions and a general rising tide of expectations."[35] The harder question is why we are so content to benignly watch this struggle in the Soviet Union and Eastern Europe, even seeing it as "part of the process," while at the same time we are so intolerant and fearful of violence attending democratic struggle in our own hemisphere.

Professors D'Amato and Reisman's defense of President Bush's blatantly illegal invasion of Panama are part of a larger, new movement away from the norm of nonintervention that is set forth in the U.N. Charter. To the extent that the new norm promotes human rights, and particularly the rights of individuals, over states in international law, one can only welcome this development. However, to the extent that this same movement regards states as either totally hostile entities or total irrelevancies, and advocates violent opposition to them, the movement deserves immediate critical analysis. While no longer the sole actors in international relations, states, by their very nature, are still the strongest. Moreover, even the most feeble state usually can collectively afford its internal populations more protection, albeit imperfectly, than any other type of organization existing today. In the absence of true world government, a legal philosophy that hoists the individual above the state to the point where the state can only act adversely to ensure its own survival, also hoists itself on its own petard and endangers individuals everywhere.

The U.S. invasions of Panama[36] and of Grenada[37] were far different in both aim and scope from the type of military interventions we usually

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34. The collapse of communism is truly one of the most wondrous events of our age coinciding as it does with the establishment of democratic entitlement in international law.

35. Brad Roberts, *Democracy and World Order*, Fletcher F. 8, 12 (Summer 1991). *See also* Robert L. Rothstein, *Democracy, Conflict, and Development in the Third World*, Wash. Q. 43 (Spring 1991).

36. The invasion was condemned by the U.N. G.A. Res. 240, 44th Sess., U.N. Doc. A/44/L.63/Add.1 (1989).

37. This invasion was also condemned by the U.N. G.A. Res. 7, 38th Sess., 43rd mtg., at 214, U.N. Doc. A/35/L.8/Add.1 (1983). *See generally* Marian Nash Leich, *U.S. Practice: Resort to War and Armed Force, OECS: Grenada, 1983*, 78 Am. J. Int'l L. 661 (1984). For a concise summary of the U.S. position, see Maj. Thomas J. Romig, *The Legal Basis for United States Military Action in Grenada*, Army Law. 1 (April 1985).

label "humanitarian" in the traditional sense. True rescue actions aimed at protecting one's nationals in a third country, prior to the drafting of the United Nations Charter, were considered "non-political."[38] Although the Charter makes no mention of "non-political" intervention,[39] recent examples of the concept in action include the Israeli raid at Entebbe airport in Uganda,[40] Israel's rescue of Ethiopian Falasha,[41] and the unsuccessful attempt by President Carter to rescue the U.S. hostages in Iran.[42] All these actions involved the rescue of citizens of the intervening state or, in the case of the Falasha, persons in whom the intervening state had a very special interest. Even though each incident involved the breaching of another state's sovereignty, the intrusions were quick, proportionate, and aimed at accomplishing a specific, limited end, rescue of one's own. Casualties were low or non-existent, and destruction of property minimal; no governments were overturned, and no tyrants were directly overthrown, not even Idi Amin, although the temptation must have been great.[43] In

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38. *See* Hodges, *supra* note 20, at 19.

39. The omission was purely intentional. *See* Quincey Wright, *The Goa Incident*, 56 Am. J. Int'l L. 617, 621 (1962).

40. For the official positions of both parties involved, see Letter from the Israeli Representative to the Secretary General 31st Sess., U.N. Docs. A/31/122, S/12123 (1976); Letter from the President of Uganda to the President of the Security Council 31st Sess., U.N. Doc. S/12124 (1976).

41. *See, e.g., Israel Has Airlifted 10,000 Ethiopians*, N.Y. Times, Jan. 4, 1985, at A6; *Airlift to Israel is Reported Taking Thousands of Jews from Ethiopia*, N.Y. Times, Dec. 11, 1984, at A1.

42. *See* President Carter's Message to the U.S. Congress, Apr. 16, 1980, 1 Pub. Papers 777-79 (1980-81). *But see* Armstrong, Wilson & Woodward, *Debate Rekindles on Failed Iran Raid*, Wash. Post, Apr. 25, 1982, at A1 (contending that the failed "operation was much bigger and bolder than the public has been told to date"). For a comprehensive analysis of the International Court of Justice's opinion in this compelling matter, see Case Concerning United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), 1980 I.C.J. 3, *reprinted in* 74 Am. J. Int'l L. 746 (1980), 19 I.L.M. 553 (1980).

43. Apparently Idi Amin was not entirely oblivious to international condemnation of his regime's chronic abuse of human rights; in fact, he anticipated that some type of military intervention would be directed at him in response. A year before the Entebbe raid, Idi Amin had arrested, tried and sentenced to death a British teacher, Dennis Cecil Hills, for having described Amin as a "village tyrant" in an unpublished manuscript. When Queen Elizabeth sent her emissary to Uganda to beg for clemency, Idi Amin reportedly claimed that the British had threatened to invade Uganda, although they had done nothing of the kind, and he sought assistance from Libya. After an animated press conference, Idi Amin produced Hills (alive) and announced: "He is free. This proves I am not mad, as British newspapers said." Daniel Patrick Moynihan, A Dangerous Place 239-40 (1978).

other words, any incursion into the norm of nonintervention was relatively small, and seemed rational in light of the good to be gained.[44] People in these limited interventions were ends, not means. Their rescue and well-being was a true aim and not pretextual.[45] The morally imperative nature of such lightning-strike, quick, clean getaway operations impresses even the most dogmatic of noninterventionists. Realist George F. Kennan, who generally favors nonintervention except in matters of genuine state security, is well-known for berating "the histrionics of moralism."[46] Nevertheless, Kennan admitted that he favored a flexible rule for some humanitarian intervention. "Foreign policy is too intricate a topic to suffer any total taboos. . . . A striking example of this was the action of the United States in apprehending the kidnappers of the Achille Lauro."[47] Nevertheless, Kennan cautioned that regardless of the success or popularity of such operations, they "should not be allowed to become a regular and routine feature of the governmental process, cast in the concrete of unquestioned habit and institutionalized bureaucracy."[48]

The U.S. invasion of Panama was different from these actions in almost every way. Once the action was commenced, President Bush gave four reasons for it: "To safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties, and to bring General Manuel Noriega to justice."[49] None of these assertions were true[50] let alone legal under international law.[51]

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44. However, it is well established in international law that all forms of intervention are significant. The threat intervention brings is not only to undermining the sovereignty of a particular state, but to the equilibrium of the whole international system. In a famous passage condemning intervention in the Corfu Channel Case, 1949 I.C.J. 4, 36, the International Court of Justice warned against might making right. "Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful of [s]tates, and might easily lead to perverting the administration of international justice itself." *Id.*

45. *See, e.g.*, Natalino Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity (1985).

46. Kennan, *supra* note 21, at 212-13.

47. *Id.* at 214.

48. *Id.*

49. President George Bush, Statement at the Office of the Press Secretary, the White House (Dec. 20, 1989).

50. Except possibly the last, which involved arresting and transporting, against his will, a foreign citizen living in a foreign country who had allegedly committed crimes in that foreign country. *See* Jessica W. Julian, *Noriega: The Capture of a State Leader and its Implications on Domestic Law*, 34 A.F. L. Rev. 153 (1991); Richard L. Fricker, *Dealing With the Maximum Leader*, 76 A.B.A. J. (1990). *But see* Neil A. Lewis, *The U.S. and Panama: Legal Issues: Scholars Say Arrest of Noriega Has Little Justification in Law*,

Yet for scholars like Anthony D'Amato, a joyous day has dawned: "The U.S. interventions in Panama and, previously, in Grenada are milestones along the path to a new nonstatist conception of international law that changes previous nonintervention formulas such as Article 18 [of the Charter of the Organization of American States, and Article 2(4) of the United Nations Charter]."[52] In light of this proclamation by a renowned and significant scholar, we consider three questions: Is this true? If true, is it worth it? Perhaps the price is too high, repellant to even the most dogmatic Kantian. If so, is there any way the doctrine could be made more rational and less costly, in terms of both money and human lives?[53]

II. IS IT TRUE? THE NORMATIVE ARGUMENT

The normative rule is that sovereign states do not intervene in the affairs of other sovereign states, unless specifically requested to do so.[54]

N.Y. Times, Jan. 10, 1990, at A12. For a discussion of the lack of veracity of Bush's assertions, see *infra* text accompanying notes 221-96.

51. Ved Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 Am. J. Int'l L. 494 (1990). Professor Nanda notes that, following the invasion, President Bush claimed "that the United States had 'used its resources in a manner consistent with political, diplomatic and moral principles.' The failure to include 'legal' among the other principles mentioned by President Bush may have been inadvertent." *Id. See also* Elaine S. Povich, *U.S. Seeks to Build Legal Case for Invasion*, Chi. Trib., Dec. 21, 1989, at C16.

52. D'Amato, *supra* note 29, at 516-17.

53. Some proponents of humanitarian intervention such as Fernando Teson emphatically reject all utilitarian comparisons. As set forth below, this view is unacceptably narrow; it makes proportionality, an important factor in using force, almost impossible to determine. Teson himself has been criticized as being "a little totalitarian" in stressing "appropriate principles of political morality" over utilitarian factors. *See* David J. Bederman, *Book Reviews and Notes*, 83 Am. J. Int'l L. 406, 407 (1989) (reviewing Fernando Teson, Humanitarian Intervention: An Inquiry Into Law and Morality).

> Because Teson rejects any possibility that humanitarian intervention can be weighed in utilitarian terms (lives lost versus freedoms restored), we are left with an essentially standardless, subjective world order where, although the content of human rights may be universally understood, the means to ensure their protection elsewhere will not be so firmly established.

Id.

54. "Normative" is what I would call the standard norm of nonintervention; elsewhere, I call it "older" because it necessarily pre-dates the "new" norm of

Even then, the rule overrides the inclination. This rule was especially apparent in World Wars I and II where, initially the United States was strongly reluctant to enter into hostilities, and only intervened after armed attacks had occurred.[55] The principle of nonintervention as set forth in the United Nations Charter Article 2(4) has become a permanent feature of

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humanitarian intervention as set forth by W. Michael Reisman in *Editorial Comment: Coercion and Self-Determination: Construing Charter Article 2(4), supra* note 30, at 642, and more broadly, by D'Amato, *supra* note 29. In terms of international law's history, nonintervention is actually a modern concept. It is certainly not the "oldest" law, what one could call the "law" of the jungle; that is, no law at all, but a state of total anarchy. Human beings being what they are, true anarchy does not last very long before someone's personality begins to assert itself into that form of behavior known as leadership, which manifests itself in the imposition of at least a semblance of order for those under its sway.

Rules governing intervention have hardly remained static, nor is it at all true that they are evolving in a progressive, unbroken line from the jungle towards some grand design. Despite Grotius's attempts to set out rules for the orderly conduct of war in a disorderly world, Hugo Grotius, The Law of War and Peace (De Jure Belli Ac Pacis): A New Translation (Louise Ropes Loomis ed., 1949), and Kant's game plan for peace in his time Immanuel Kant, To Perpetual Peace: A Philosophical Sketch (1795), states in the nineteenth century were almost completely free to employ force in their interstate relations, or not, as they saw fit. *See* Military and Paramilitary Activities, (Nicar. v. U.S.), 1986 I.C.J. 362, para. 200 (separate opinion of Judge Schwebel, "in the pre-United Nations Charter era . . . states were free to employ force and go to war for any reason or no reason."); Edward Gordon, *Article 2(4) in Historical Context*, 10 Yale J. Int'l L. 269, 271 (1985) ("Until this century, the decision by states to employ armed force in their international relations enjoyed close to a full measure of legitimacy under international law."). The nineteenth century rules governing the use of force do not reflect any struggle with rightness or justness per se; they were "value-neutral and ultimately power-based." W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale. J. Int'l L. 279, 281 (1985).

It is not at all unusual for mankind to beat its swords into ploughshares, and back again.

55. Although World War I did not directly involve an armed attack on the United States territory per se, there was no shortage of armed attacks on U.S. citizens and property, and the threat of armed attack on U.S. territory was very real. European ships in the Atlantic, including the Lusitania, were attacked and sunk by German U-boats, resulting in a high loss of American life. Later, even though the official policy of the United States was neutrality, the Germans began sinking U.S. vessels, including merchant fleet ships. These ships were legal extensions of U.S. territory.

U.S. involvement in World War II commenced with the Japanese bombing of the U.S. naval base in Pearl Harbor in 1941, after which the United States declared war on Japan.

international law.[56] It specifically provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[57]

Thus, Article 2(4) effectively outlaws war in the traditional sense.[58] Its "fundamental presumption [is] that the use of force by [s]tates in pursuit of their national interests poses an unacceptable danger to the larger community."[59] Although Article 2(4) has been lauded as "the exemplary case of a peremptory norm,"[60] its admiration is far from universal.[61] Given the recurrent frequency of armed aggression between states since its adoption in 1945, some scholars question whether Article 2(4) even approaches normative status.[62]

The essence of Article 2(4) is more subtle than generally acknowledged. As Oscar Schachter points out: "We know that the

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56. Teson, *supra* note 18, at 91 n.215.

57. U.N. Charter art. 2, ¶ 4.

58. Specific declarations to "outlaw" war pre-date the U.N. Charter. For a clear pre-Charter outline of this concept, see Quincy Wright, *Changes in the Conception of War*, 18 Am. J. Int'l L. 744 (1924), followed by Quincy Wright, *The Outlawry of War*, 19 Am. J. Int'l L. 76 (1925), and twenty-eight years and one World War later by Quincy Wright, *The Outlawry of War and the Law of War*, 47 Am. J. Int'l L. 365 (1953).

59. Gordon, *supra* note 54, at 275.

60. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. Chi. L. Rev. 113, 129 (1986). *But see* Richard Falk, *The Decline of Normative Restraint in International Relations*, 10 Yale J. Int'l L. 262 (1985). Falk suggests that nonintervention may be more of an "aspirational norm" than a real reflection of actual conduct.

61. As Michael Walzer fairly points out, such norms, being composed of positive legal constructs, do not "provide a fully plausible or coherent account of . . . moral arguments." Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations xii (1977).

62. *See* International Incidents: The Law that Counts in World Politics 4, 10-3 (W. Michael Reisman & Andrew R. Willard eds., 1988); Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 Stan. J. Int'l L. 1, 45 (1990), describing Article 2(4) as "simply no longer authoritative and controlling." Richard Falk has termed it an "aspirational norm." Falk, *supra* note 60, at 263. *See also* Eugene V. Rostow, *The Legality of the International Use of Force by and From States*, 10 Yale J. Int'l L. 286, 290 (1985), declaring Article 2(4)'s normative status "impossible to determine." Even the most optimistic and liberal of scholars have expressed impatience with the paradox of Article 2(4)'s repeated affirmations, but nonapplication, by Member States in their international relations. *See* Thomas M. Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int'l L. 809 (1970). *But see* Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 Am. J. Int'l L. 544 (1971).

principle [of nonintervention] was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state."[63] Emphasizing this change by pointed omission, Article 2(4) does not even use the word "war."[64]

Nevertheless, The U.N. Charter provides for some very war-like behavior. For instance, Article 2(7), also known as the "self-determination" provision, permits belligerencies "which are essentially within the domestic jurisdiction of any state."[65] Articles 42 through 50 allow the Security Council to authorize and/or recommend economic and/or military sanctions, including, but not limited, to the severing of all communications, the use of naval blockade and embargo, and the use of armed force against states provoking a threat to, or breach of, the international peace and security.[66] Moreover, Article 51 not only permits

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63. Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 Mich. L. Rev. 1620, 1624 (1984). A more subtle notion of war as a "sanction" for wrongdoing was expressed in the League of Nations Covenant and the Kellog-Briand Pact. *See* Rhoda Mushkak, *Who May Wage War? An Examination of an Old/New Question*, 2 Am. J. Int'l L. & Pol'y 97, 103 (1987). *See also* Hans Kelsen, Law and Peace in International Relations 52-54 (1942).

64. Schachter, *supra* note 63, at 1624. This omission reflected an intentional departure from the League of Nations Covenant and the Kellog-Briand Pact of 1928, done to clarify semantic ambiguities surrounding the word "war." According to Schachter, "The term 'force' was thus a more factual and wider word to embrace military action." *Id.*

65. Also known as the "self-determination" provision. One of the bitter ironies of the Charter is that, under Article 2(7), civil war seems to be permissible as long as it stays sufficiently localized:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter, art. 2, ¶ 7.

Yet this policy is clearly changing in cases where internal conflict "produces sustained domestic violence and intense international concern." Richard A. Falk & Saul H. Mendlovitz, *Towards A Warless World: One Legal Formula to Achieve Transition*, 73 Yale L.J. 399, 412-13 (1964). In fact, Falk and Mendlovitz observe that "U.N. practice discloses a willingness to disregard the constraints of 2(7) whenever an ardent consensus can be mobilized in the General Assembly"as in the case of the Belgian Congo. *Id.* at 413, 418-24.

66. Article 41 actions "may include complete or partial interruptions of economic relations and of rail, sea, air, postal, telegraphic, radio, and other

self-defense actions, but recognizes acts of self-defense as an "inherent right" of all states.[67]

The traditional view is that these exceptions to the established rule of nonintervention under Article 2(4) are the prerogatives of states. Moreover, Article 51 clearly sets forth, and the International Court of Justice has held, that self-defense and collective self-defense justify the use of force only if an *armed attack* has occurred.[68] The idea, of course, is that the "armed attack" comes from an aggressor-state, and not from a disgruntled citizen within that state, unhappy with his present system.[69] The classic idea of self-determination within the Charter has little to do with notions of self-defense or defense of others; instead, its laurels rest on the conception that political identity is something that the disgruntled citizens of each state work out for themselves.[70] Moreover, a state's

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means of communication, and the severance of international relations." Article 42 authorizes "such action by air, sea or land forces . . . includ[ing] demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." U.N. Charter, art. 41.

67. Article 51 preserves the concept of traditional war, but limits it as a response to an illegal use of force and further narrows it as an "inherent right of self-defense." Article 51, although physically located in chapter VII of the Charter, is really an *exception* to it. As two leading public international law scholars have observed:

> The U.N. Charter explicitly mentions and preserves this permission to resort to force in response to unauthorized coercion, describes it as an "inherent right," and recognizes that permissible coercion may be exercised by the target state individually, or by a collectivity of states, without prior authorization from the organized community (although, of course, subject to its subsequent appraisal).

Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 126 (1961).

68. *See* Military and Paramilitary Activities, *supra* note 54, at 103, para. 195.

69. In fact, there is probably nothing so typical as a disgruntled insider, kicking up a fuss. The fact that there is inside discontent takes nothing away from the integrity of many societies as functioning systems. As Reisman explains: "A system need not be enthusiastically supported by its members. Indeed, many may have great reservations about its operations and may insist upon certain structural or personnel changes. What renders it a system is the minimal support regularly if not habitually given it." W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision,* 14 Va. J. Int'l L. 1, 7-8 (1973).

70. This conception also allows the struggle to remain one among internal, competing, territorial elites--"insiders." Deference to the prerogatives of "inside" elites within their own territories is well-established in international law. According to Professor Reisman:

political identity cannot be, in itself, a threat to the international peace and security. Article 2(7)'s purpose is not to aid tyrants or Nazis in their infernal but internal mischief, although it may incidentally give them a running start, but to give every state the right to work towards its own destiny relatively undisturbed.[71] The purpose of Article 2(4) is not to tie our hands, but to reduce bloodshed even if we are powerless to stop it, without taking away a state's right to defend itself if it is truly threatened.[72] This reasoning has the effect of reducing, if not eliminating, violence from outside parties.[73] Moreover, it also focuses on what Kenneth Walz calls "old truths": "[I]f a country, because of internal disorder and lack of coherence, is unable to rule itself, no body of foreigners, whatever the military force at its command, can reasonably hope to do so."[74]

In fact, the concepts embodied in Articles 2(4) and 2(7) are almost inseparable. A good example of how they combine in practice is U.N. General Assembly Resolution 34/22 (Nov. 14, 1979), concerning the

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> The traditional corpus of international law comprised excess and tacit communications between the effective elites of territorial communities about the practices which ought to be reciprocated among themselves. Precisely because of the reciprocal character of the arrangements, there was also a high degree of deference to the fundamental postulate of their system; respect for the territorial and political power base of each elite group.

Id. at 2-3.

As Kenneth Walz notes, outsiders can only go so far. "Military force, used internationally, is a means of establishing control over a territory, not of exercising control within it." Kenneth N. Walz, *International Structure, National Force and the Balance of World Power*, 21 J. Int'l Aff. 218-31 (1967).

71. The concept is almost straight out of the argument of John Stuart Mill, as set forth in Walzer, *supra* note 61, at 87-91. However, states' obligations *erga omnes*, to refrain from acts such as genocide, slavery and torture, and to prevent, protest and punish states engaging in these acts, have narrowed the scope of the nonintervention norm. *See* Barcelona Traction, Light and Power Co. (Belgium v. Spain) 1970 I.C.J. 3 (Feb. 5). However, the International Court of Justice's remedy in case of a violation was that avenging states would bring the wrongdoing state into court, rather than wage war on them, no matter how briefly.

72. *See* Gordon, *supra* note 54. Reducing bloodshed, especially that of civilian populations, is a more than reasonable aim, no matter how moral one's cause. As pointed out previously, some humanitarian intervention proponents disagree. *See supra* note 53.

73. *But see* Reisman, *supra* note 69, at 34: "The challenge is not merely to supress violence, for violence is a ubiquitous feature of social processes and a characteristic of law. The challenge instead is to respond creatively to violence in ways which use it to lever toward an improved world order."

74. Walz, *supra* note 70.

Vietnamese invasion of Kampuchea. The General Assembly not only insisted that all foreign troops be immediately withdrawn and all acts and threats of aggression cease, but also called for an end to "all forms of interference in the internal affairs of states of South-East Asia."[75] The Assembly not only reiterated "the right of all peoples to determine their own future free from outside interference," but directed all Member States "to refrain from any interference in the internal affairs of Kampuchea in order to enable its people to decide their own future and destiny free from outside interference, subversion or coercion, and to respect scrupulously the sovereignty, territorial integrity and independence of Kampuchea."[76]

Even so, as part of the "Reagan Doctrine," uses of force such as the U.S. invasions of Grenada and Panama, illegal under the Charter, have been rationalized by the executive branch as Article 51 self-defense actions, and have been extended also as variants of collective self-help.[77] These unilateral invasions are not only direct challenges to the nonintervention norm, they are almost abrogations of it. As Christopher Joyner notes, "[t]he strict test under international law legally sanctioning such a military response is the presence of some real and immediate imperilment to a state."[78] Even under Mill's most generous view, the essence of the concept is an outside threat,[79]because here, we are not just

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75. G.A. Res. 22, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/L.13/Rev.2 (1979). *See also* Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 Am. J. Int'l L. 811, 812-13 (1984). But see Hans-Peter Gasser, *The American Red Cross--International Humanitarian and Human Rights Law in Internationalized Non-International Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 Am. U. L. Rev. 145, 148, 152-56 (1983), describing Kampuchea as an example of "internationalized civil war" rather than a true international conflict.

76. *See* Franck, *supra* note 75, at 812.

77. *See* Tom J. Farer, *Beyond the Charter Paradigm*, 84 Am. J. Int'l L. 503, 504-08 (1990); Nanda, *supra* note 51, at 495-500; Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 Am. J. Int'l L. 131, 132-34 (1984). For the contrary viewpoint, see Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* Lewis Henkin, et al., Right v. Might: International Law and the Use of Force 19-36 (1989); John Norton Moore, *Grenada and the International Double Standard*, 78 Am. J. Int'l L. 145, 152-58 (1984); D'Amato, *supra* note 29, at 516-19.

78. Joyner, *supra* note 77, at 133.

79. According to Mill:

> The doctrine of non-intervention, to be a legitimate principle of morality, must be accepted by all governments. The despots must consent to be bound by it as well as the free States. Unless they do, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong, but the

simply discussing forms of help, financial aid or assistance like farm machinery credits. Here, we are talking about the use of lethal weapons against citizens, some of whom want the intervenor to use these weapons to "help" them and others who don't, who may resist outside help and use similar if not more deadly weapons against the intervenor. If the intervention is anything more than a simple airlift, it will probably become a struggle in which numbers surely will die on both sides.

III. THE NONINTERVENTION NORM AND "HARD CASES"

It is well established in international law that "[e]ither overt or subversive complicity by a state in the overthrow of an adversarial regime should be construed as unlawful intervention and therefore a delict of international norms."[80] Even military interference "by invitation" to uphold a friendly regime may be wrongful and violate the Charter where the use of force is excessive, or violates "the territorial integrity or political independence of any state."[81] But supposing an intervention violates these legal norms, can it still be the morally "right" thing to do?

Kalman H. Silvert, a prominent political scientist and Latin Americanist, had seen enough by the end of his life to answer affirmatively:

> Though the pacifist will protest mightily, I submit that under certain conditions there is no alternative but to break laws and be aggressive in the defense of better social ways against worse ones. I propose the legitimacy of illegality only in extreme cases, however, and only as last resort against regression into increasing authoritarianism.[82]

This, however, is qualitatively different from D'Amato's argument. Silvert proposed a rule of *exception* to the norm of nonintervention, close

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> right must not help the right. Intervention to enforce non-intervention is always rightful, always moral, if not always prudent.

John Stuart Mill, III Dissertations and Discussion: Political Philosophical and Historical 176 (1875), *reprinted* in Mill, *A Few Words on Non-Intervention*, Fraser's Magazine (Dec. 1859).

80. Quincy Wright, *Subversive Intervention*, 54 Am. J. Int'l L. 521 (1950) *cited in* Joyner, *supra* note 77, at 134.

81. U.N. Charter, art. 2, ¶ 4.

82. Kalman H. Silvert, Man's Power: A Biased Guide to Political Thought and Action 93 (1970).

to what Walzer disingenuously calls "rules of disregard."[83] D'Amato, on the other hand, is proposing a new and quite radical *rule.*

It is not possible to stress enough that in examining interventions, each case must stand on its own. Sometimes the side of moral rightness will outweigh the interests protected through the nonintervention norm.[84] Nazi Germany is always the tempting example:[85] Jews and Gypsies are being killed by the millions? Intervene! Save those people![86] Still, it is worth remembering that when the United States finally did enter the war, moving its armies across Europe, the Germans only stepped up their slaughter, even in the face of certain defeat.[87] And what steps could we have taken?[88] For purely emotional purposes, the answer is easy, *take any step,* take any step *now.*[89]

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83. Walzer, *supra* note 61, at 86. Fernando Teson also suggests that although there may not be a "general right of intervention, that does not dispose of the issue of whether there are *specific* grounds to intervene." Teson, *supra* note 18, at 13.

84. Commentators have not been reticent to point out that modern international laws of war are astonishingly devoid of considerations of justice. *See generally* J. T. Johnson, *Ideology and the Jus Ad Bellum: Justice in the Initiation of War,* 41 J. Am. Acad. Religion 212 (1973).

85. In fact, Nazi Germany has become the humanitarian intervention paradigm. Even beyond notions of humanitarianism, Nazi Germany remains the epitome of destructive evil. "It is because the Nazis are so extreme that they become useful in epitomizing certain destructive patterns that may operate--less visibly, more subtly--in nuclear weapons policies." Robert J. Lifton & Eric Mardusen, The Genocide Mentality: Nazi Holocaust and Nuclear Threat 11 (1990).

86. In weighing the aspects of humanitarian intervention against the value of sovereignty, Robert Phillips puts the issue succinctly: "It may seem perverse to accept any amount of localized evil rather than intervene in the affairs of a sovereign state. After all, is sovereignty all that important?" Robert L. Phillips, War and Justice 21 (1984).

87. *See* Bruno Bettelheim, Surviving and Other Essays 85-86 (1980).

88. In an administration such as President Bush's, that did not hesitate to use force on its own prerogative, and favors the types of *blitzkrieg* lightning strikes involving military commandos, "special forces," special weapons and "smart" bombs, it is worth remembering that sometimes the most effective strategies are the simplest. In times of crisis, public opinion should be rallied, thoughtfully used to really accomplish something, other than acting as an invasion traffic signal. From either inside or outside a state, it is a powerful weapon even against totalitarian regimes, who are not immune to it. (That is why they work so hard at repressing it).

89. Both the success and wisdom of such reasoning are far from certain; however, history is replete with brave decisions made by those persons having an "instinct for the bold stroke." Even the seemingly lackluster presidency of Gerald Ford sometimes combined courageous decision-making

However, even if law's "paper" demands can be met, no urgency or emergency can completely override the moral questions with which we must wrestle. For even when we are faced with the enormity of genuine evil, our morality will not let us take just "any step."[90]

In the case of World War II, the Allies and the Germans had already bombed each other senseless. How many cities can one bomb, without losing one's moral direction? How many noncombatants can one kill before one crosses the immorality frontier? One? One hundred? One thousand? The Allied bombing raids on Germany were especially devastating.[91] However, these did not halt the churning of the German war machine.[92] Would it have halted their genocidal campaigns? No one can answer this question with any certainty.

What if we had killed Hitler? Now, *there* is a question everybody likes to think about. We must acknowledge that some German officers tried, although the attempt came rather late during the war. The would-be assassins were strongly motivated by the fact that Hitler was losing, rather than by any horror at what he had inflicted upon humanity.[93] Would they have tried to kill him if he was winning? It is also worth noting that, in the same situation today, U.S. laws would specifically prohibit us from doing so.[94] Why should we aid, abet, or encourage in any way nationals

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with startling simplicity, as when Ford explained his order to recapture the Mayaguez by saying, "I felt something had to be done." R.W. Apple, Jr., *Prudent Meets Timid; Bush's Critics Say He's Crossed the Line, But Public Still Sees him as Presidential*, N.Y. Times, Oct. 15, 1989, at A1.

90. As Max Weber warned:

> No ethics in the world can dodge the fact that in numerous instances the attainment of 'good' ends is bound to the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones--and facing the possibility or even the probability of evil ramifications.

Max Weber, Essays In Sociology, 120-22 (H.H. Gerth & C. Wright Mills eds., 1946).

91. *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 1-2 n.1 (1990), *See also* Ronald Schaffer, Wings of Judgment: American Bombing in World War II (1985); Conrad C. Crane, The Evolution of American Strategic Bombing of Urban Areas (1990) (unpublished Ph.D. dissertation, Stanford University).

92. *See* Michael Sherry, The Rise of American Air Power: The Creation of Armageddon (1986); Wesley F. Craven & James L. Cate, The Army Air Forces in World War II (1948).

93. *See* Desmond Seward, Napoleon and Hitler: A Comparative Biography 269-70, 289 (1988).

94. The average citizen would be deterred, at least in theory, by domestic laws and statutes prohibiting all types of intentional killing. Assassination as a crime has a significant political dimension that gives its commission a more dangerous quality of being a crime, not just against the actual victim, but

of other states to take such actions against individuals that our own laws prohibit us from taking, even if in a special circumstance one murder might appear to be the lesser evil?[95]

There are other moral questions that go far beyond the legalist, liberal Charter paradigm. How far can we go in "helping"? Can we go as far as the evil empire does? Can we play tit for tat? Fight fire with fire? If we kill, does that make us as "bad" or as "evil" as we think they are?[96] Even if our motives are "pure,"[97] what about the dangers inherent in the rescue? Why must the rescuers risk their own lives and well-being, especially if they themselves have done no wrong, or feel no loyalty?

These are questions that must be asked every time an intervention is contemplated. It is plainly not enough that an invasion be popular or even desired, although this is certainly a requirement in most cases. Cases like Nazi Germany, however, may be the exception. Where the evil to be vanquished is great and unambiguous, one can fairly say: "Who cares what the German people think? The evil is too enormous to depend on their wishes alone." Nevertheless, the idea is to foster good government, not to inflict it upon an unwilling populace. While it may be one requirement, desire alone is not enough; indeed, it may not even be relevant, unless one is a mercenary for hire. Nevertheless, "[t]here is no shortage," notes Walzer, "of revolutionaries who have sought, pleaded for, even demanded outside help."[98] Even so, the interests of both intervenors, and those they wish to "save," require that the decision to intervene be made by more than a "wetted finger held up to the breezes."[99]

The average person has simply no conception of what a large-scale

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against the political belief or value the victim represents.

95. Loch K. Johnson uses the test of "extreme scenarios" that highlight "one's sense of imminent threat to the national security." Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 Am. J. Int'l L. 284, 297 (1992).

96. Many able minds have struggled with this angel 'til dawn. One of the ablest, Kalman H. Silvert, answered in the negative (although in the case of Panama, he might well have considered differently in light of the carnage). Silvert, *supra* note 82, at 93-94.

97. See Reinhold Niebuhr, Moral Man in Immoral Society 74 (1932), for the proposition that even moral perfectionism does not inevitably lead to ideal social consequences.

98. Walzer, *supra* note 61, at 88.

99. George Will, *Unseriousness Afflicts This Presidency*, Newsday, Oct. 13, 1985, at 91. Falk particularly notes that, in the United States, the international law restraints on the uses of force are being intentionally replaced by "a domestic popularity poll." Falk, *supra* note 62, at 268. Or, as William Schneider of the American Enterprise Institute has put it, "You can't criticize a president who's at 70% in public approval ratings." Johanna Neuman, *Critics: Bush as Frenetic as "Steam Engine,"* USA Today, Oct. 13, 1989, at A4.

military intervention entails. It is important to bear in mind that neither the United States nor Panama, prior to U.S. invasion, had ever experienced a true armed attack on their own soil. Seabury eloquently makes the point about the United States when he states that:

> The United States has never been successfully invaded, much less defeated in war. In an age of intercontinental missiles, its interior has never suffered more than trivial physical damage from enemy attack in time of war. . . . From the Civil War up until the time of the Cuban crisis of 1962, civilian America had only experienced the terrors of revolution, civil war, or international conflict vicariously. Americans shared this national immunity from large-scale conflict and terror with very few other peoples. America had been a unique exception in the modern world.[100]

In the case of Panama, most Panamanians clamoring for the U.S. invasion had not a clue as to the violence and destruction that such a military operation would entail. This naivete is evident in interviews with Panamanian citizens, who apparently based their ideas of invasions on old war movies.[101] "The majority of the people will clap and wave the troops on . . . They'll give them water, coffee and sandwiches," said one.[102] Another predicted quite erroneously that "[t]here'll be about four people who fight. It'll be a fiesta."[103] One interviewee, angry that the economic dive, resulting from U.S. sanctions to oust Noriega, had caused him to postpone his wedding plans said, "Bring them in."[104] He explained that he was not alone: "In my neighborhood, everybody is for an invasion. Now."[105] A Panamanian woman expressed her great disillusionment when, after the 1989 election riot, the United States did not immediately intervene: "I felt exactly the same way as the day I was told Santa Clause doesn't exist."[106]

These are not the rational, cautious comments of people bracing for awful violence, but the wishful, fanciful musings of those who have never experienced war or violent altercation, and believe they can have their

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100. Paul Seabury, Power, Freedom and Diplomacy: The Foreign Policy of the United States of America 16 (1963).

101. These quotes are taken from Lindsey Gruson, *U.S. Invasion is Debated in Panama*, N.Y. Times, May 16, 1989, at A6.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

fighting done for them by others.[107] The statements have an immature, fantastic quality, hence the references to Santa Claus and "fiestas." They stand in stark and stunning contrast to those made by Colin Powell, who informed his commander-in-chief: "We are going to hurt people. There will be loss of life and there will be chaos."[108]

IV. THE NEW ARGUMENT AGAINST THE NONINTERVENTION NORM

The older, non-intervention norm considers self-determination to be a right of every state, hence the assurance of nonintervention in Article 2(7). This concept of self-determination is not the same as a person's or even a peoples' right to self-determination, although this right is implicitly recognized in the Charter.[109] The Charter, mostly concerned with

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107. Panamanians were prepared to march against Noriega in protest, but that was about all. "We're not going to ask our people to confront these monsters," Vice-President-elect Billy Ford told journalists, "We're not going to take them to the butcher shop." Buckley, *supra* note 10, at 184. Eric Arturo Delvalle, Panama's "interim President" recognized by the United States, made a cryptic plea for an invasion early on: "All imaginable pressures," he said, "no matter how dramatic they may seem, should be taken if we want to have a democracy in Panama." *Id.* at 127. In fact, Delvalle had his own agenda. He wanted to keep being president, but knew that this could not happen without help from the United States. Delvalle had expected that the United States would send a force similar to that of the Grenada invasion and restore him to power. *Id.* at 136-37. Even during the "Great White March" of August 6, 1987, that drew close to half a million people, Panamanians simply mingled together in the streets, waving white handkerchiefs at each other. The highlight of the event, largely ignored by the Panamanian Defense Forces (PDF), occurred when a cluster of white balloons became tangled in the ironwork halo of a statue of the Virgin Mary. The crowd stared at the balloons for hours, murmering "*Que milagro*" and "*Justicia*," and then everybody went home. Said one protester of the "march": "That was their best chance, the damned fools . . . I started shouting, 'Let's go and get Noriega. Let's go to the Commandancia. Demand his head, for Christ sakes.' But they just wanted to congratulate themselves and talk about miracles. They wanted everything done for them." *Id.* at 98-99.

108. Woodward, *supra* note 7, at 169.

109. Although the nation state is the unit of membership, the United Nations is concerned with "persons" and "peoples." The Preamble of the U.N. Charter states that the Organization's purpose is nothing less than

> [t]o save succeeding generations from the scourge of war, . . . to reaffirm faith in fundamental human rights, in the dignity and

discouraging war, directs its appeal at states, which are the entities that control war's engines. The United Nations is often criticized for its state-to-state focus, especially by human rights advocates, but for the most part such criticism is unfair. State-to-state communication is a functional necessity, not least of all because Member states are the Organization's integral parts. People, even individuals, are hardly excluded from this framework. States are composed of people, both citizens and not, and without them a state is nothing more than a piece of land, lacking even the feeble legal identity of property.[110] The United Nations is not a state itself, nor is it truly a world government in any sense; membership of states is voluntary, although members are expected to fulfill their duties and obligations under the Charter.

The Charter is not a bulwark of pacifism, but it does seek to control war and minimize its violent effects. The Charter aims at containment, de-escalation and eventual resolution of tense conflict situations.[111] This strategy is not merely a matter of belief or foolish wishful thinking, as many of its critics claim.[112] Its premise is elegantly simple. Yet if it is based on anything more enticing to the average realist, the entire Charter can be summed up in the modified truism that "money talks, and everyone will walk." As Karl Deutsch explains: "It is possible to make conflicts rare and weak, even between closely interdependent countries or peoples, and to make collaboration so frequent and rewarding that it may initiate a chain of events leading to some form of stable and lasting political integration."[113]

U.N. Charter chapters IX and X, respectively governing "International Economic and Social Co-Operation" and the creation and maintenance of "The Economic and Social Council," spell out an elaborate system of social and economic welfare to promote the "conditions of stability and well-being necessary for peaceful and friendly relations among nations."[114] By implication, Member states that behave themselves by refraining from fighting with their neighbors may avail themselves of the

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> worth of the human person, in the equal rights of men and women . . . to live together in peace with one another as good neighbors, and . . . to employ international machinery for the promotion of the economic and social advancement of all peoples.

Basic Documents of the United Nations 1-2 (Louis B. Sohn, ed., 2d ed. 1968).

110. Unless the land belongs to another state, in which case it may be territory.

111. *See generally* Thomas M. Franck & Faiza Patel et al., *Angora: The Gulf Crisis in International and Foreign Relations Law: U.N. Police Action in Lieu of War: "The Old Order Changeth"*, 85 Am. J. Int'l L. 63 (1991).

112. *See, e.g.*, Walzer, *supra* note 61.

113. Karl W. Deutsch, The Analysis of International Relations 150 (1968).

114. U.N. Charter art. 55; Sohn, *supra* note 109, at 14.

international good.

A state's internal turmoil is usually only a threat to the well-being of other states when it begins to overrun its borders, and the Charter recognizes that in terms of an immediate response, usually the state itself is in the best position to handle the matter.[115] In realist terms, the United Nations also acknowledges, through its doctrine of nonintervention, Weber's famous dictum, "The decisive means for politics is violence."[116]

Another reason for the survival of Charter Articles 2(4) and 2(7) is that they embody survivalist principles for small states. As Thomas Franck has noted, "Most states in the United Nations are small and weak. They are more likely to be the victims, rather than the perpetrators, of aggression."[117] In fact, these small states "fear aggression more, even, than they fear hunger and poverty."[118] Because nonagression "is so central to any definition of their self-interest," these states actively seek enforcement of the norm.[119]

The new argument, eloquently proposed by Michael Reisman,[120]but strongly challenged by Oscar Schachter,[121]augers against a blanket application of the noninterventionist norm.[122] Writing after the U.S. invasion of Grenada, Reisman proposed taking a giant step in a discipline where a baby step might be more in order. Specifically, Reisman proposed expanding legitimate exceptions to Article 2(4) to include the imposition of democracy by force.[123] Reisman's contentions have nothing to do with self-defense, but instead aim to diminish Article 2(7) through Article 2(4). "Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate

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115. U.N. Charter, ch. VIII, *Regional Arrangements, reprinted in* Sohn, *supra* note 109, at 13. In Article 52, Member States are urged to develop "regional arrangements or agencies" and "make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council." *Id.* at ¶ 2.

116. Weber, *supra* note 90, at 120-22.

117. Franck, *supra* note 27, at 831.

118. *Id.* at 818.

119. *Id.*

120. Reisman, *supra* note 30.

121. Oscar Schachter, *Editorial Comment: The Legality of Pro-Democratic Invasion--Editorial Comment*, 78 Am. J. Int'l L. 645 (1984).

122. Of course, blanket applications are what make norms so normative, as opposed to mere choices.

123. Professor Reisman has made similar, but less radical, arguments in earlier writings. He has long been a proponent of "a public order of human dignity," and sees it as "the most fundamental recommended goal . . . in which all values are abundantly produced and widely shared." Reisman, *supra* note 69, at 34.

consequences, to increase the probability of the free choice of peoples about their government and political structure."[124]

As though he had never even heard of Mill, Reisman warns that "a mechanical interpretation of Article 2(4) may . . . superimpose on an unwilling polity an elite, an ideology and an *external* alignment alien to its wishes."[125] Coming close to the argument about Nazi Germany set forth later in this text,[126] Reisman contends that a state's refusal to bend the nonintervention norm "may entail far-reaching social and economic changes and grave deprivations of human rights for substantial members and strata of the population."[127]

Reisman's reasoning is seductive; it's like advertising, piquing our interest with all the right key words. For example, who wouldn't be in favor of upholding the minimum public order of the world community?[128] Isn't that what the United Nations is all about? In this light, Reisman explains that interventions, originally thought to wreak havoc, to kill the innocent and to send states scurrying to defend their prerogatives, are actually *good* for everyone.[129] Reisman has changed the test from one of the free will of persons "willing to brave labor and danger for their liberation"[130]to one of "enhancement" of "world order:"

> A *sine qua non* for any action--coercive or otherwise--I submit, is the maintenance of minimum order in a precarious international system. Will a particular use of force enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies.[131]

The task of contemporary international lawyers in all of this,

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124. Reisman, *supra* note 30, at 643-44.

125. *Id.* at 645. Such a "polity" would be very weak indeed. Moreover, as Walzer points out, it seems unlikely that most interventions would last long enough to provide the kinds of long-term change that Reisman talks about. *See* Walzer, *supra* note 61, at 88.

126. *See supra* text accompanying notes 88-98.

127. Reisman, *supra* note 30, at 645.

128. Clearly, only "thugs."

129. This is like a geologist saying that earthquakes are "normal." Such a statement may be indisputably true, yet it gives no comfort to those injured by them, and does nothing to solve the many problems earthquakes pose for humanity.

130. Mill, *supra* note 79.

131. Reisman, *supra* note 30, at 643.

according to Reisman, is a negative one, not to "engage in automatic indiscriminate denunciations of unilateral resorts to coercion," but to invent a scheme to appraise their "lawfulness."[132]

On the surface, Reisman's proposal seems unoffensive. In fact, one's first inclination is to ask what is new about it. As Lea Brilmayer points out, the nonintervention norm "does not require that one state be entitled to pursue ruthlessly its own interests, protected from all interference from other states. States sometimes are entitled to thwart one another's plans."[133] Mill's acknowledgement that all counter-interventions can be justified still rings true under Reisman's paradigm. The issue that Reisman appears to address, but in fact does not, is not whether sovereignty has become some lofty, ridiculous impediment to "self-determination," but, as Brilmayer indicates, "whether the interference is within the scope of that state's legitimate power."[134]

Legitimacy is, in fact, the key element in uses of force by states. D'Amato realizes this and seeks to avoid the issue, or at least diminish its importance.[135] However, if the United States, or any state, claims to use unilateral force permissibly and rightfully in a "just cause,"[136] its policymakers cannot ignore the issue of legitimacy, for it is determinative.[137] Without it, the state is not just, and neither is its cause. As John Rawls explains:

> [T]he national interest of a just state is defined by the principles of justice that have already been acknowledged. Therefore such a nation will aim above all to maintain and to preserve its just institutions and the conditions that make them possible. It is not moved by the desire for world power or national glory; nor does it wage war for purposes of economic gain or the acquisition of territory. These ends are contrary to the conception of justice that defines a society's legitimate interest, however prevelant they have been in the actual conduct of states.[138]

Oscar Schachter easily pin-points the holes which permeate the

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132. *Id.*

133. Lea Brilmayer, Justifying International Acts 111 (1989).

134. *Id.*

135. D'Amato, *supra* note 29, at 517.

136. Operation "Just Cause" was in fact the Pentagon's code name for the U.S. invasion of Panama. Originally called operation "Blue Spoon," one must wonder at the speedy, and so very apt, name change on the eve of the invasion. *See* Woodward, *supra* note 7, at 173.

137. Revisionism is the task of their apologists.

138. John Rawls, A Theory of Justice 379 (1971).

concept of unilateral intervention for the purpose of fostering states' self-determination. It is true, Schachter admits, that the United Nations has done precious little to prevent aggression by states, making unilateral uses of force under color of Article 51 necessary.[139] It is also true that some unilateral uses of force are legitimate, and should not be "indiscriminately" condemned as wrongful.[140] However, it does not naturally follow that, because both of these tenents are sometimes true, a new norm justifying the use of unilateral force to encourage self-determination has emerged. To so conclude is, as Hobbes would say, to suffer "[f]rom defect in Reasoning (that is to say, from Errour)."[141] Schachter registers his shock at Reisman's proposal, stating "it is almost startling to be told that Article 2(4) is now only a means and that such aims as the maintenance of peace and the prevention of aggression are secondary to the enhancement of popular rule."[142]

Moreover, Reisman's proposed "reinterpretation" of Article 2(4) to expand its scope to encompass the very thing that it implicitly prohibits, the overthrow of foreign governments by violent means, is incredible. The problem with Reisman's reasoning is not so much its truth or falsity, but that it "serves to minimize the important distinction between self-protection and nondefensive uses of force."[143]

Schachter terms Reisman's proposal "a radical departure," but this language is really too mild to describe what is happening. Schachter correctly observes that, far from outlawing war, or at least limiting it, Reisman's proposal would introduce into being "a new normative basis for recourse to war" that would favor powerful, armed states, and legitimize unprovoked attacks on otherwise peaceful governments "alleged to be unresponsive to the popular will."[144] This proposal, Schachter insists, "is not law, will not and should not be law."[145] I would go further and say that, in fact, having no law at all would probably be better than having one like this. And Ovid's maxim, that laws were invented to prevent the strong from always having their way, has probably never been more true.

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139. Schachter, *supra* note 121, at 646.

140. *Id.*

141. Thomas Hobbes, II Leviathan 339 (1651).

142. Schachter, *supra* note 121, at 648.

143. *Id.* at 646. Schachter recognizes that Reisman, like D'Amato, has skirted the issue of legitimacy. "When Reisman implies that the legitimacy of self-defense may mean that other unilateral uses of force are also legitimate, he only begs the question." *Id.*

144. *Id.* at 649.

145. *Id.* at 650.

V. THE CASE OF PANAMA: STICKS (BIG ONES) AND STONES AND LOTS OF NAME-CALLING BREAK BONES

If Professor D'Amato is to be believed, the U.S. invasion of Panama was akin to a crusade of might making right. In substantiating his thesis, however, he greatly overstates his case. Starting out on a defensive note, he denies that the purpose of the invasion was solely to rescue a bunch of blue-haired matrons being held hostage poolside.[146] In fact, D'Amato is not talking about rescue at all. "I am talking," he assures us, "about the human rights of Panamanians to be free from oppression by a gang of ruling thugs."[147]

"Thug" is a favorite word of both D'Amato and President Bush,[148] and their use of it to justify the invasion of Panama is interesting because it intentionally invokes images of domestic criminality, and low-life criminality, at that. The reference, of course, is to Noriega, and he was an easy target even at the height of his power. Noriega is far from a charismatic caudillo leader; he is short, squat, dark-skinned, pock-marked, rheumy-eyed and inarticulate.[149] His limited English sometimes makes him appear obtuse.[150] In brief, Noriega is ugly and coarse, which is what names like "thug" imply.[151]

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146. This is not to say that such persons do not have human rights worth defending. *See* D'Amato, *supra* note 29, at 516. The image of helpless matrons was raised initially by Tom J. Farer, who used the 1867 "Blue Nile" rescue by British expeditionary forces of Europeans being held hostage by the Ethiopian Emperor Theodore as a point of comparison. *See* Farer, *supra* note 77, at 503-04. The blue hair and swimming pool are my own embellishments; however, based on my personal experiences in Panama, I think the description of who was being "defended" there is a fair one.

147. D'Amato, *supra* note 29, at 516.

148. It was also a favorite word of President Reagan; although, he preferred to couple it with an adjective like "leftist thugs." *See Text of President Reagan's Announcement of the Invasion of Grenada, supra* note 3.

149. Elliot Abrams "had not met the general before [December, 1985] and was taken aback by his ugliness enough to talk about it." Buckley, *supra* note 10, at 45.

150. Buckley, *supra* note 10, at 14.

151. It was noted by at least one writer that the opposition's "Civic Crusade" movement lost almost all of its momentum from the lower classes early on, because of the oligarchy's incessant ridicule of Noriega's personal appearance, which to many dark-skinned Panamanians bordered on cruelty and outright racism. *See* Dinges, *supra* note 9, at 267-68. In fact, the Civic Crusade's logo was that of a pineapple with a slash across it, a cheap shot at Noriega, whom the oligarchs called "pineapple face" because of his disfiguring acne and smallpox scars. *Id.* While the slur infuriated Noriega and embarrassed his family, it also revealed the childishness and immaturity of Panamanian

Where D'Amato and the Bush administration differed somewhat was in their characterization of Noriega's dangerousness. To invade a sovereign state, kill its citizens, many of whom chose to defend Noriega's regime with their very lives, and destroy their property, calls for fighting more than a mere "thug."[152] Such aggression, to possibly be both justified and justifiable, must be inflicted in the cause of vanquishing a great danger or enormous evil.[153] D'Amato understood this requirement; whereas, President Bush did not.

In fulfillment of his agenda, D'Amato rhapsodizes at length about Noriega's alleged iniquities. He characterizes Noriega as the omnipotent warlord. "Noriega rules Panama because he and his co-thugs controlled the guns, rockets, mortar, truncheons and tear gas."[154] D'Amato also points a Dreyfusian finger at Noriega, the megalomaniacal murderer, when he states, "[a]ny citizen who defied Noriega by rational argument risked being answered by bullets."[155] "[In the 1989 elections,] Noriega invoked the logic of brute force, of steel, of gunpowder, of the infliction of imprisonment and disappearance. The electoral victors were crushed."[156] There is Noriega, the tyrant and foe of democracy, an evil in the world as common as rain, almost guaranteed to stir American sentiment when all else fails.

The other necessary players in this drama are the allegedly oppressed

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opposition politics, and shed some light on how Noriega was regarded by his local enemies. If Noriega was in fact the tyrannical despot portrayed as the epitome of evil by D'Amato, and as a drug-dealing, common criminal by the Bush administration, one could certainly come up with more provocative propaganda than "pineapple face."

152. Both D'Amato and President Bush indulged in demonizing Noriega; however, it was a necessary step in light of the extreme actions taken to oust him. D'Amato reviled Noriega as if the United States had never faced a greater foe. President Bush stuck to embellished drug-thuggery talk. One presidential aide referred to Noriega as the "drug kingpin of the world." Buckley, *supra* note 10, at 155. Bush also, albeit erroneously, equated drug dealing with international terrorism claiming "drug dealers are domestic terrorists, killing kids and cops, and they should be treated as such. I won't bargain with terrorists, and I won't bargain with drug dealers, either, whether they're on U.S. or foreign soil." *Id.* at 155-56. While this sounds impressive, it is simply untrue that drug dealing and international terrorism pose the same type of threat to societies, especially Western democracies.

153. For example, Nazism seemed to be that type of threat, and its image persists despite its defeat and clear failure as ideology. *See* Walzer, *supra* note 61, at 109-16.

154. D'Amato, *supra* note 29, at 517.

155. *Id.* "Dreyfusian finger" actually refers to Major Henry's finger, which he pointed at Captain Dreyfus during Dreyfus' court martial for espionage, shrieking, "And that traitor is sitting there!" David L. Lewis, Prisoners of Honor: The Dreyfus Affair 51 (1973).

156. *Id.*

people. Without them, a despot is little more than an invention of wishful thinking. These are the people to whom our "humanitarian" impulses are ostensibly addressed. In D'Amato's formula, they are supposedly the rest of the state, apart from "Noriega and his henchmen." They are the weakling, lost lambs, helpless to preserve themselves against Noriega's slaughter. In a passage best described as curious, D'Amato compares them to battered women when he claims "[t]he citizens of Panama were as powerless against Noriega and his henchmen as the 19th century American wives were against physically stronger husbands."[157]

Unfortunately, much of this is simply wrong, and what is not obviously wrong is overblown, indulgent exaggeration. While Noriega's "badness" is not in doubt, he was no Hitler. It is true that the "electoral victors" were beaten up when they and their supporters took to the streets to protest the "nullification" of the May, 1989 elections, but that riot was not the Bloody Sunday D'Amato describes. Protestors, for the most part, were not subdued by "guns, rockets [and] mortar," as D'Amato contends, but by tear gas, birdshot, and clubs, riot control hardly being a novelty in Latin America.[158] In fact, after months of all but ignoring protesters, Noriega had directed his commanders to quell the marches and strikes, but warned them repeatedly not to kill anybody.[159] During the riot-torn summer of 1987, Noriega and the Panamanian Defense Forces (PDF) exercised almost exquisite restraint; despite six weeks of demonstrations and clashes, Panama's death toll was a startling zero.[160] Even on July 10, the "Black Friday" of 1987, during one of the largest demonstrations ever in Central American history, the PDF "battered and stunned" a crowd of several hundred thousand protesters, without causing a single fatality.[161] Between June 1987 and April 1988, total protester fatalities numbered four, "a rare slip-up by the well-trained police, who were under strict orders to prevent fatalities, and therefore headlines."[162] The unpleasant reality is that Noriega's PDF were in fact trained primarily by U.S. military personnel at the Southern Command to handle just such exigencies, receiving both arms and aid for this purpose.[163]

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157. *Id.*

158. Buckley, *supra* note 10, at 94-95. *See also*, Frederick Kempe, Divorcing the Dictator: America's Bungled Affair with Noriega 213 (1990). Nevertheless, there is a growing trend around the world to use lethal force against civilian protestors. *See* David J. Scheffer, *Must Demonstrators Be Shot?*, Los Angeles Times, May 24, 1990, at B7.

159. Buckley, *supra* note 10, at 93.

160. *Id.* at 95.

161. *Id.*

162. *Id.* at 132.

163. *See* Dinges, *supra* note 9, at 10. *See also* R.M. Koster & Guillermo Sanchez, In the Time of the Tyrants (1990) (Although not a scholarly work,

D'Amato also mischaracterizes Panama's political scene. The opposition were not the victims of "steel, of gunpowder," nor were they imprisoned or "disappeared" for their political activities, as occurred in Argentina, El Salvador and Guatemala.[164] Some people were imprisoned for short periods, and others went into voluntary "exile" mostly in Caracas, Miami and New York, where many oligarchs were living anyway.[165] One Noriega opponent and former PDF colleague, Hugo

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this is an informative, highly anecdotal and opinionated account of Panamanian politics. I have nevertheless used this book to document political facts about Panama which are widely known but seldom published. Where I think there is a problem with the authors' account, I have so stated.)

164. *See generally* Iain Guest, Behind the Disappearances: Argentina's Dirty War Against Human Rights and The United Nations (1990); Thomas Buergenthal, Robert Norris & Dinah Shelton, Protecting Human Rights in the Americas: Selected Problems (1982).

165. To evaluate tyranny's scope, or even to determine that it exists, one must look deeply into each case of alleged human rights violations. Two cases of human rights violations were brought to the U.S. Congress's attention. One involved a panamanian journalist, Leopoldo Aragon, who became distraught upon being denied a U.S. visa. His widow testified that he had been imprisoned and tortured by the PDF for political activities. *See Proposed Panama Canal Treaties: Hearings Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 320-24 (1977) (statement of Rose Marie Aragon speaking on behalf of the Panamanian Committee for Human Rights). However, the U.S. Department of State's investigation showed the facts to be far from clear. *See* Letter to Senator James B. Allen, *reprinted in Proposed Panama Canal Treaties , supra* at 328-30 (statement of Curtis Cutter, Legislative Officer, Congressional Relations, U.S. Department of State).

The second alleged human rights violation involved a U.S. citizen from Texas, David Mendelson. *Id.* at 334. Embroiled in a violent domestic dispute with his Panamanian wife, Mendelson was arrested by the PDF on his wife's complaint. *Id.* at 331. The officer in charge of the case was none other than then-Lieutentant Colonel Manual A. Noriega. Noriega's report on the incident indicated that Mendelson would have been charged with illegal possession of a firearm, assault with a deadly weapon, battery, breaking and entering and possession of marijuana. *Id.* However, Mendelson's wife insisted that he be taken to the airport and placed on a flight to Miami rather then sent to jail, on the grounds that he had an unspecified psychological problem and would be unable to endure imprisonment. *Id.* His wife, Mayin Correa, paid for Mendelson's airplane ticket herself. *Id.* Ironically, Ms. Correa is a popular radio talk show hostess in Panama, who became very active in the Civic Crusade's anti-Noriega movement.

Mendelson was briefly detained by Noriega before his flight left, and claimed to have been beaten with a rubber hose and tortured. *Proposed Panama Canal Treaties, supra* at 335 (statement of Mr. Mendelson). However, Mendelson initially refused medical treatment. State Department doctors who consulted with a physician who examined him upon his return to the United States found no evidence of physical damage. *Id.* at 332. The Department of

Spadafora, was allegedly killed and decapitated on Noriega's orders in 1985 when he tried to cross the Panamanian border from Costa Rica.[166] Another opponent and former Torrijos crony, Colonel Roberto Díaz Hererra, placed himself under effective house-arrest after losing to Noriega in a political struggle in 1987.[167] Although Díaz Hererra's house was approached by PDF soldiers loyal to Noriega, they left without firing a shot.[168] Two months later, on July 27, 1987, Díaz Herrera's house was attacked by helicopter-borne commandoes, who slid down ropes and arrested forty-five people, including Díaz Herrera.[169] Díaz Herrera's children, wife and mother were delivered over to the Venezuelan embassy.[170] The PDF claimed that no one had been killed during the incident, and Díaz Herrera confirmed this following his release from prison

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State noted, however, that the PDF failed to observe its obligations under the Vienna Convention on Consular Relations to inform the U.S. embassy in Panama that Mendelson was being held. The Assistant Secretary described the omission as "serious" and requested an explanation from the Panamanians. *Id.* at 331-32. The Assistant Secretary explained that he had not taken any further actions "in order not to jeopardize our Consul's efforts with Mrs. Mendelson and the National Guard to have Mr. Mendelson's property sent to him." *Id.* at 332. Mendelson then contacted seven attorneys in Panama asking, "please represent me in a suit against the Republic of Panama." *Id.* Quite rightly, the Department of State refused to involve itself further in Mendelson's personal affairs. *Id.*

These examples are cited not to prove that there were no human rights violations under Torrijos's and Noriega's regime, but to illustrate how such matters can be misused to fatten up a political agenda.

166. Hugo Spadafora, like Noriega, was one of General Torrijos's proteges. A medical doctor by training, Spadafora idealized Che Guevara, and served as a combat medic to guerilla bands in West Africa in 1966. Reportedly, a street in Guinea-Bissau was named in his honor. *See* Buckley, *supra* note 10, at 22. *See* Dinges, *supra* note 9, at 43-48.

167. Roberto Díaz Herrera was Omar Torrijos's cousin, and came to power under the dictator's patronage, along with Noriega and Spadafora. Although white-skinned and effecting patrician tastes, Díaz Herrera actively colluded with Noriega most of his professional life. *See* Buckley, *supra* note 10, at 80.

168. *Id.* at 80-85.

169. According to Kevin Buckley, "Official estimates by the PDF and SOUTHCOM say the raid lasted between seven and fifteen minutes. There is no question that it was brief and effective--'a classic Israeli operation,' an American general said." *Id.* at 98. *But see* Dinges, *supra.* note 9, at 280-81, indicating that "Díaz Herrera's six loyal bodyguards held them off for almost two hours." *See also* Koster & Sanchez, *supra* note 163, at 351-52.

170. Díaz Herrera's family went immediately to live in Caracas, Venezuela. *See* Buckley, *supra* note 10, at 98. Díaz Herrera himself reportedly spent five months in a Panamanian jail before joining them exile. *See* Dinges, *supra* note 9, at 281.

to exile in Venezuela.[171]

Of Panama's civilian population, Serafin Mitrotti, a businessman opposed to Noriega's regime, disappeared in July 1986, and was later found dead in a motel room. On evidence most favorably described as circumstantial, his family alleged that Noriega had ordered his murder.[172] Mitrotti was described by journalist Kevin Buckley as a "Babbittista"[173] rather than a truly political activist. Mitrotti, who "owned a photo laboratory and traveled around Latin America selling a variety of merchandise," was President of a group called "Committee for the Redemption of Moral Values," that Buckley later identifies as a founding group of the Panamanian National Civic Crusade.[174] "Free market-oriented, civic-minded, they had pledged their allegiance, not to any political party, but to the Rotary, Kiwanis, and Lions Clubs."[175] Some people speculated that Mitrotti had been killed by the Medellin Cartel, based on his frequent travels, and on the fact that as a photo laboratory owner, Mitrotti dealt in the same chemicals used to process and "cut" cocaine.[176]

Mitrotti's family vehemently denied any involvement in drug trafficking, and paid for a full-page newspaper advertisement to proclaim his innocence.[177] Mitrotti's death was officially classified as a suicide,[178] although he was given a Catholic funeral, a rite not usually afforded suicides. Still, the circumstances of Mitrotti's disappearance and death do not point readily to Noriega or the PDF. However, the accusation

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171. *See* Buckley, *supra* note 10, at 280-81. However, two U.S. Embassy cables report several deaths. *Id.* at 390, n.281.

172. *Id.* at 65-68.

173. The "Babittistas" were the white-skinned, oligarchical businessmen who had ruled Panamanian politics and economics with a visibly heavy hand in the days before Torrijos. Noriega incurred their ire by using his power to usurp control of private business. For a description of one of Panama's Babattistas, *see* Kempe, *supra* note 158, at 214-17.

174. *See* Buckley, *supra* note 10, at 64. Even so, the Civic Crusade produced neither leadership nor a true political party. Its *raison d'etre* continued to focus around "crony capitalism" and the antagonism of the middle and upper classes. The whiter, more affluent groups, the *rubiblancos*, were Noriega's most vocal opposition, but they were consumed with self-interest. *Id.*

175. *Id.* Despite the group's emphasis on morality, such business organizations are essentially non-political. They commonly occur in dictatorships because the dictator has erred "not in allowing corruption but in monopolizing it." Barry Rubin, Modern Dictators: Third World Coup Makers, Strongmen, and Populist Tyrants 91-92 (1987).

176. *See* Buckley, *supra* note 10, at 66-67.

177. *Id* at 67.

178. *Id* at 66.

illustrates the pronounced divisions and bitter resentments between Panama's business elites, the traditional, white, middle and upper-class, and the darker, lower-class upstarts, who usurped white control first under Torrijos, then under Noriega, through the PDF's control of customs, the airport, and other strategic points relevant to trade.[179]

In the case of justifying "humanitarian" intervention, the actual number of alleged dead, whether "disappeared," executed, shot "while escaping," or mowed down in rioting mobs, as alleged by D'Amato, is important. Does anybody know how many innocents died at Noriega's hands? D'Amato implies that these numbers are considerable, yet he makes no effort to cite any. However, these numbers are essential to determine what type of threat Noriega truly embodied. Numbers are also necessary when examining the appropriateness of invasion as a "solution," especially on issues of proportionality.[180] Those who blindly promote

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179. Historically in Panama, these areas had previously been at the service of the white upper classes until Omar Torrijos seized power. According to Kevin Buckley:

> By 1986, it was clear that there were two economies in Panama; one was composed of the old businesses run by the 'Babbittistas,' and the other was run by Noriega and the PDF. Noriega was muscling out the Babbittistas and expanding his own business empire in all directions, creating a new commercial elite composed of his accomplices. Noriega's extended family, the PDF, government employees, were the beneficiaries of 'reverted' Canal Zone properties and were involved in everything from smuggling computers and shrimp, to black market steroids, to property development.

Id. at 64.

Noriega not only had the gall to take a share of *rubiblanco* business for himself, but he and his family lived in Golf Heights, an exclusive neighborhood where anyone as dark as Noriega was either a maid or a yard man. *Id.*

180. *But see* Teson, *supra* note 18. Interestingly, Teson limits humanitarian intervention to cases of "proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights, and who themselves would be rationally willing to revolt against their oppressive government." *Id.* at 5. Quite apart from this statement's inherent ambiguity ("would be rationally willing" is imbued with vagueness), if one rejects utilitarian factors as Teson and D'Amato both do, in favor of moral principles alone, proportionality will be almost impossible too determine. *See supra* notes 53 and 72 and accompanying text. Moreover, as pointed out below, while some Panamanians were willing to march and wave handkerchiefs, they were not willing to do much else. They certainly were not in any stage that could be described as a "revolt."

humanitarian intervention may find such number-counting crass, but the utility of this grisly arithmetic is obvious if one is to examine the scope of tyranny. As Charles Mair noted in his historiographic study of comparative holocausts, "Most people accept that murdering upward of a million people is a different order of crime from unjustly executing several hundred."[181] Certainly the same may be said of the difference between two and ten.

Neither were the "people" of Panama being relentlessly gunned down in the streets, as D'Amato implies.[182] One wonders, in fact, exactly who D'Amato thinks are the "powerless citizens" of Panama. He is obviously not talking about the dark-skinned, mixed-race people who live in the putrid slum of Terraplin, where Noriega himself was born, literally a stone's throw from the presidential palace and the elite old Union Club, who were Noriega's most fervent supporters. Nor can he be talking about the wretched homeless dwelling in cardboard shacks on the outskirts of Colon, who survive only by rooting through piles of garbage for food. He is also not talking about the landless poor in the interior, who have no access to medical care and decent education for their children, and who worshipped Torrijos and respected Noriega for the attention these men paid to their ceaseless complaints. And when he invokes the image of battered women, D'Amato is not even thinking about the hundreds, if not thousands, of Panamanian women and men and children, pressed into

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The only acts coming even close to being revolts were three separate unsuccessful coup attempts from with the PDF, none of which were popular uprisings. The first attempt in 1984 under Colonel Eduardo Herrera Hassan, who plotted with the CIA after Noriega fired him from an ambassadorial post in Israel, was completely abortive. *See* Buckley, *supra* note 10, at 205; Dinges, *supra* note 9, at 305-06. Stung by public criticism for his inaction, Bush seemed to take the moral high road claiming, "I didn't use military force because it wasn't warranted under the circumstances. Any commander-in-chief must have the lives of American citizens and of American soldiers foremost in mind when making a decision." Buckley, *supra* note 10, at 216.

Even former Secretary of Defense Dick Cheney joined the chorus, stating, "We are not in the business of willy-nilly running around the hemisphere toppling governments we don't like." *Id.* Nor was Cheney offended by utilitarian notions of justice. "How many dead Americans," he asked rhetorically, "is General Noriega worth?" *Id.* These statements seem noteworthy for their humanitarian concerns; however, in light of subsequent events, they could not have been true when made. It is far more likely that the U.S. government simply did not trust Giroldi. For one thing, Giroldi was black, and was a decorated Torrijista hero and fervent Noriega supporter; he had been loyal to Noriega during the 1985 Díaz-Herrera coup attempt. Moreover, if Giroldi succeeded, he planned to call for new presidential elections, rather than support Guillermo Endara, Noriega's contender in the May, 1989 elections. *See* Dinges, *supra* note 9, at 306, 392-93.

181. Charles Mair, The Unmasterable Past 75 (1988).

182. *See supra* text accompanying notes 155-63.

prostitution through unemployment and poverty, who live lives punctuated daily by violence, drunkenness and disease, who sell to any and all buyers the only thing with which they have left to bargain: their physical bodies. These people are the truly powerless of Panama, but they are not the people to whom D'Amato refers. These, in fact, are Noriega's people, the dark-skinned poor of Panama, the angry, the ugly, the alienated and the unemployed, for whom Noriega's wealth and power were symbols of hope, and incentives to struggle against the whiter "*rubiblancos*"[183] making up the middle and upper-class oligarchy.[184]

These distinctions are not made to prove any social "truths" or disparage D'Amato's ignorance of Panamanian society. However, in considering the issues raised by humanitarian intervention, it is important to keep in mind that Panamanian society is deeply divided, and that there is an economic and social plateau to which the average Panamanian citizen cannot even aspire.[185]

D'Amato's main thesis is "that human rights law demands intervention against tyranny."[186] Does it really? D'Amato does not specify whether he means all tyranny, wherever located, or just the petty

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183. "White-tails," is a slang word for light-skinned oligarchs of Spanish-speaking ancestry that refers to a pale tail-feathered local songbird.

184. In fact, Noriega inherited this mestizo and mulatto constituency from his mentor and predecessor, General Omar Torrijos. *See* Dinges, *supra* note 9, at 44.

185. See Lee Hockstader, *Panamanians Relieved, Beset by Other Issues*, Wash. Post, Apr. 10, 1992, at A35, for the contention that the plight of the poor has actually worsened since the invasion.

Part of Panama's incipient racism stems from U.S. involvement through the Canal Zone, which enforced Jim Crow laws long after they had been abolished in the United States. At some level the discrimination appeared to be based upon nationality, evidenced by restrictions placed upon non-U.S. citizens. However, the element of race is obvious, stemming from the early days of canal construction, when light-skinned U.S workers were paid in gold, and dark-skinned workers, including Panamanians, West Indians, Asians and others, were paid in silver. *See* William J. Jordan, Panama Odyssey 26 (1984). These dark-skinned workers were also restricted from using "white" facilities, such as toilets and water fountains. *Id.* at 65. Jordan defined the Zone as "a bastion of white supremacy." *Id.* at 108. *See also* R.R. Baxter & Doris Carroll, *The Panama Canal--A Working Paper* 35-7, Hammarskjold F. (May 28, 1964); Walter Lafeber, The Panama Canal: The Crisis in Historical Perspective 62-66 (1978).

186. D'Amato, *supra* note 29, at 519. The concept of using intervention to overthrow tyrants simply because of what they are, cannot help but muddy international waters. It is difficult enough to distinguish humanitarian interventions as defined by Teson and D'Amato from traditional and lawful uses of force, such as self-defense and wars of national liberation.

tyrannies next door.[187] D'Amato contends:

> I do not argue that intervention is justified to establish democracy, aristocracy, socialism, communism or any other form of government. But if any of these forms of government become in the Aristotelian sense corrupted, resulting in tyranny against their populations . . . I believe that intervention from outside is not only legally justified but morally required.[188]

The realist response to this was best expressed by Irving Babbitt, who wrote in 1924: "[L]eaders, good or bad, there will always be and . . . democracy becomes a menace to civilization when it seeks to evade this truth."[189] This pessimistic view of human nature pervades classical realism, incorporating both Niebuhr's religious view of human sinfulness,[190] and Hobbes' more secular view of human beings as power-grubbing and selfish.[191] For realists, the Noriegas of the world are simply social givens. They are evolutionary creatures, integral and inevitable, and a natural part of the political food chain. As Aldous Huxley put it, "So long as men worship the Caesars and Napoleons, Caesars and Napoleons will arise to make them miserable." [192]

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187. For example, the former Soviet Union was a tyranny by any definition, especially under Stalin, and an egregious violator of human rights. *See generally* Aleksandr Solzhenitsyn, The Gulag Archipelago (1978). However, the United States never intervened there. To do so would have been an act of war. The moral dilemma of "Better dead than red" and vice versa, illustrates the conundrum of intervening against truly sovereign states, even if they are "tyrannies." Real states, when meddled with, are guaranteed to snarl and bite back. Real states will also defend their satellite countries, such as Czechoslavakia. Making humanitarian intervention a legal and moral *requirement* would do nothing less than plunge the world into total, endless war.

188. *Id.* This sweeping statement, which looks good on the surface, still evades the larger moral questions. As Mohandas Gandhi asked: "What difference does it make to the dead, the orphans and the homeless, whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty or democracy?" I Non-violence in Peace and War 142 (1944).

189. Irving Babbitt, Democracy and Leadership (1924), *cited in* Arthur M. Schlesinger, The Cycles of American History 417 (1986).

190. *See generally* Reinhold Niebuhr, The Children of Light and The Children of Darkness (1944). *See also* Introduction To Reinhold Niebuhr, Love and Justice, Selections From The Shorter Writings Of Reinhold Niebuhr (D. Robertson ed., 1957).

191. Hobbes, *supra* note 141.

192. Aldous Huxley, Ends and Means (1937). Realists studying Latin America have ascribed this to a legitimacy vaccum in a system where "[t]here

While states' moralists make valid and important points about states choices, realists know that a "moral requirement" is just that, it is something that must be done, and must be done consistently; one cannot pick and choose one's moral imperatives. If an act of moral intervention is required under the D'Amato criteria, it must be undertaken. If one makes exceptions on convenience grounds, such as "too costly," "too far away," "too close," or "too dangerous," one is not acting morally in any legitimate sense. Here, realists suffer no such pretensions. If they are a slave to anything, it is to the state's own convenience.

Although American liberals undoubtedly find "bad" leadership such as Noriega's repugnant, realists can convincingly argue that such regimes pose "no serious threat to American interests other than the threat of their own precarious weakness and vulnerability to other new political currents in the underdeveloped world," such as radical Marxist or Maoist doctrine.[193] This argument rests on the notion that realism, a powerful influence in U.S. foreign policy, is distinguished by a pure indifference to the internal matters of other states.[194]Therefore, it is not so much a matter of deliberate choice, as it is simple neglect, that the United States usually tolerates dictatorships in Central America. American foreign policy in Latin America is generally "reactive"[195] and, historically, Central America has been considered one of the less interesting, more "stagnant eddies of international politics."[196] Before the end of World War

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is only power and the habit of obedience to whoever successfully claims the power of government. Kirkpatrick, *supra* note 77, at 83.

D'Amato intentionally sidesteps the issue of legitimacy in Panamanian politics, claiming that words such as "legitimate" and "authority" "only serve to dull our senses against the reality of power." D'Amato, *supra* note 29, at 517. This is an evasive and fatuous response, almost alien to D'Amato's previous scholarship.

193. Seabury, *supra* note 100, at 128.

194. *See generally* Moore, *The Legal Tradition and the Management of National Security, in* Toward World Order and Human Dignity 321 (W. Michael Reisman & Burns Weston eds., 1976); Hedley Bull, The Anarchical Society: A Study Of Order In World Politics (1977). For a more subtle comparison of realism and statism as pertaining to interpretations of the "national interest," see Teson, *supra* note 18, at 72-73.

195. As Seabury explains:

> All too often policy is the product of random, haphazard, or even irrational forces and events. Equally often it is the result of deadlocked judgments, an uneasy compromise formula. Often what appears on the surface as a nation's settled course of action may be due to indecision, unwillingness or inability to act. It may be no policy at all but simply a drift with events.

Seabury, *supra* note 100, at 5.

196. *Id.* at 128.

II, its area studies attracted neither the best nor the brightest. This neglect was especially evident in the 1950s, when Latin America in general was considered "a backyard of American diplomacy, an object of pity and often derision, virtually forgotten in the great crises of Asia and Europe."[197]

This position changed with Fidel Castro's revolutionary rise to power in 1958; however, the U.S. government's renewed attention focused largely on the fear that Castroism inspired.[198] Indeed, without the Sandinista-led overthrow of the Somoza regime in Nicaragua, and the subsequent Central American guerilla war, and the bungling antics of General Poindexter, Oliver North, and Elliot Abrams, the United States would probably have ignored Panama altogether.

Realists are sure to be amused by D'Amato's obsession with Noriega's alleged immorality.[199] George Will, ever the realist reporter-at-large, considered Noriega more of a "bug" than a "thug,"a pesky insect to be shooed away and ignored or, if convenient, swatted as a show of U.S. power over its restless vassal states.[200] From a purely security point of

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197. *Id.* at 116.

198. *Id.* at 366. The U.S. focus on Panama has been largely determined by fear of "Castroism." During the Senate Hearings on the 1977 Canal Treaties, many U.S. citizens living in the Zone and many prominent, right-wing Panamanians, testified vociferously about "Cuban agents" and "Castroites" allegedly in their midst. *See U.S. Interest in Panama Canal: Hearings Before the Subcomm. on the Panama Canal of the Senate Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 247-50 (1977). Torrijos's normalization of relations with Cuba was a point of much debate during the ratification process. Noriega's allegedly close relations with Castro were also speculated upon. During the U.S. invasion of Grenada, much ado was made over "Cuban advisors" captured there.

199. American politicians expressed similar revulsion (tinged with envy, no doubt) at the personal conduct of Noriega's predecessor, General Omar Torrijos:

> MR. DORNAN: Yesterday, when I asked some experts from Panama off the record about rumors of his [Torrijos's] activities in houses of prostitution and womanizing and heavy drinking, the three or four people I asked laughed and said, "What do you mean rumors? It's common knowledge." Newsweek laughs at him running from bed and being in a different bed every night; it's not running from assassination attempts, it's other reasons.

U.S. Vital Interest in the Panama Canal, Hearings Before the Subcomm. on the Panama Canal, 95th Cong., 1st Sess. 251 (1977).

200. Will, *supra* note 99. A few months before the U.S. invasion, Will wrote:

> The insect, Gen. Manuel Antonio Noriega, threatens no significant U.S. interest and deserves U.S. attention only for

view, realists knew there was little to fear from Noriega, except possibly embarrassment, because of his past work for the CIA, and because of his connections with the Medellin drug cartel.

President Bush alternated between calling for Panamanians to either overthrow Noriega,[201] or incredibly, to assasinate him,[202] and retreating behind the criminal-domestic law metaphors of "thugism." Much fuss was made over Noriega's allegedly criminal activities, especially allegations of drug dealing.[203] Bush's concern, however, may have been

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> humanitarian reasons: Panamanians have suffered enough. But so has U.S. governance suffered enough, from pandemic unseriousness. . . . Washington is awash in it. It is fortunate that Noriega is not a serious problem, because he is more than a match for Washington at the moment.

Id.

201. On May 13, 1989, Bush complained to the press about Noriega's "thuggery" and stated that the Panamanian people "ought to do everything they can to get Mr. Noriega out of there." When asked whether this included every kind of "removal," Bush responded, "No, I would add no words of caution." Woodward, *supra* note 7, at 92. After Bush sent in troop reinforcements to the U.S. Southern Command, reporters asked him whether he favored a coup attempt. Bush replied: "I've asserted what my interest is at this point. It is democracy in Panama; it is protection of the life of Americans in Panama." *Id.* at 90.

202. *Id.* at 92. That Bush repeatedly used force as a foreign policy tool more than any President in recent memory may be at least partially explained by a new perspective on political assassination. According to Lorie Damrosch, "The CIA General Counsel has reportedly advised that preemptive raids against terrorist bases and military actions taken in self-defense do not constitute assassination, even if foreign officials die in the attack." Lori Damrosch, *Covert Action,* 83 Am. J. Int'l L. 785 (1989) *citing* Bob Woodward, Veil 362, 394 (1987). The U.S. Armed Forces themselves have also enlarged their more traditional activities to formally include assassination. *See Hays Parks, supra* note 91, at 4-5.

If so, this also explains why Noriega took such care to hide from U.S. forces, and why these forces completely bombed his headquarters, stormed his several homes and the homes of his friends, and even invaded the official residence of the Nicaraguan ambassador, literally bringing a tank to the ambassador's doorway. *See* Woodward, *supra* note 7, at 193. Because assassination of foreign leaders is permissible in time of war, but a war was not immediately forthcoming, war had to be created.

203. While Noriega probably never actually dealt drugs himself, he did allow the Medellin Cartel to use Panama for smuggling purposes, and he benefited financially thereby, as did many other Panamanians. *See* Buckley, *supra* note 10, at 117, 152; Kempe, *supra* note 158, at 247. In fact, had Noriega not done so, the Cartel would almost certainly have assassinated him. *See* Dinges, *supra* note 11, at 16-23; Kempe *supra* note 158, at 195. Reportedly, the Cartel sent Noriega a miniature coffin and a videotape of each of his three daughters being followed by Cartel members to prove that the

little more than political contrivance combined with a search for the issue of the week.[204] In this case, Bush had a campaign promise to fulfill. On the advice of James A. Baker III, who was managing his campaign, Bush talked tough on how he would handle Noriega if elected.[205] No special deals, no plea bargain, no golden exile.[206] George Herbert Walker Bush would be even tougher than Reagan; the "spin" his campaign put on the tough talk was that Bush was "making his bid to 'be his own man.'"[207] As the invasion of Panama was being planned at the White House,

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Cartel could seriously retaliate against him should Noriega cross them. *See* Buckley, *supra* note 10, at 97.

204. Typically expressive of his fanciful behavior was Bush's official agenda for December 12, 1989, the day of the invasion, which noted that Bush would meet with officials to discuss the increased participation of the U.S. military in the "war" on drugs. *See* Buckley, *supra* note 10, at 232. Invading U.S. forces had to admit that, despite their warrentless and unimpeded searches of Noriega's offices and homes, the only "drugs" seized turned out to be some white dough tamales containing slips of paper with the names of Noriega's enemies (it is unknown whether any of the tamales had Bush's name in them). According to Woodward, the tamales were to be eaten as "part of a ritual to neutralize foes and [obviously] had nothing to do with drugs." *See* Woodward, *supra* note 7, at 191. *See also* Buckley, *supra* note 10, at 248.

205. Interestingly, as Reagan's Treasury Secretary, Baker had downplayed Noriega's antics, which at the time, were conducted far more openly and notoriously than during Bush's administration. *See* Jack Nelson, *Willingness to Use Force Mark's Bush's 1st 2 Years; Foreign Policy: Much Like Teddy Roosevelt, The President Sees Military Ventures As a Standard Option*, Los Angeles Times, Mar. 15, 1991 at A1:

> Even as vice president in 1988, a longtime aide disclosed in an interview, Bush advocated using military force against Panamanian dictator Manuel A. Noriega, an option that President Ronald Reagan rejected on the advice of his top military aides. Bush invaded Panama in the first year of his own Presidency.
>
> Indeed . . . Bush and some of his closest advisers came to office determined to change what they saw as the excessive reluctance of Reagan and his immediate predecessors to use military force.

Id.

206. An editorial in The New Republic revealed that then-Vice President Bush undermined a deal proposed by the Reagan White House "to get the dictator to resign in exchange for dropping all indictments because it might taint Mr. Bush's presidential bid," especially given the fact of "Mr. Bush's approval when he was CIA director of clandestine payments to Manuel Noriega." *The Cynicism Thing: Bush Failure to Lead on Domestic Policy--Editorial*, 204 The New Republic 25, June 24, 1991, at 9. *See also* Koster & Sanchez, *supra* note 150, at 293-94.

207. Buckley, *supra* note 10, at 156.

Secretary of State James Baker is said to have ruefully remarked: "If we had known we would win the election by so much, we would not have dug such a deep hole for ourselves."[208]

Campaign promises aside, part of the Bush Administration's interest in nabbing Noriega was to divert attention away from its failure to apprehend Pablo Escobar Gaviria, a true king of the Medellin cartel.[209] Escobar had reportedly transfered part of his smuggling operations into Panama, and had supposedly been sighted in the country by a U.S. Drug Enforcement Agency (DEA) informant in August of 1989.[210] Because the Justice Department had recently issued a new opinion permitting the abduction of fugitives from foreign states for U.S. law violations,[211] Secretary of Defense Dick Cheney thought it would give Bush's "war on drugs" a boost if Bush were to announce the arrest of a high-level drug dealer in Panama by U.S. agents in his next State of the Union message.[212] However, the DEA's information on Escobar turned out to

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208. Woodward, *supra* note 7, at 86.

209. *See* Koster & Sanchez, *supra* note 163, at 286-88, 293-95.

210. *See* Woodward, *supra* note 7, at 114-16.

211. The new opinion was authored by Barr and entitled, Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activitites. The official citation is not available because the opinion was not released. For a discussion of the new opinion, see Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l L. 444, 484-88 (1990).

Bush's opinion overruled a 1980 Carter Administration opinion to the contrary; 4B Op. Off. Legal Counsel 543 (1980), signed by John H. Harmon, Assistant Attorney General under A.G. Civiletti. Carter requested the opinion pursuant to a proposal to seize Robert Vesco, the fugitive U.S. financier who was residing in the Bahamas. *See id.* at 483. The opinion concluded that such a seizure would violate international law and Vesco was not kidnapped.

The day after the invasion of Panama, a second Barr opinion was relased concluding U.S. military forces had the legal authority to conduct law enforcement activities outside the United States and to pursue and apprehend drug traffickers in foreign jurisdictions. The opinion was prepared prior to the invasion, but kept secret until the day after. *See* Michael Isikoff & Patrick Tyler, *U.S. Military Given Foreign Arrest Powers,* Wash. Post, Dec. 16, 1989 at A1; *Ruling May Expand Arrests Abroad,* Chi. Trib., Dec. 17, 1989 at 5C; Ronald J. Ostrow, *Ruling backs U.S. Forces' Policy Role; Law Enforcement: Legal Opinion Supports Overseas Arrests. Drug Traffickers, Terrorists Would Be Targets,* Los Angeles Times, Dec. 17, 1989, at A1.

212. This was not the first time that a U.S. president invoked the image of Pablo Escobar to get attention. During the Reagan administration Barry Seal, a pilot drug-smuggler-turned undercover agent for the DEA, photographed Pablo Escobar and several recognizable Sandinista officials loading cocaine into Seal's plane at an airstrip near Managua, Nicaragua. In March of 1986,

be a false lead, and so "there was a blank space in the President's planned speech on the drug war."[213]

To fill in the gap, Bush aides had the DEA lure an unwitting, small-time high school hoodlum to Lafayette Park, across from the White House,[214] where he sold undercover DEA agents a small amount of crack cocaine, but was not arrested.[215] Bush then went on television, held up a small bag allegedly containing "crack" cocaine, and waxed rhapsodically about drug dealers being so bold and notorious as to sell their evil wares anywhere, even in the shadow of the White House.[216] When the Washington Post revealed that the entire episode had been a political set-up, the Bush Administration had to admit that it had effectively entrapped the alleged drug dealer in order to obtain Bush's television prop.[217] The Noriega "bust" likely was intended to revive the crime-fighting, big stick-thumping image of virility and bravado which, invasions to the contrary, sometimes seemed to be more wishful thinking than reality for the Bush Administration.

A. Making Panama Safe For The Canal

President Bush's claim to "protect the integrity of the Canal Treaties," is pure farce. The 1977 Treaties[218] grant both the United States and

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then-President Reagan used this photograph in a televised appeal for Contra aid. Buckley, *supra* note 10, at 59-61. He did not mention that a month earlier, Barry Seal had been machine-gunned to death by persons unknown. Typical of the twisted and intertwined doings of Central America at this time, Seal's plane lived on until October 5, 1986, when the Sandinistas shot it down as a Contra supply plane. Notably, the lone survivor of this crash was Eugene Hasenfus. *Id.* at 60-61.

213. Woodward, *supra* note 7, at 116.

214. *See Lafayette Park Supplied Crack for Speech*, Wash. Post, Sept. 6, 1989, at A20: *But see* Michael Isikoff, *Drug Buy Set Up for Bush Speech; DEA Lured Seller to Lafayette Park*, Wash. Post, Sept. 22, 1989 at A1.

215. *See* Isikoff, *supra* note 214.

216. *See* Woodward, *supra* note 7, at 114-16. "[A White House spokesman] said that by displaying the crack...Bush wanted 'to say that this is a typical example of what's going on. Drug dealers have gotten so daring and so brazen. . . .They're going around unchallenged and unimpeded.'" *Lafayette Park Supplied Crack for Speech, supra* note 214.

217. Sadly, this incident only serves as further evidence of the Bush Administration's slender grasp of what an affront their manipulation of reality has become. *See* David Hoffman, *Bush Defends Luring Drug Suspect; Sen. Breaux Criticizes 'Theatrics' in Use of Cocaine as Prop*, Wash. Post, Sept. 23, 1989, at A12.

218. Panama Canal Treaty and Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (Neutrality Treaty), Sept. 7, 1977, Panama-

Panama the right to use force to maintain the "neutrality" of the Canal.[219] However, President Bush seemed to assert an entirely different right, a right to unilateral offensive military action requiring neither the invitation nor the approval of the Panamanian government.[220]

U.S., TIAS Nos. 10,030 and 10,029.

219. The term "neutrality" was best summarized by Henry Kissinger: "[W]e have under the new treaties the right and obligation to take such action as is required to ensure that the Canal remain permanently neutral--free of the threat of foreign military presence and forever open to the ocean-borne commerce of the world on a non-discriminatory basis." *Statement of the Hon. Henry Kissinger*, printed in Subcomm. on Separation of the Sen. Comm. of the Judiciary, 95th Cong., United States Senate Debate on Panama Canal Treaties, Part 1, 537-41 (Comm. Print 1977-78)[Hereinafter Part I], Jan. 12-Feb. 24, 1978, 537-41 at 538. Under Article IV, the United States reserved the right to unilateral and indefinite defense; it had "primary responsibility to protect and defend" until the year 2000, after which time responsibility was to be "shared" with Panama.

Kissinger elaborated:

> With respect to our right to defend the Canal, I concur in the Administration's interpretation that we have the right and obligation to act, if necessary unilaterally, to defend the Canal's neutrality. It is unfortunate that the word "intervention" has been injected into the debate to characterize that right; this word conveys implications with respect to interference in the domestic affairs of Panama that we neither need nor claim, and which are provocative throughout Latin America. With respect to expeditious passage, I consider that it must mean priority passage in wartime and speediest possible passage at all times.

Id. at 540.

220. In fact, the 1977 Panama Canal Treaty had a built-in ambiguity regarding the U.S. bases and installations; the "fortifications" permitted under the 1903 treaties. *See* Panama Canal Treaty *supra* note 218, art. IV, TIAS No. 10,030. U.S. military presence at the bases was guaranteed until the year 2000, with an unwritten understanding that the United States would thereafter lease them from Panama. Because of the deterioration of U.S.-Panamanian relations under Noriega, President Bush may have been concerned that the continued U.S. military presence in Panama, at least after the year 2000, was in jeopardy. At the time of the 1977 Treaty ratification, this issue was of much concern to Torrijos, who correctly predicted that "[p]robably I will not be alive in the year 2000 to see it." *Torrijos Addresses Nation [Panama] Prior to Treaty Plebescite* (live interview on Televisora Nacional, Oct. 20, 1977), *printed in* Part I, 1977-78, *supra* note 219, at 1,008.

Torrijos was so concerned that eventually he and President Carter met personally and drew up a "memorandum of understanding" to clarify that the purpose of the bases was to be defensive, and not for the invasion of Panama. *Id.* at 1,013. *See also* the March 15, 1978 exchange of letters between President Carter and General Torrijos, printed in Subcommittee on Separation of Powers of the Committee on the Judiciary, 95th Cong., United States Senate

The difference between the legitimate objective of defending the Canal, and President Bush's more implausible aim of "defending" the "integrity of the Panama Canal Treaties" is a big one, the latter being a gem of the tortured linguistic double-talk that has so marred the Bush administration's foreign policy. Using military force to invade a sovereign state, ostensibly to defend a treaty, a piece of paper, really, is pedestrianly put, just the weirdest of ideas, and violates both the Vienna Convention on Treaties and the U.S. Restatement (Second) on Treaties, as well as the United Nations and Organization of American States Charters. At best, the idea of defending a treaty itself, rather than its actual physical object, is a whimsical notion. Even the usually fawnish magazine, *Newsweek*, saw the difference:

> Privately, Pentagon officials admitted there was not tangible threat to the Panama Canal. In fact, Operation Just Cause was not designed to protect the waterway (a task that would have required an even larger force--perhaps 100,000 men). The real threat was to Jimmy Carter's Panama Canal Treaties, under which the canal is to be handed over to Panama by the end of the century. Congressional pressure to abrogate the agreement has been building. Washington had refused to approve a Noriega crony as the next administrator of the canal, even through the treaties call for a Panamanian to take charge on January 1.[221]

The Senate debates on the 1977 treaties considered the most significant threat to Canal operations as coming from the Soviet Union or Cuba, its client-state, although the United States was suspicious of the political sympathies General Torrijos had expressed with the poor and downtrodden of Panama, and worried that this evinced leftist tendencies that would encourage a "threat from within."[222]

Debate on Panama Canal Treaties, 3rd and Final Part 3930-31 (Comm. Print (1977-78)).

221. David Adams, et al., *The Invasion of Panama*, Newsweek, Jan. 1, 1990, at 12.

222. Torrijos, son of a provincial Panamanian schoolteacher, had absorbed an "ideological mishmash" of Latin American social theory, along with a smattering of Marxism that revealed itslef in "the left-of-center pragmatism Torrijos would propogate years later with such simplistic but effective slogans as 'We believe not in class struggle but in struggle in the classroom' and 'We are not against the rich; we are for the poor.'" Dinges, *supra* note 9, at 35-36 (1991). Torrijos was never a Marxist. However, in promoting Panamanian nationalism, Torrijos did engineer "a special relationship with Castro's Cuba, a wary alliance based not on politics but on Latin solidarity and a desire to keep U.S. power at bay," *Id.* at 117-18, that caused U.S. politicians to be confused and concerned. *See* statements of Congressman Dornan, Hearings before the Subcomm. of the Panama Canal of the House of Representatives

In actuality, the principle of "neutralization" of the Panama Canal was established in the Hay-Pauncefote Treaty of 1900, revised in 1901.[223] Athough the texts of the 1901 and 1903 Panama Canal Treaties

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Comm. on Merchant Marine and Fisheries, 95th Cong., 1st Sess. 251 (1977).

223. The Hay-Pauncefote Treaty was actually between the United States and Great Britain rather than Panama, and dealt with the freedom of ships of all nations to transit the Canal without discrimination in peacetime. When the United States itself was "neutral," before World Wars I and II, the Canal itself was neutral, subject to customary international rules of conduct for belligerents. However, when the United States finally entered World War I, President Wilson publicly closed off the Canal to the U.S. enemies and their allies. *See* Subcomm. on Separation of Powers of the Comm. on the Judiciary, 95th Cong., United States Debate on Panama Canal Treaties, Part 2 3092-114 (Comm. Print 1978). This action was later upheld by the Permanent Court of International Justice in the case of The S.S. Wimbledon (France, Italy, and Japan v. Germany, 1923 P.C.I.J. (per. A) No. 1, at 26. "There is no clause guaranteeing the free passage of the Canal in time of war as in time of peace without distinction of flag and without reference to the possible belligerency of the United States, nor is there any clause forbidding the United States to erect fortifications commanding the Canal." *Id.*

When the United States finally entered World War II in 1941, President Roosevelt not only closed the Canal to its enemies, but extended war powers to the Governor of the Canal Zone, directing him to "use force against any vessel or person taking actions 'inimical to the defense of the United States.'" Under the 1977 Neutrality Treaty, this right of exclusion was changed to afford all warships of any state "expeditious passage." This was fine with Torrijos, who remarked:

> All warships will be first in line. I do not wish to see any warships around here. Those warships have guns which point everywhere. They point everywhere, and when warships are in line, I would prefer to let a ship carrying copper wait rather than delay a ship which has such destructive power, because if that ship is attacked near here because it did not transit quickly, it (?harms) the country. So let it leave quickly, let it leave quickly.

Torrijos Addresses Nation [Panama] Prior to Treaty Plebescite, *supra* note 110, at 1013.

Kissinger defended the treaty change:

> I can only comment that the United States has and must continue to have at its disposal other means to defend its vital security interests in any such situation. The United States must have the capacity to control the sea lanes; hence we must be able to prevent hostile ships from reaching the Canal. If we do not maintain that capability, we are in a perilous condition indeed and the provisions of a legal document will be precious little help.

use the terms "neutral" and "neutralization," the legal status of the Canal itself was never "neutral" in any genuine sense. As one commentator noted in 1958: "When belligerent, the United States excluded ships of her enemies from the Canal and there was nothing in the Panama treaties, that could prevent her from so acting." Ironically, the 1888 Constantinople Convention that governed the Suez Canal uses the term "neutral" not at all, yet it "did confer to the Suez Canal a status very similar to that of maritime neutrality as defined in the 13th Hague Convention of 1907 for neutral ports and territorial waters."[224]

Customary international law likened man-made navigational canals to natural straits, through which all ships had the right of passage. This general freedom of navigation through "an artificial waterway . . . permanently dedicated to the use of the whole world" in time of war as in time of peace, was reflected in the treaties governing the Suez Canal.[225] The Court noted that the general rule was elucidated by the Convention of Constantinople of 1888, in which the governments of Austria-Hungary, France, Germany, Great Britain, Italy, Holland, Russia, Spain and Turkey declared:

> On the one hand, that the Suez Maritime Canal should "always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" including even the vessels of countries at war with Turkey, the territorial sovereign, and on the other hand, that they would not in any way "interfere with the free use of the canal, in time of war as in time of peace," the right of self-defense on the part of the territorial sovereign being nevertheless reserved up to a certain point; no fortifications commanding the [Suez] canal may be erected.[226]

The Court pointed out that the United States, by the Hay-Paunceforte Treaty, had availed itself of an entirely different standard. Moreover, the Court reasoned that the Hay-Paunceforte Treaty's uncustomary effect was bolstered by the 1903 Hay-Buneau Varilla Treaty between the United States and the Republic of Panama, that established "in perpetuity the use, occupation and control" of the Canal Zone, and the right to use and police "any lands and waters outside the zone . . . as if it [the United States] were sovereign of the territory . . . to the entire exclusion of Panama." When the United States finally entered World War II in 1941, President Franklin D. Roosevelt not only closed the Canal to its enemies, but extended war

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Statement of the Honorable Henry A. Kissinger, supra note 219, at 539.

224. Benno Avram, The Evolution of the Suez Canal Status from 1869 up to 1956: An Historico-judicial Study (1958).

225. *Id.*

226. *Id.* at 26.

powers to the Governor of the Canal Zone, directing him to "use force against any vessel or person taking actions 'inimical to the defense of the United States.'"

Peter C. Haines, an international law scholar who examined the Hay-Pauncefote Treaty in 1909 observed that "neutralization means immunity from war and warlike operations."[227] Quoting Professor John Bassett Moore, the authority of the day, Haines concluded that the very "idea . . . of neutralization has usually been deemed incompatible, even with the mere maintenance of armed forces and fortifications."[228]

The 1977 Treaties did not entirely depart from this earlier conception. In fact, it struck closer to the original treaty's intention. Indeed, the 1977 Congressional Hearings before the Subcommittee on the Panama Canal make clear that the 1977 Treaties afford the United States no unilateral right of unrestricted intervention in the affairs of Panama:

> MR. NONNENMACHER: [C]ould you add anything to what Ambassador Linowitz stated as to what we can do if the threat to the canal came from Panamanian source, whether dissidents, terrorists, or the Government in power in the event that occurred? General Torrijos' statement was that we are not to intervene in Panama's internal affairs.
>
> GENERAL DOLVIN: I really would not like to say what we would do. I would be happy to clarify again how the Joint Chiefs feel about this. They think the treaty as written and certainly as clarified, gives us a right to take whatever steps we deem necessary to maintain the neutrality of the canal, no matter what the threat might be . . . . I think you are asking for a precise answer to a situation that is not known.
>
> MR. NONNENMACHER: Not quite. The question is meant only after the year 2000 when we no longer have a presence there, and Panama has total control, and in the precise situation where Panamanians, whether the legitimate regime or dissidents with enough power to do so, pose this threat.
>
> GENERAL DOLVIN: Again, I think the Treaty gives us the right to maintain the neutrality of the Canal no matter where the threat comes from. What it doesn't give us is the right to interfere in the internal affairs of Panama. Precisely what steps we would take should be left to the time when that situation

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227. Peter C. Hains, *Neutralization of the Panama Canal*, 3 Am. J. Int'l L. 354, 363 (1909).

228. *Id.* at 368.

arises.

> MR. NONNENMACHER: Then it is fair for Members of Congress to conclude that we have a right to intervene to take the action necessary to keep the canal open even if Panama itself or a dissident Panamanian force is the aggressor?
>
> GENERAL DOLVIN: I did not use the word "intervene," if you will recall. I said we have the right under the Treaty to take whatever steps we deem necessary to maintain the neutrality of the canal, irrespective of the threat source.[229]

The facts unambiguously show that, despite the White House's contentions to the contrary, the Panama Canal has never been in any danger of losing its neutrality. Its operation is what gives Panamanians their economic edge on the rest of Central America, and although they may infrequently have altercations with U.S. citizens living and working in the Canal Zone,[230] most Panamanians would be loathe to obstruct or sabotage the Canal's operations.[231] Damage for natural erosian, landslides and earthquakes are more likely to close the Canal than any act of man. Moreover, it is well-recognized that the Panama Canal is in any case indefensible;[232] there is no practical way of protecting it from the

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229. *Panama Canal Treaty Ramifications: Hearings before the Subcomm. on the Panama Canal of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 103 (1977).

230. Called "Zonies."

231. In the words of Senator Allen, the Canal is "the goose that lays the golden egg." *See* Part I, *supra* note 219, at 1558. As the Subcommittee Hearings indicate:

> MR. BOWEN: Of course the last thing in the world the Panamanians want is the closing of the Canal.
>
> GENERAL PARFITT: It is true that Panama would probably suffer worse from a closing of the Canal; therefore, one finds it very hard to envision their doing something which would adversely impact on its efficient operation.

U.S. Vital Interest in the Panama Canal, Hearings Before the Subcomm. on the Panama Canal, supra note 199, at 88.

232. Senate Committee on Foreign Relations, Senate Debate on the Panama Canal Treaties: A Compedium of Major Statements, Documents, Record Votes and Relevant Events 208 (Statement of Senator Edward Muskie) (Comm. Print 1979). "The [Joint Chiefs of Staff] have pointed out that the Canal is impossible to defend against any nuclear arrack, missile attacks, and acts of terrorism." *Id.*

acts of terrorists or others.[233]

The Canal's indefensibility was known even before its construction. In debating the right of the United States to construct "fortifications" at the Canal's mouth as a defensive measure, Haines observed:

> To deprive the United States of its [the Panama Canal's] use in war it is not necessary . . . to send a fleet to the Isthmus. A few resolute men landing on the coast nearby could cut an embankment or destroy a lock with a few sticks of dynamite which they could carry on their person. The perimeter of Lake Gaten [the artificial lake that feeds water back and forth into the Canal's locks] will be many miles in length, with remote spots where a break could be made in a few hours. Fortifications commanding the entrances afford no protection whatever against

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233. Defense of the Panama Canal has long been a Congressional sacred cow, but in 1977, despite a lot of tugging on its udder to the contrary, Congress had to face the fact that the Canal, by its very construction, could not be defended as they envisioned:

> MR. BOWEN: There is a question of a military character that perhaps should be addressed later, but keeps coming up again and again. The point is made that the Canal is not defensible, that all it takes is a hand grenade in the right place, or something to that effect, to disrupt the Canal and, therefore, it is pointless for us to try to continue to operate it if there is any hostile attitude on the part of Panamanians or anybody else.
>
> How would you comment on this military argument that it is not really defensible and that it is futile to talk about defending it?
>
> GENERAL PARFITT: I think this arises from the fact that a facility as long and open as the Panama Canal is vulnerable to sabotage. But I would say that vulnerability existed from the time of its construction, and it is no worse today than it was when constructed. We had that same potential problem during World War II, and we were adequately able to cope with it . . . .
>
> MR. BOWEN: Do you believe the American military forces are capable of defending the Canal in the sense that I mentioned?
>
> GENERAL PARFITT: Well, certainly there is no 100 percent guarantee of defending the Canal. It is vulnerable in many places, and sabotage of an extensive nature could result in its putting it out of action for some period of time. That is always a possibility. We have had to face it in the past and will have to face it in the future.

See Part 1 *supra* note 219, at 88.

this danger.[234]

Ironically, even in 1909, the Panamanian military force, soon to be created as the National Guard and later as the PDF, was recognized as an absolute necessity, if not yet a necessary evil, because of the Canal's indefensible nature. "A military police, strong enough to keep up a constant patrol of the weak spots, is what is needed, not forts."[235]

The first and only true violation of the 1977 Treaties regarding neutralization occurred on June 14, 1986, and involved an elaborate scheme concocted by Oliver North to discredit the Sandinistas. North had arranged for a Danish freighter, the Pia Vesta, to be loaded in Europe with munitions and military vehicles; however, Noriega supplied North with fake documents showing that the cargo had been picked up in Nicaragua and was on its way to El Salvador. North had planned for Contra patrol boats to intercept the Pia Vesta on the high seas, thereby "proving" that the Sandinistas were arming Salvadoran rebels. Noriega, who had assisted North before, was angered by a rumor that North had recommended that his services and possibly, his life, be "terminated." When the Pia Vesta entered the Canal, she was seized by PDF patrol boats. The PDF kept the cargo for itself. Although the fancier equipment such as rocket-powered grenade launchers was undoubtedly sold off, the PDF kept several trucks, which quickly became known around town as "Pia Vestas."[236]

Prior to the Pia Vesta incident, the Canal had once before been intentionally closed, not by Panamanians, Soviets or Cubans, but by American Canal Zone pilots who went on strike hoping to influence the U.S. Senate to reject the proposed new 1977 Treaties. As the former U.S. Secretary of State William D. Rogers noted in promoting the new treaties:

> Closure [of the Canal] is possible. But this is not the reason we should have a new treaty.
>
> —It is distinctly in Panama's national interest to keep the Canal open. But governments are not always able to persuade their citizens. Example: We have been committed to keeping the Canal open. Yet it was locked up tight for several days by the recent pilot's strike. This closure had vast consequences for the maritime commerce of the world. If U.S. pilots can decide to close the Canal for their own purposes, and over the most insistent efforts of their government, one must assume that there are a few individuals in Panama who might, under circumstances

234. Hains, *supra* note 227, at 385.

235. *Id.*

236. For an account of the Pia Vesta incident, see Buckley, *supra* note 10, at 58.

> they regarded as personally intolerable, also try to close the Canal.
>
> It is easy to do. The Canal is one of the world's most vulnerable utilities.[237]

The fact is that the Panamanians never attempted to close the Canal or interfere with its "neutrality." Torrijos had once hinted at the possibility that "young students" pushed beyond endurance, might seek to take over the Canal Zone. However, on the issue of the Canal, Torrijos was adamant:

> What does neutrality mean? It means that Panama commits itself to the free transit of all ships of all flags of the world without charging one more than the other. It means that Panama takes on the obligation of maintaining the geographic basin at the service of this shipping, because the Canal can be very well defended, but if we did not keep the geographic basin at the service of this shipping, navigation would be impossible because there would be no water. And no matter how good a sailor the captain of a ship may be, he cannot navigate without water. It means that Panamanians, no matter how much we may fight internally, must respect the fact that this strategic belt is at the service of humanity, and that this strategic belt is our main natural resource, which has to bear the burden of the development of future generations.[238]

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237. Letter of former U.S. Secretary of State William D. Rogers, dated August 12, 1977, to the *Panama Canal Subcomm., The House of Representatives, Comm. on Merchant Marine and Fisheries, Hearings*, printed in Serial No. 95-10, *U.S. Vital Interest in Panama Canal, supra* note 199, at 331. As U.S. Senator Mike Gravel concluded:

> The vulnerability of the Canal arises from the fact that it laces for 50 miles through the jungles of Panama and could be rendered inoperative for as long as 2 years by such simple means as landslides or the destruction of locks or dams. A submarine launched missile with conventional warhead could achieve this purpose in the event of hostilities with a major world power, but it could just as well be accomplished by a single sabateur with a few sticks of dynamite.

Statement of Senator Mike Gravel, Part 1, *supra* note 219.

238. *Torrijos Addresses Nation, supra*, note 218, at 1011-12. Although it is clear that Torrijos misspoke when he called the Canal a "natural resource," this is the way that most Panamanians view it.

Even during his stint as "maximum leader,"[239] Noriega himself never threatened to impede or otherwise harm the Panama Canal.[240] As late as December, 1989, Noriega dramatically declared: "We will sit by the Canal and watch the bodies of our enemies float by, but we will never destroy the Canal."[241] From the time of Torrijos' acsension to power until the U.S. invasion, within Panama itself, there were virtually no incidents between U.S. Southern Command forces and the PDF regarding any perceivable threat to the Canal until the United States intentionally decided to remove Noriega from power, rather than follow its past policy of alternating between using him for Central Intelligence Agency (CIA) taskwork and ignoring him.

Military clashes within the American Zone were also exceptionally rare. In October of 1976, when U.S.-Panamanian negotiations on the new treaties were stymied on the issue of the United States' right to defend the Canal militarily, one incident occurred which, although unquestionably violent, did not provoke any military response from either party. Proving unequivocably the pregnability of both the Canal and U.S. Southern Command Headquarters, three car bombs exploded inside the Zone.[242] Although never publicly accused, Noriega was widely considered to be "the number three, four or five man being involved" in the bombings.[243] One of the cars had belonged to William Drummond, a Canal Zone policeman who had outspokenly opposed the Canal treaty

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239. Originally, this was Omar Torrijos's title. His full title is: Commander in Chief of the Panamanian National Guard [alternatively, Defense Forces] and Maximum Leader of the Revolution without Dictatorship and of Liberty With Order. *See* Koster & Sanchez, *supra* note 163, at 118. The term "revolution" refers to the 1968 overthrow of Arnulfo Arias by Torrijos and the National Guard. *Id.* at 47-96.

240. In 1988, in response to the Miami-based indictment naming him as a drug dealer, Noriega called the indictment "a joke and an absurd political maneuver." The Panamanian Foreign Ministry, stacked with Noriega appointees, made a statement that the Bush Administration probably found more threatening, although it mentioned nothing about the Canal: "The [Panamanian] government warns that it is extremely dangerous to tax the patience, tolerance and good faith of the Panamanian people with campaigns that could spark unforeseen reactions." *See* Dinges, *supra* note 9, at 296. The indictment also named Pablo Escobar Gaviria as a defendent. *See supra* notes 195-201, and accompanying text.

241. Buckley, *supra* note 10, at 226.

242. At this time, George Bush was head of the U.S. Central Intelligence Agency and Noriega was head of Panamanian Intelligence. Buckley, *supra* note 10, at 147.

243. *See U.S. Vital Interest in the Panama Canal, Hearings Before the Subcomm. on the Panama Canal, supra* note 198, at 252.

negotiations.[244] Others claimed that Drummond himself had set up the bombings to prove that the situation was so unstable that the 1977 Treaty ratification should not go forward. In any event, the incident was an isolated one, and was not repeated.

B. Making Panama Safe For Democracy

As for Bush's claim of "restoring" democracy in Panama, "inventing" it might be a better word. Although it is true that Guillermo Endara appeared to be winning during the May 1989 elections, in actuality the vote-counting was never completed.[245] Moreover, the pathetic reality is that Panamanian history since its inception in 1903 is a virtual litany of "stolen" elections.[246] This lamentable history does not make Noriega's regime "right" in any sense, but to view disruption of the electoral process in Panama as grounds for a military invasion is to imply that the occurrence must be extraordinary and unusually dangerous to the well-being of the community, and this is misleading; in Panama, such disruptions are the norm. As long as the coup or election fraud brought to power a Panamanian with whom the United States could do business, the United States never protested very much about the damage being done to Panama's "democratic" process.[247] This does not mean at all that

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244. *See* Dinges, *supra* note 9, at 84-86.

245. "When a Catholic Church-sponsored independent straw count showed Endara winning easily, Noriega's electoral tribunal simply stopped the count and annulled the election." *Id.* at 305. The votes were never officially counted. "[T]he electoral tribunal annulled the election. The vote, it said, was obstructed by foreigners, to the point where many tally sheets were missing and a true count impossible." Koster & Sanchez, *supra* note 163, at 366-67. However, it was important for the United States to uphold even projected results, for it could not keep pretending that Eric Arturo Delvalle, who was then living permanently in Miami, was the government of Panama. Dinges, *supra* note 9, at 305. Delvalle, supported by the United States, had never actually been elected to the Presidency. He came to power as a Noriega appointee and fellow coup plotter when then-President Barletta was overthrown. Buckley, *supra* note 10, at 31-36. Hence his nickname "Tuturno," meaning "your turn." Delvalle was little more than either a puppet of Noriega or the United States throughout his political career; he urged the United States to invade on the supposition that it would cement him into the presidency. Buckley, *supra* note 10, at 136.

246. *See generally* Koster & Sanchez, *supra* note 163.

247. For a discussion on the role of the United States in assisting the presidential election of Nicolas Ardito Barletta in 1984 see Koster & Sanchez *supra* note 163, at 301-09. Barletta, a handsome World Bank vice-president and former student of George Schultz, with a doctorate in economics from the

Panamanian citizens are not entitled to something better; it does mean that in 1989 the actions of the Panamanian Electoral Tribunal could not have come as a surprise to either the U.S. Government or the Panamanian people.

The United States has spent the greater part of its history seeking to establish democracy, or what it considered to be the next best thing, in places near and far. That is the aspiration. On the whole, however, in Latin America and the Caribbean, the United States has been more concerned with creating an orderly and stable backyard. Sometimes, as was the case recently with the Nicaraguan elections of 1990,[248] democracy has prospered with only a modicum of violence, despite a backdrop of U.S. perfidy. Costa Rica is often held up, even lauded, as a indigenous democracy, although this was not always so.[249] The United States has also tolerated nearby "revolutionary" pseudo-democracies in

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University of Chicago, was a U.S. "dream" candidate; he was nevertheless losing the election to Arnulfo Arias, then 83 years old, until Noriega stuffed the ballot boxes in Barletta's favor. Barletta was subsequently nicknamed "Fraudito" by the Panamanian press. Buckley, *supra* note 10, at 20. The United States was well-aware of the fraud, but preferred the sleek Barletta to the fascist populism of Arias, and did not urge a vote recount. *See* Report of James Cason, *The 1984 Presidential Election: The Question of Fraud and Voting Irregularities*, Sept. 20, 1984, *cited in* Dinges, *supra* note 9, at 369-72. Despite a brutal confrontation at the legislative palace that reportedly left three dead and eighty wounded, Barletta and his vice-president, Eric Delvalle, assumed their offices and were fully recognized by the Reagan Administration. *See* Koster & Sanchez, *supra* note 163, at 307-09. In fact, even in the face of damning evidence of electoral fraud, George Schultz personally attended his protege's inauguration. *See* Buckley, *supra* note 10, at 32. Because Barletta agreed to investigate the murder of Hugo Spadafora, Noriega forced him to resign even as he sat in Washington, D.C., negotiating a new loan for Panama. *See supra* text accompanying note 163. For Washington's tepid response to Barletta's overthrow see Dinges, *supra* note 9 at 230-31. *See also* Rubin, *supra* note 175, at 110.

248. *See* Robert Pear, *U.N. Team Reports on Nicaragua Vote*, N.Y. Times, Feb. 7, 1990, at A10; Mark A. Uhlig, *Carter Applauds Nicaraguans on Election-Monitoring*, N.Y. Times, Jan. 30, 1990, at A10; Mark A. Uhlig, *Nicaragua Approaches an Election That May Rise or Fall on its Fairness*, N.Y. Times, Jan. 28, 1990, 1:3.

249. In fact, in 1917 President Woodrow Wilson refused to recognize the Costa Rican government of Federico Tinoco, a dictator who had seized power through a *coup d'etat*. Despite strong pressure from the U.S. Senate and commercial interests who wanted "business as usual" with whomever was in charge, Wilson held firm to his policy of recognizing only constitutionally-elected governments, even after Tinoco made the gesture of legitimizing his power through a sham election. *See* Dana G. Munro, Intervention and Dollar Diplomacy in the Caribbean, 1900-1921 427-36 (1964). *See also* George W. Baker Jr., *Woodrow Wilson's Use of the Nonrecognition Policy in Costa Rico*, 22 Am. 3 (1965).

such countries as Mexico, which promotes colorful but very predictable "elections" within its one-party system.[250]

The example of Mexico lucidly illustrates how the myth of humanitarian intervention works when it comes to overthrowing tyrannical regimes. Many Mexican nationals complain that their government oppresses them, and many are in jail for activities not considered criminal or seditious by their big neighbor to the North.[251] Some Mexican intellectuals live outside of Mexico, in either voluntary or forced exile.[252] Not infrequently, U.S. citizens living in Mexico may be menaced, harrassed, unjustly imprisoned without right to counsel, and even tortured.[253] U.S. DEA agents have been tortured and killed in Mexico almost with impunity,[254] and some governmental involvement in drug trafficking, at least at local levels, is certain.[255] Although the United States has occasionally violated Mexico's territorial sovereignty to kidnap nationals suspected of such criminal activities,[256] with scarcely a peep in response from Mexico, it is highly unlikely that Mexico would

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250. *See, e.g.*, Stan Persky, *Before Embracing Mexico, Ponder Its Sham Democracy*, Vancouver Sun, Mar. 14, 1992, at G2.

251. *See* Buckley, *supra* note 10, at 102. Of course, one could easily include over 140 U.N. Member States in this paradigm. Mexico is used here because of its proximity, and because of its involvement in the "Drug War." Although Mexico refrained from official comment when U.S.-Panama relations became strained under President Bush, it is interesting to note that during its 1987 Independence Day celebration, Mexico invited Noriega as an honored guest and awarded him a medal.

252. *See, e.g.*, Lawrence Kootnikoff, *Reporter's Death Called to Attempt to Intimidate*, Vancouver Sun, Oct. 28, 1991, at A11; T.J. Milling, *Making a Case For Fear: Asylum Seeker Says Book Angered Mexico's Power Elite*, Hous. Chron., Sept. 28, 1991, at A22.

253. *Id.*

254. *See, e.g.*, William Branigin, *Mexican Drug Kingpins Recovering From Crackdown After DEA Killing*, Wash. Post, Dec. 18, 1988, at A34.

255. *See, e.g.*, Marjorie Miller, *Mexican Officials Blame Ex-Police in Two Kidnappings*, Los Angeles Times, June 14, 1992, at A10; William Branigin, *Newly Named Mexican Officials Linked to Drugs*, Wash. Post, Jan. 1, 1989, at A15.

256. *See, e.g.*, U.S. v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988). *See also* U.S. v. Alvarez-Machain, 112 S.Ct. 2188 (1992). For an extensive and probably exhaustive commentary on the issues of the U.S. policy of kidnapping foreign nationals, see Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 Am. J. Int'l L. 655 (1991); *Kidnapping by Government Order: A Follow-Up*, 84 Am. J. Int'l L. 712 (1990); *Kidnapping by Government Order: A Follow-Up*, 84 Am. J. Int'l L. 712 (1990); *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 Am. J. Int'l L. 444 (1990); *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 Am. J. Int'l L. 880 (1989).

gladly suffer an intervention on the scope of the one imposed on Panama.

If invaded by the 32nd Airborne, Mexico would almost certainly retaliate; at the very least, it would protest mightily. And it should, for such intervention is an act of war. Having struggled first against Spain, then France and finally, against the United States to achieve its independent statehood, Mexico would find such intervention, no matter how well-intentioned, to be simply intolerable.[257] So, probably, would the rest of the world. The difference between Mexico and Panama is inherent in the states themselves. Simply put, Panama is both a creation and a creature of the United States; Mexico is not, and has violently resisted all attempts to render it so.

Anthony D'Amato's claim that the U.S. invasion "did not violate Article 2(4) because the United States did not act against the 'territorial integrity' of Panama"[258] is the emptiest of platitudes. D'Amato's rationalization that "[b]efore and after the invasion, Panama was and remains an independent nation" because the United States has not "colonialized, annexed or incorporated" it,[259] almost embarrasses the reader. Small comfort that, after bombing a small and defenseless country and its citizens, the United States did not reach out and grab its land as well. Not that it needed to, for now at least this much is clear: like all good creatures, Panama can be controlled by being kept on a leash. The bulk of its territory need not be formally incorporated into the United States, like Puerto Rico or the Virgin Islands, for it to be any less at that power's beck and call.

C. Making Panama Safe For Expatriates

President Bush's claim "to safeguard the lives of American citizens" has an especially hollow ring. For one thing, most U.S. citizens had already been evacuated in preparation for the invasion.[260] Had the United States felt it truly necessary to "safeguard" anybody, they could have simply put them on a plane, because regular commercial flight service had not yet been disrupted. In fact, commercial aircraft had been landing and departing throughout the night on the eve of the operation. Thus, when the 1st Platoon of Charlie Company of the 3d Battalion (U.S. 75th

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257. A U.S. military officer who requested to remain anonymous once joked with me when questioned about this comparison: "Mexico? Mexico would explode a nuclear device if we invaded it." Interview with anonymous U.S. Government official (Nov. 1992).

258. D'Amato, *supra* note 29, at 520.

259. *Id.*

260. *See* Woodward, *supra* note 7, at 130.

Ranger Regiment) moved into Battle Position Two to seize Torrijos International Airport, it was startled to find an Eastern Airlines Boeing 727 parked on the tarmac at the terminal's central jetway, and a terminal full of weary passengers, including small children, laden with luggage and bundles of bulky Christmas gifts.[261] In fact, once the shooting started, some PDF soldiers attempted to use "several obvious Americans" as hostages or shields to make their getaway, but were forced to barricade themselves down in the baggage office because one of the U.S. squads had already secured the airport exits.[262] After a brief but tense confrontation, the Panamanian airport security manager negotiated the PDF soldiers' surrender as prisoners of war, and the hostages were released unharmed.[263]

The "citizens" staying behind were there by choice and with full knowledge of their situation. They were not "hostages" in any genuine sense.[264] Most of them were U.S. military personnel stationed in the

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261. For a full account of the airport's seizure by U.S. troops, see Malcolm McConnell, Just Cause: The Real Story of America's High-Tech Invasion of Panama 99-127 (1991). The total number of civillians caught in the airport was reportedly over three hundred. *Id.* at 200.

262. *Id.* at 119.

263. *Id.* at 200.

264. The only U.S. citizen in Panama on the eve of the invasion who even came close to being a "hostage" was Kent Muse, and he was no hostage; he was a prisoner. Kurt Muse, a CIA operative, had the unfortunate experience of being caught in the act of espionage in a foreign country. Among other things, Muse ran a clandestine radio network as part of the CIA's covert operation to drive Noriega from power; hardly an activity that would endear him to either Noriega or the PDF. After his arrest, Muse reportedly signed an admission that his broadcast materials were provided to him from U.S. civilians on a U.S. military base, and that the programs were produced by exiled opposition leaders. Allegedly the radio program "never reached its audience, prompting one Panamanian to complain the radio was 'so clandestine no one ever heard of it.'" Katherine King, *Panamanian Opposition Fights Damage Over Reports of CIA Aid*, Reuter Library Report, April 26, 1989, *available in* LEXIS, Nexis Library, Archive File. *See also* Buckley, *supra* note 10, at 176. The charges against Muse, threatening state security, were not denied by Washington.

Muse was incarcerated at Modelo Prison, near Noriega's headquarters, under 24-hour guard. Not surprisingly in Central America, his guard was armed with a machine gun. Because Muse's wife was a Department of Defense employee, Muse was entitled by treaty to regular visits from a U.S. lawyer and doctor, and he was reportedly well-treated. The only reason Muse was imperilled and needed rescuing was because the CIA feared he would be killed in retaliation for the invasion. Morale in the CIA had been seriously stung by the execution of William Buckley in Iran. From the outset, the CIA lobbied hard with the White House to have Muse's rescue made a priority. As a result, Muse's successful liberation was one of the first acts of the invasion. *See* Woodward, *supra* note

Canal Zone, and their numbers increased as Bush sent in additional troops for "maneuvers."[265] The only documented "dangers" to them from the PDF were a series of incidents ranging from the truly innocuous[266] to the more substantial but isolated.[267] As Ved Nanda states so well:

7, at 91, 135-37, 185.

After the invasion began, the PDF managed to round up some U.S. citizens who were mostly journalists, who they then held hostage at the Marriot Hotel. U.S. forces stormed the Marriot on the second day of the invasion, and the "hostages" were freed. *Id.* at 190. However, these people were seized *because* of the invasion, and not before it; they were not the objects of rescue when the invasion was being planned. Had it not been for the invasion itself, they would not have been in any danger, and many of them probably would not even have been in Panama. Koster and Sanchez claim that Noriega had a "hostage plan," but they give no evidence in support of this contention, nor is their explanation that the purported plan was "too poorly drawn" to be effective persuasive. *See* Koster & Sanchez, *supra* note 163, at 374.

265. *See* Woodward, *supra* note 7, at 132-35.

266. More than six months before the invasion, one U.S. Army Sergeant Johnson, stationed in Panama, sent his family back to the United States and warned, "The situation in Panama is bad and getting worse." When asked to elaborate, Sergeant Johnson explained that "members of the Panamanian Defense Forces often harass American personnel, stopping them on the streets and sometimes asking them for money." *First Families Arrive in U.S.*, N.Y. Times, May 18, 1989, at A8.

267. Supposedly, the straw that broke the camel's back was the fatal shooting of U.S. Marine Lieutenant Robert Paz. Lieutenant Paz and four other Marines were out of uniform and returning back to the Canal Zone after a night of partying, when their car was stopped by a PDF roadblock. Instead of stopping and cooperating with an identification check, their car attempted to run the roadblock. Tragically, but not without cause, PDF soldiers fired on the car. In the melee, Lieutenant Paz was fatally shot and another Marine was wounded. Woodward, *supra* note 7, at 156-57. *See also* Dinges, *supra* note 9, at 307-08. Even though the U.S. embassy refused to communicate directly with Noriega or the PDF, the PDF immediately informed it that the Paz shooting was unintentional. *See* Buckley, *supra* note 10, at 229.

The incident was witnessed by Navy Lieutenant Adam J. Curtis and his U.S. civilian wife, Bonnie, who had been stopped at the same checkpoint. The couple was blindfolded by the PDF and taken to the Commandancia (PDF headquarters), where they were interrogated about the incident. Lieutenant Curtis claimed that he was repeatedly kicked in the groin and hit in the mouth, and his wife claimed that PDF officers fondled her neck and the back of her legs. Bonnie Curtis asserted that the PDF officers threatened to rape her, although it seems like this was more of a verbal suggestion. As reported, the threat sounds disgusting, but, as threats go, it was relatively innocuous. "If you don't tell the truth," Bonnie Curtis claims a PDF officer told her, "I will stick my fingers up inside you. Don't you want me to put my nine inches inside you?" The officers then made some disparaging remarks to the effect that Bonnie's husband would be of little use to her sexually after they finished

> The incidents are serious, but the question is whether they warranted the launching of 'Operation Just Cause'--a full-scale invasion, of a size not seen since the Vietnam War, and eventually consisting of 12,000 American invaders (added to the approximately 12,000 U.S. military personnel already stationed in Panama), helicopter gunships, artillery and other heavy fire-power.[268]

The one American hostage who was apparently killed in cold blood was Raymond Dragseth, a forty-seven year-old professor at the Panama Canal Commission College, a U.S. Defense Department facility.[269] Shortly after the invasion commenced, Dragseth was taken from his luxury Punta Paitillla apartment at gunpoint by two men dressed in plain clothes, who

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kicking him around. *See* Woodward, *supra* note 7, at 173.

I set forth these incidents in graphic detail not to shock or titillate, but to show that they provide no grounds for the action taken as defense or, alternatively, retaliation. In fact, U.S. citizens were not the only victims of heightened tensions. Following the Paz and Curtis incidents, a U.S. soldier leaving a laundromat in Panama City shot to death a PDF officer who had only asked to see his identification. *See* Dinges, *supra* note 9, at 307-08. Other reports indicate that the PDF officer survived, but maintain that the attack was unprovoked. "SOUTHCOM admitted the American was carrying the gun illegally and tried to forget that the incident had happened." Buckley, *supra* note 10, at 232.

When questioned about the Soviet Union's condemnation of the invasion, President Bush stated to the press that he would like to send President Gorbachev a telegram, reading:

> Look, if they kill an American Marine, that's real bad. And if they threaten and brutalize the wife of an American citizen, sexually threatening the lieutenant's wife while kicking him in the groin over and over again, then, Mr. Gorbachev, please understand this President is going to do something about it.

Woodward, *supra* note 7, at 190.

This is the statement of a person whose perceptions of a situation are not at all grounded in the reality. For this, hundreds of innocent people had to die? The idea is frightening beyond belief.

268. Nanda, *supra* note 51, at 497.

269. *American Killed in Panama Had Planned to Return to California*, UPI News, Dec. 30, 1989 available in LEXIS, NEXIS Library, Archive File. Dragseth, married to a Panamanian citizen and the father of two, had lived in Panama since 1972. His wife, Vicky, was related by marriage to Anel Beliz, a close Endara friend and associate who was appointed Presidential Spokesman that same night. *See* William Branigin, *Nicaragua Orders Americans Out; GIs Enter Managua Enfoy Home*, Wash. Post, Dec. 30, 1989, at A1.

reportedly claimed to be from the PDF.[270] Five days later, Dragseth's body was found buried in a shallow mass grave used by the Santo Tomas Hospital to make room in their crowded morgue.[271] He had been executed by a gunshot to the head.[272]

Dragseth's murder again raised the issue of the alleged "hostages and hit lists" that Noriega supposedly created in the event of an American invasion.[273] The issue of the "list" was not something that Dragseth's family actually saw, or were even aware of, until much later.[274] It would have been a simple thing for the gunmen to find their apartment. In point of fact, the Punta Paitilla apartment complexes were full of U.S. citizens and others who would be likely PDF targets. Had there really been a "list" for hostage-taking and execution, it seems remarkable that only one person, Raymond Dragseth, was taken.[275]

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270. There are some discrepancies about the identity of the gunmen. Dragseth's daughter Carolyn described them as uniformed PDF. *See* Kenneth Freed, *U.S. Teacher was Seized, Executed by Panama Army*, Los Angeles Times, Dec. 30, 1989, at A1. His wife Vicki, however, described them in some detail, including their accents and their weapons, AK-47 assault rifles, and said they were not wearing uniforms. Branigin, *supra* note 1. It is likely, however, that in the melee of the invasion, any PDF gunmen taking hostages probably discarded their uniforms early on, to prevent detection as they moved about the streets.

271. *See* Branigin, *supra* note 269. Dragseth was identified by photographs taken of his body by hospital employees before the burial.

272. *Body of Kidnapped American Found; Shot in the Head*, Los Angeles Times, Dec. 29, 1989, at P1. Dragseth's American nephew, Richard Paul, who also lived in Panama, was not taken hostage, but was killed during the same night by U.S. Army soldiers when he failed to stop at their roadblock. *Id.*

273. Indeed, not such list ever materialized despite Bush's claims. As Carolyn Dragseth admitted, the tragedy was put in motion by the Dragseths themselves, who were watching the invasion's rockets' red glare from the relative safety of their balcony, when their cheering caught the attention of PDF soldiers whom they mistook for U.S. soldiers.

274. Carolyn Dragseth's remarks in a published interview indicate that the notion of a "list" may well have been subsequently suggested to her. *U.S. Army Says Unidentified Body Found in Panama*, Reuters, Dec. 29, 1989. Carolyn stated, "The information we have is the men came with a list of where Americans lived and what floor they lived on. We were just unfortunate enough to be the ones they decided to pick on." *Id.* The Dragseth's apartment was on the fifth floor of a large high-rise, situated right between the PDF Commandancia and Paitilla Airport, both of which were U.S. military targets. McConnell, *supra* note 261, at 203.

275. One published report detailing Noriega's alleged kidnapping scheme states: "Another American family in the same building escaped over a third-floor balcony as the raiders shot off the lock of a steel-reinforced front door,"

Most of the "dangers" to U.S. "citizens" were directly the result of inter-political tensions exacerbated by the Bush administration, which was annoyed and embarrassed by its inability to force Noriega to relinquish power.[276] The La Paz and Curtis incidents were the most serious altercations between the two countries in over twenty-five years.[277] The escalation of this tension was undertaken intentionally by the United States, which hoped to encourage Noriega or the PDF to "start something" and provide an "emergency" to justify the invasion.[278] The first step the Bush administration took to ensure that this would happen was to fire U.S. Army General Woerner, the head of the U.S. Southern Command, an "old Panama hand" who was against the invasion and under whose command there had been no altercations of any consequence.[279]

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but offers no details as to the identity of the "family," or how they all apparently survived a three-story free-fall. *See* David Adams, *U.S. Foiled Secret Noriega Plan to Snatch Americans*, Independent, Jan. 3, 1990, at 8. Moreover, Dragseth was an educator. It seems that there must have been many more desirable, more politically-correct, targets in the area, yet nobody else was kidnapped. At least one eye-witness account indicates that the Dragseths were given up by their own Panamanian doorman, who identified them to the gunmen as Americans, hardly the action of someone acting methodically from a prepared "list." *See supra* note 4.

276. *See* Buckley, *supra* note 10, at 187-89. "Early in the summer of 1989, [General] Woerner sent a cable to the Pentagon in which he predicted that an American would be killed." *Id.* Woerner claimed that he was "trying to shock them [the Bush administration] into realizing that the military posturing was bound to provoke the kind of situation we were seeking to avoid. We wouldn't commit to military intervention, but posturing would make it necessary." *Id.*

277. The most serious incident (other than the car bombing in the Zone, *see supra* notes 242-44) occurred in 1964 when some U.S. high school students in the Zone raised a lone U.S. flag in violation of a treaty provision guaranteeing that the flags of both the United States and Panama would fly jointly in the Zone, or not at all. This prompted a group of Panamanian students to enter the Zone with a Panamanian flag, make some speeches, and try to raise their flag alongside the U.S. one. A fight broke out and the Panamanian flag was ripped. This prompted a serious riot lasting four days, in which U.S. forces fired on Panamanians, and several fatalities resulted. In response, Panama severed diplomatic relations with the United States, and renamed the Zone's Fourth of July Avenue "Avenue of the Martyrs." *See* Richard R. Baxter & Doris Carroll, The Panama Canal: Background Papers and Proceedings of the Sixth Hammarskjold Forum 3-7, 60-91 (Lyman M. Tondel ed., 1965). *See also* Dinges, *supra* note 9, at 76-77; Koster & Sanchez, *supra* note 163, at 177-78.

278. *See* Woodward, *supra* note 7, at 161-62. "It was, as one official confided to a reporter later, 'a decision in search of an excuse.'" *See also* Dinges, *supra* note 9, at 307

279. Buckley, *supra* note 10, at 190-91; Woodward, *supra* note 7, at 83-93, 96-99.

Military force used to rescue people by simply removing them from danger, as the Israelis did in Entebbe, is undoubtedly far different from removing or destroying the alleged "danger" itself through bombing strategic sites, shelling civilian areas and toppling a regime.

D. Making Panama Safe For The War On Drugs

Drug trafficking in Panama was yesterday's news long before Noriega seized power. The issue was given great attention by the U.S. Senate and Congress during the 1977 Treaty ratification hearings.[280] While Bureau of Narcotics and Dangerous Drugs (BNDD) officials were unable to link Omar Torrijos directly to drug trafficking, they found abundant evidence against several of his relatives who held positions in Panama's government.

Most notorious was his older brother Moises, who had been indicted by a New York Grand Jury for narcotics trafficking on May 16, 1972.[281] The indictment apparently arose out of an incident at the Kennedy Airport, where a routine customs search discovered 155 pounds of heroin in the luggage of one Rafael Richards, a Panamanian. Richards calmly flashed a diplomatic passport and claimed immunity. U.S. Customs officials were unimpressed and arrested Richards anyway. Their investigation revealed that Richards was not in fact a diplomat; Richard's accomplice Guillermo Gonzalez, Moises' former chauffer, had obtained the passport through Moises Torrijos, who also routinely walked Richards through Panamanian customs. The Senate Staff Report vacuously relates: "If Moises Torrijos should enter the United States therefore, he is subject to arrest. Possibly for this reason, even though he is Director of Treaty Information in Panama, Moises did not attend the Treaty-signing ceremony in Washington, D.C."[282]

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280. Staff Report to the Comm. on Merchant Marine and Fisheries Regarding the Alleged Involvement of Panamanian Government Officials in Narcotics Trafficking, *printed in* Panama Canal Treaties, Part 2, *supra* note 218, at 2762-68. This report specifically referred to activities of the PDF's G-2 unit, then headed by Noriega. The report describes the PDF as not so much actively involved in drug trafficking as in "shaking down" drug dealers, i.e., collecting "protection money" from them. *Id.* at 2765-66.

281. *See* Robert G. Kaiser, *Torrijos Likely Knew of Drugs, Senate Told*, Wash. Post, Feb. 22, 1978, at A1. U.S. District Court Judge Jack Weinstein ordered the indictment unsealed in 1978, after being advised by the U.S. Attorney's Office that its contents had become "common knowledge." N.Y. Times, Feb. 23, 1978, at 8.

282. *Staff Report, supra* note 218, at 2767. Although Moises did not in fact go to Washington with his brother, Omar Torrijos did not lack for

In response, Omar Torrijos evinced great surprise, revulsion and moral outrage over his brother's bad behavior. He then made Moises ambassador to Argentina, which enabled him to claim diplomatic immunity.[283]

Evidence against Omar Torrijos's other brother, Hugo, ranged from thin to almost laughable. According to the Senate Staff Report, Hugo owned a bar in Colon that was "reputed to be known for its relationship to prostitution . . . and . . . for the sale of cocaine."[284] Even worse, Hugo had "a special relationship with certain well-known drug traffickers in the Republic of Colombia and is the godfather of the daughter of one known trafficker."[285] Out of ammunition if not innuendo, the report concludes, "[o]ne witness [unidentified] went so far as to state that Hugo is a known cocaine user, and that he has been seen in the company of alleged Mafia members."[286]

Of greater concern to the Senate were provisions of the 1977 Treaties that would transfer full sovereignty of the Canal Zone to Panama. Senator Griffin from Indiana set forth his concerns as to how this would affect the United States' ability to control drug trafficking:

> Not in the year 2000--but 30 months after ratification--customs jurisdiction passes from the United States to the Republic of Panama. Then the United States would no longer have the right. . . or the authority to inspect vessels transiting along the Canal. Furthermore . . . (i)f the U.S. authorities should apprehend a Panamanian or a U.S. citizen for violation of drug trafficking laws, this treaty requires that they be turned over to the Panamanians.[287]

The issue of jurisdiction to arrest and prosecute drug traffickers was a bone of contention for the Panamanian government. In 1970, the BNDD had set up a small office in Panama and staffed it with two Spanish-

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company; Noriega accompanied his commanding officer to the treaty-signing ceremony. *See* Dinges, *supra* note 9, at 97. At the same time, Noriega's illicit drug-related activities were well-known to senators on the Intelligence Committee, who referred to him cryptically as the "National Guard Officer." Chairman Senator Birch Bayh noted that, while the evidence was insufficient for an indictment, "there is just a tremendous amount of smoke there, as far as the Guard official is concerned." *Id.* at 98, citing *Bayh Remarks on Noriega: Senate Closed Session*, Cong. Record, S4003. Bayh further remarked that Noriega, "as our DEA people say, is now cooperating. They want him to continue to cooperate." *Id.* at S4010.

283. *See* Dinges, *supra* note 9, at 59-63.

284. *Staff Report, supra* note 218 at 2,767.

285. *Id.*

286. *Id.*

287. *Id.* at 2,760.

speaking agents. Problems arose when they arrested Joaquin Him Gonzalez, chief of Tocumen's air traffic controllers and deputy chief of Panama's civil aeronautics authority, on drug trafficking charges originating in the United States.[288] Oblivious to the political ramifications of their acts, the BNDD agents had enticed Him Gonzalez into the Canal Zone on the pretext of joining a baseball game, and forcibly arrested the Panamanian as he was attempting to flee back into Panamanian territory only a few hundred yards away.[289]

Him Gonzalez's arrest became a serious diplomatic incident, since the BNDD had failed to notify both the U.S. ambassador and the Canal Zone governor of their plans. It also violated an understanding between the BNDD and the Panamanian government from the time it set up shop there: that it would notify the government first, before arresting any Panamanian official.[290]

The incident spurred an explosion of anti-U.S. sentiment and elicited an angry outburst from Omar Torrijos, who went on television and accused the United States of kidnapping a Panamanian citizen from his own country. Torrijos decried the arrest as conclusive proof that the United States had no respect for Panama's national sovereignty.[291] He threatened that if Him Gonzalez was not released, Panamanians would go into the Zone and rescue him themselves.[292]

In a dramatic foreshadowing of things to come, Noriega was present during the negotiations that preceded Him Gonzalez's deportation to the United States.[293] According to the U.S. ambassador, Noriega seemed concerned that the BNDD was embarking on plans to arrest Panamanian government officials, possibly even Omar Torrijos, on the basis of Him Gonzalez's word.[294] BNDD officials assured Noriega that they would never do such a thing.[295]

All this and more came to light during the treaty negotiation and ratification process in 1977 and 1978. Despite the serious nature of the drug trafficking situation in Panama, the United States was unruffled.

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288. *See* Dinges, *supra* note 9, at 54-59.

289. *Id. See also* Kempe, *supra* note 158 at 75-76.

290. Dinges, *supra* note 9, at 55.

291. *Id.* at 55-56.

292. *Id.*

293. SOUTHCOM officials, horrified by the idea of facing down an angry mob of Panamanian citizens in the Canal Zone, were reportedly so disgusted by the bad publicity of the whole affair that they refused to supply air transportation to take Him Gonzalez to the United States. As a result, the White House sent down one of President Nixon's Air Force One fleet to transport the BNDD's prisoner. *Id.* at 57.

294. *Id.*

295. *Id.*

Such actions should not be allowed to disrupt normal relations between states. U.S. realpolitik was best summarized by Senator Percy, who reminded his colleagues:

> When we think back, it was only a few years ago that our own American Ambassador had to exert extraordinary pressure upon France to break up the French [heroin] connection. . . . [B]efore that, it was a much more lower priority matter for the Government of France.
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> So, too, today we have tremendous problems with drugs. When we consider Mexico, a great portion comes through Mexico, yet a friendly nation with which we do not hesitate to do business, conduct business, and we just signed a treaty with them on prisoner exchange. We did not hesitate to do so. We never questioned their motivation with respect to drugs.[296]

Senator Percy somewhat facetiously reminded the others of "the time during the Watergate scandals when we had high officials in the White House involved in admittedly illegal actions. Countries did not really cut us off."[297] Percy then reached the heart of the matter:

> What we are dealing with is a government and a people, and we cannot just throw away the work of 14 years because we have some problems with some of those people. Really, in a sense, we are dealing with the entire Panamanian people and future governments, and we are trying to make a deal that will be in partnership with them that will cause them to want to work with us in partnership rather than develop an air of hostility, evidence of which we have seen in the past and certainly could break out again in the future.[298]

Although Richard Nixon started the war on drugs, President Bush seemed desperate to win it, or at least to look good in the attempt. However, despite the Bush administration's claims to the contrary, Noriega's arrest and subsequent conviction in Miami on charges of drug-running and other criminal enterprises has had little effect on the continuation of these illegal but very, very lucrative activities in the Panama he left behind.[299]

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296. *Staff Report, supra* note 218 at 2,760-70.

297. *Id.* at 2,770.

298. *Id.*

299. *See* Hockstader, *supra* note 185; Allan Tomlinson, *Panama Remaining Drugs Conduit*, Times, Dec. 20, 1991. *See also* David Adams, *Drug*

Endara, the U.S.-educated lawyer who was hurriedly sworn into Panama's presidency but not officially elected[300] as the first U.S. soldiers were parachuting in,[301] has proven to be something of a mixed blessing. A devoted follower of Arnulfo Arias,[302] Endara combined his political aspirations with mystic rhetoric rather than voodoo spells, "I remember," Endara mused during his campaign, "Dr. Arias always saying to me . . . that responsibilities for the country were things that came up on oneself by force of destiny, sort of, although we're not orientalists, a sort of karma. You don't seek the karma, you have the karma."[303]

Grossly overweight, Endara reaped screams of hilarity when he recently went on a "hunger strike."[304] Endara has had to avert several attempts to expel him from office, and it has lately come to light that, in his former law career, he not only set up phoney shell corporations for drug-dealer clients, but listed himself and his law partners as their corporate officers.[305] When this news came to light in Panama, Endara

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Case Perils Panama's Leader, U.S.-Backed Regime Implicated in Scandal, S.F. Chron., Dec. 24, 1991, at A8.

The scale of the operation detailed in the new case makes the drug charges against Noriega look like petty theft. And Panamanians are asking themselves if, by arresting Noriega, the United States merely substituted one drug-tainted government with another. "They took Ali Baba and left us with the 40 thieves," said Tomas Cabal, a local journalist. *Id.*

300. Although Jimmy Carter's unofficial count put Endara ahead of Noriega's candidate by no less than three to one, the vote counting was never completed, and many actual ballots were destroyed by paramilitary groups and protesters. Buckley, *supra* note 10, at 178-79.

301. Endara was sworn in just after midnight. Buckley, *supra* note 10, at 234. The U.S. troops parachuted in around the same time. *See* Douglas Jaehl & Bob Secter, *Invasion: A Web of Surprises; The Fighting in Panama Was No Snap. Citizens Fended for Themselves Amid Anarchy*, Los Angeles Times, Dec. 27, 1989, at A1. It is interesting that, although the U.S. government maintained that Endara was Panama's recognized President, it did not consult Endara on the invasion. "'We were told, very diplomatically, but we were told,' Endara said later. 'We were not really consulted.'" Endara claimed that the invasion caught him by surprise, "like a kick in the head." *Id.*

302. Arnulfo Arias, former President of Panama a number of times, served until 1968 when Torrijos overthrew him.

303. Buckley, *supra* note 10, at 172-73.

304. After receiving a special telephone "scrambling" device from the U.S. embassy in 1989, Endara insisted upon using the code name "El Gordo" ("Fatso") for himself "because it was easy to remember." *Id.* at 174.

305. *See* Adams, *supra* note 221. Endara is not named in the charges . . . . However, investigations have revealed that the President and other members of his law firm helped to build the smugglers' financial empire by serving as officers of front companies that allegedly laundered money for the ring. *Id.*

The traffickers made contact with Endara's firm through an intermediary lawyer, Juan Acosta, whom Endara says was "a good friend and colleague

did not hesitate to invoke the civil law of criminal libel to silence his critics.[306] It is interesting, but hardly a revelation, that neither the United States nor Panama sought to confirm Endara's presidential appointment with another election, or even to finish counting the old one.

VI. ENDS AND MEANS

Use of force inevitably comes down to ends and means. And this is true regardless of how popular the use of force is with the enfranchised public.[307] President Bush, orchestrator of the U.S. invasion of Panama, has been called a pragmatist by some, but as *The New Republic* pointed out, this is "something of a misnomer. Pragmatism is a style of pursuing ends, not a substitute for having them."[308] Indeed, President Bush seemed almost compelled to act dramatically and dangerously, and then move rapidly on to the next event, the next sound-bite, photo opportunity, press conference. Disturbingly, this style permeated his administration even prior to his election:

"Everything I did last year [1988]," the president explained, "was

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'recommended to the firm' by a very dear client of ours." But Acosta, who was later murdered in his Miami office by a Colombian assassin, was notorious to U.S. officials for his drug connections. *Id.*

When news broke in Panama of a DEA investigation into possible connections between Endara and the Falcon-Magluta case, a local DEA agent was forced to leave the country after a series of death threats. Panamanian newspapers accused another partner in the Endara law firm, Mealco Solis, of being behind the threats. *Id.*

Even earlier, in 1976, as a lawyer, Endara had personally set up a string of shell corporations for one General Manuel Contreras, the chief of Chile's secret police. According to Dinges, these companies were "later linked to a tax-fraud scheme." Dinges, *supra* note 9, at 171. As Yogi Berra said, "It's deja vu all over again."

306. In Panama, as in many other Latin American countries, libel of a public figure may be a criminal offense, punishable by a jail term. After a perfunctory hearing on such a charge, the alleged publisher of the libel can be held in jail pending trial. Merely bringing a second charge of libel against the same person may result in his immediate incarceration. Kevin .Buckley wrongly identifies criminal libel as "a technicality of Panama's legal system." *See* Buckley, *supra* note 10, at 48, 62. Although dictators doubtless find such laws convenient for repressing criticism and silencing enemies, the law of criminal libel did not evolve for this purpose.

307. As H. L. Mencken warned, one never loses, at least in America, by overestimating the bloodthirstiness of the mob.

308. *The Cynicism Thing: Bush Failure to Lead on Domestic Policy -- Editorial*, *supra* note 206, at 9.

> the purpose of advancing my--everything I did politically--advancing my election. And of course I'm not going to say that." Suddenly, even Mr. Bush himself seemed to agree that his campaign demagogy had been deplorable. "That's history," he remarked flippantly about all the issues that he had used to roil the voters.[309]

Indeed, it is history, and Mr. Bush made a lot of it, although in his case it seemed to pass rather speedily by, with no moment for reflection on the past, or consideration of any consequences beyond those of his next four years. International law scholars are at least partly to blame, caught either doused in a wave of adulation or frozen with revulsion by the Bush Administration's rolling juggernaut it called its foreign policies.

Professor Anthony D'Amato, the villain of this piece, is a brilliant legal mind who has not been led astray as much as he seems simply not to see the truth of what happened in Panama and why. Professor Oscar Schachter, of course, felt the first breeze of revolution in the law tickle the back of his neck in 1984, when Professor Michael Reisman suggested that the nonintervention norm was no longer normative, but dispensible if it meant "enhancing the public order of human dignity." By standing up for the nonintervention norm, Oscar Schachter risked the obloquy of his contemporaries, most of whom have neither lived as long nor seen as much as he. Truly, one has to have had some direct experience with total war to understand what is at stake. Because the nonintervention norm sometimes requires one to "do nothing," it seems foolish and unwise, even selfish not to "help."

This is not true.

Short of using deadly weaponry to blast away at an evildoer, no matter what the cost to the community, there is a virtual panoply of nonviolent intervention choices available to states.[310] One chooses lesser and, perhaps, less effective ways of evincing one's displeasure with

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309. *Id.*

310. Both the United States and France, for example, simply could have refused to issue Noriega and his assistants travel visas and publicized this fact. Multilateral economic sanctions, bad publicity, and plain old shunning greatly diminished Colonel Muammar Qadaffi's ability "to play spoiler on the world stage," and has had a more sustained effect than the U.S. bombing of Libya did. *See* William J. Holstein, *Pariah in the Desert: The Increasing Isolation of Qadaffi*, Bus. Wk., Nov. 30, 1987, at 57. There is also emerging within international law a new species of humanitarian and human rights legal instruments involving not only states, but non-governmental organizations as well. *See* Theodore Meron, *Editorial Comment, Towards a Humanitarian Declaration of Internal Strife*, 78 Am. J. Int'l L. 859 (1984). Such instruments may render far more appropriate, and less invasive, solutions to international problems of certain states' acts.

tyrants great and small, not because one is weak or cowardly, but because, as Walzer notes in his seminal work on just war, "doing justice, in the legalist sense, isn't always the right thing to do."[311]

However, neither Professors Reisman nor D'Amato have seized out of the air their concept of intervening for the enhancement of human dignity. Something is definitely going on, but it need not destroy the norms of nonintervention and self-determination.[312] What is happening, as Professor Thomas M. Franck elucidates so well, is that "a new legal entitlement is being created, based in part on custom and in part on the collective interpretation of treaties, an "emerging right to democratic governance."[313] The norms of nonintervention and self-determination, in fact, are the literal DNA of the democratic entitlement.[314] To proclaim their destruction is as futile as trying to kill one's ancestors.

It goes without saying that Professor Franck is talking about more than simply the "right" to vote.[315] In fact, at one level the major actors are not just the huddled masses in the streets being cracked on their heads and deluged by water cannons, but the states themselves, personified by

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311. Walzer, *supra* note 61, at 117.

312. However, the conflict between newly emerging global rights and these well-established norms must be recognized and dealt with effectively. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L. 46, 78 (1992).

313. *Id.* at 47.

314. The tension that exists between the norms of nonintervention and self-determination has given each a dynamic quality. Each norm clearly adds a dimension to the other. As Charles Beitz observes, nonintervention and self-determination are positive and negative aspects of what is properly called "state autonomy." Charles R. Beitz, Political Theory and International Relations 92-93 (1979). Nonintervention is essentially conservative in nature, tending "to preserve the structure of the international order against all non-consensual changes." *Id.* at 93. The nonintervention norm "takes the political order as it is." *Id.* Consensual change, however, is different. In fact, the concept of self-determination *requires* such change. As Beitz understands it, and here it must be noted that Beitz is looking largely at countries under colonial domination, the self-determination norm "looks behind the political order to the order of social (cultural, ethnic, linguistic) groups and supports efforts to bring political boundaries into alignment with boundaries between groups." *Id.*

315. Nevertheless, it should be noted that in 1983, "popular participation" was proclaimed a human right by the Commission on Human Rights in its Resolution 1983/14. *See* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 Am. J. Int'l L. 607, 613-14 (1984), which discusses this "new" right at 613-14, but cautions that "reason for serious concern with respect to current trends arises not so much from the proliferation of new rights but rather from the haphazard, almost anarchic manner in which this expansion is being achieved." *Id.* at 607.

their ruling elites. Professor Franck describes this phenomenon:

> Increasingly . . . governments whose legitimacy is questioned are turning to the international system for that validation which their national *polis* is as yet unable to give. They do so to avoid the alternative — persistent challenge to authority by coups, countercoups, instability and stasis — and to enable themselves to govern with essential societal acquiescence. What they seek is legitimation by a global standard monitored by processes of the international system.[316]

This legitimation implies a corresponding duty of states to conform their behavior to an internationally-recognized standard. Professor Franck contends that "[s]tates which deny their citizens the right to free and open elections are violating a rule that is fast becoming an integral part of the elaborately woven human rights fabric."[317]

Election monitoring, while reminiscent of earlier colonial ideologies, is a way of "helping" oppressed peoples improve their lot in a quite unintrusive way, provided that international rules are followed.[318] International condemnation of impeded elections undoubtedly carries more weight than the unilateral moanings and groanings of one power alone, no matter how worldly prominent. If the alternative is a unilateral military invasion, the choice should be ridiculously easy.

One can always point to the election monitoring efforts in Panama and Haiti as examples of how such elections must not only be monitored, but the results enforced, at gunpoint, if monitoring is to mean anything. However, the very essence of morality, if one is talking about real principles and not merely posturing, is that one imposes certain limitations on one's self, and upon one's national self. If our ability to make things turn out perfectly right and lasting is limited, so be it.[319] Part of being moral persons, and a moral state to which humanitarian interventionists allegedly subscribe, is that we live with these limitations. That is the true essence of being an old democracy. If patience and restraint are limitations, they are ones which reflect well upon us, and discredit nothing in which we believe.

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316. Franck, *supra* note 312, at 50-51.

317. *Id.* at 79.

318. *See generally* Larry Garber, The International Human Rights Law Group, *Guidelines for International Election Observing* (1984); Larry Garber, *Memorandum on NDI Election Observing Program: Past Experiences/Future Prospects* (March 7, 1991). For specific observations on the case of Panama, see National Democratic and National Republican Institutes for International Affairs, *The May 7, 1989 Panamanian Elections* (1989).

319. Mill, *supra* note 79, at 90.

Election monitoring does not mean an end to state-oriented violence; one need only look to the public slaughter and mayhem that attends elections in places like the Philippines or Thailand, or Mississippi in the fifties, to put the lie to the myth that electioneering is a peaceful process.[320] It does mean exercising what Professor Falk calls "normative restraint" at an international level, something the Charter has called for all along.[321] This will not be easy, because, as Professor Franck notes:

> If there is to be monitoring, some consequences could resonably be expected to ensue for those who "fail the test." And if monitoring evolves into a systemwide obligation, perhaps some consequences will attach even to a refusal to be monitored.[322]

Undoubtedly, some "consequences" may well include limited uses of force. Dictators, by their very nature, do not go quietly into that long goodnight, but rage, rage very effectively at those who seek to dislodge them.[323] Indeed, in the case of repellent dictatorships, inhibitions about using force to right egregious wrongs "seem less compelling than they used to be."[324] Moreover, Mill's caution that people must liberate themselves "is no longer wholly defensible" in light of "the technological

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320. *See* James Clad, *A New Kind of Domino Effect; How the Clash in Thailand Spurs Democratic Dissent in Asia*, Wash. Post, May 24, 1992, at C4. Also see William Branigin, *Former Judge Leads Acquino-Backed Candidate in Philippines Election*, Wash. Post, May 13, 1992, at A26, which should forever dispell the notion that election monitoring is for sissies, while military invasions are for "real" men:

> At least 13 people were reported killed around the country on election day, raising the toll of election-related deaths during the three-month campaign to more than 70. However, compared to past elections, these were relatively peaceful. At least 386 people were reported killed during three election campaigns from 1986 to 1988. Police said bomb-disposal units Tuesday defused three bombs aimed at blowing up electrical power lines around Manila in an apparent attempt to disrupt vote-counting. Bombings Monday night slightly damaged electrical facilities, . . . and power failures in some precincts forced officials to count ballots by candlelight.

Id.

321. *See* Falk, *supra* note 60.

322. Franck, *supra* note 27, at 84.

323. Language borrowed from Dylan Thomas, *Do Not Go Gentle into that Good Night.*

324. *Id.* at 83.

edge dictators nowadays enjoy over their people."[325]

But these consequences, whatever they may be, should not be determinable solely at the whim of the United States, or of any one state alone, or even of united humanitarian interventionists, no matter how well-intentioned. Such unilateral determination is tyranny pure and simple. Nor does intervention guarantee an end to dictatorial strife. Even people who feel immediately ready for democracy will need time to work their ideas out, especially if democracy is something new. It will not be at all unusual if the flegling democracies try and fail at first, or perhaps serially. Our only mission is to encourage them, and help them to try again, even if despotism reasserts itself.

Dictatorships are defeated not by bullets, but by better ideas. Real democracy and the democratic process itself require that a society base its most fundamental values on rights rather than power. States that are characterized by democratic systems consist of more than mere inhabitants; they have, to use Reismann's word, polities. They have citizenries.

Moreover, the United States, although militarily the most powerful nation on earth, may simply be unsuited for the effort of demolishing tyrannies and putting something meaningful in their place, especially in the Third World. The United States' world view has been shaped largely by its own unbroken democratic traditions; anything less elsewhere is considered to be a mystifying aberration. This view is unfortunate, but apparently immoveable. Nowhere in the world are there more good intentions but less real understanding about how foreign dictatorships really work, and why the democracies intended to replace them survive or fail. Part of this is due to the blind spot inherent in all democracies. The case of Panama is a good example; even at this late juncture, Panama has neither a political party nor political leadership capable of running the country.

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325. *Id.* at 82. *See also* Leo Strauss, On Tyranny 23 (V. Gourevitch & M.S. Roth eds., 1991).

> In contradistinction to classical tyranny, present-day tyranny has at its disposal "technology" as well as "ideologies"; more generally expressed, it presupposes the existence of "science," i.e., of a particular interpretation, or kind, of science. Conversely, classical tyranny, unlike modern tyranny, was confronted, actually or potentially, by a science which was not meant to be applied to "the conquest of nature" or to be popularized and diffused.

Id.

VII. CONCLUSION

This detailed analysis of the U.S. invasion of Panama demonstrates that unilateral intervention is neither legal nor moral, neither just nor right. There is nothing humanitarian about invasions at all. Neither human rights advocacy nor theories of state morality can justify it or explain away intervention's pitfalls. In the deeply abstract world of hypotheticals, unilateral intervention is theoretically possible, although invoking it in reality seems to require historical revisionism that borders on the delusional. Still, history itself is marred by the times we wish we, or someone, had "done something." As Walzer remarks, "When a people are being massacred, we don't require that they pass the test of self-help before coming to their aid. It is their very incapacity that brings us in."[326] This, at least, is the theory. Unfortunately, it is not what usually happens in the real world. Despite the best intentions of scholars like Reisman, D'Amato and Teson, most massacres are unprevented and, when they occur, are largely ignored and remain unavenged. The reasons for this are more complex than simply bowing to the nonintervention norm. Stalin understood the issue well, for the reluctance to answer the roaring cry of the many seems more a part of human psychology than we care to admit: "One death is a tragedy," Stalin supposedly said, "but a thousand deaths is just a statistic." Why is this so?

Bettelheim had an answer:

> Our emotions are still the emotions of the small clan or village. We react with deep feeling to what we see and can feel in ourselves, to what is immediately before our eyes, or what we can understand from personal experience. We have not yet learned to deal with the experience of the total mass state. We simply cannot think in terms of million--or, at least, most of us cannot--but only in terms of the individual. A few screams evoke in us deep anxiety and a desire to help. Hours of screaming without end lead us only to wish that the screamer would shut up.[327]

Michael Walzer admits that "clear examples of what is called 'humanitarian intervention' are very rare."[328] Despite protestations to the contrary, the truth is that, for individual states and the powers that run them, the "lives of foreigners don't weigh that heavily" in the domestic scheme of things.[329] To be able to move forward in a more rational and

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326. Walzer, *supra* note 61, at 106.
327. Bettelheim, *supra* note 87, at 259-60.
328. Walzer, *supra* note 61, at 101.
329. *Id.* at 101-02.

effective way, we must therefore be more honest with ourselves when we consider intervention, even if we are being begged by people we like or for whom we feel sorry. This does not mean the interventions cannot occur; it does require "that all states unambiguously renounce the use of unilateral, or even regional, *military* force to compel compliance with the democratic entitlement in the absence of prior Security Council authorization under chapter VII of the Charter."[330] This simple rule will go far in discouraging the pretextual invocation of Articles 51 or 53 justifying intervention to ostensibly enforce "rights" such as human dignity and democratic governance.[331]

There are lots of legitimate ways to use force that, however, require consensus, something the United States has not usually been good about obtaining before a military strike. The Second Gulf Crisis is an example of such consensus, but it remains to be seen whether this was truly an activity of the "New World Order" that will represent U.S. policy in the future, or merely a unique experiment in coalition construction. For the United States, the true test will be when the Security Council declines to authorize the use of military force, and the United States has the choice of either acting in accordance with the Council or going off on a frolic of its own.

In an action-oriented world, it is hard to believe that sometimes one could do more good for humanity by merely pausing in brilliant repose, but Milton, even when old and blind, knew this truth: "They also serve, who only stand and wait." [332]

Author's Dedication

This Article is part of a larger work on the history of Panama. I would like to thank all of the citizens of Panama, who have welcomed me to their country many times with unlimited hospitality; Professors Thomas M. Franck, David Richards, Paul Szasz, and Greg Fox for encouraging my

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330. Franck, *supra* note 27, at 84. Professor Franck duly observes that "such authorization, except for *regional* action under Article 53, would require a finding that the violation has risen to the level of a threat to the peace." *Id.* (emphasis added).

331. There are lots of legitimate ways to use force that, however, require concensus, something the United States has not usually been good about obtaining before a military strike. The Second Gulf Crisis is an example of such consensus, but it remains to be seen whether this was truly an activity of the "New World Order" which will represent U.S. policy in the future, or merely a unique experiment in coalition construction.

332. John Milton, *On His Blindness* (1652).

participation in their N.Y.U. seminars on just war theory and the international democracy movement, and for tolerating my chronic outspokenness; Professors Warren Dean and Nicholas Sanchez-Albornoz for sharing their knowledge of Latin America, as well as their passionate commitment to searching for truth in history; Steve Shapiro for his valuable insights and constant encouragement; and to Elizabeth Dallam and the entire editorial staff at the *Arizona Journal of International and Comparative Law* for their perseverance and unwavering dedication. I also wish to thank Professors D'Amato, Riesman, and Teson for always encouraging me to be a free thinker. Developing one's own ideas requires the freedom to topple one's greatest idols and I thank them for their patience with my fledgling efforts — all three edifices still stand tall! This Article is dedicated to the memory of all those who died in the U.S. intervention of Panama, both military and civilians, in the hope that we will remember this heavy sacrifice of human flesh and blood, and next time, choose a better means to resolve conflict, no matter how just in itself the end may seem.