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Grenada, Nicaragua and Panama: Tracking Force-for-Democracy Discourse in the 1980s

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**GRENADA, NICARAGUA AND PANAMA:
TRACKING FORCE-FOR-DEMOCRACY
DISCOURSE IN THE 1980s**

Craig Scott*

One can no longer simply condemn externally motivated actions aimed at removing an unpopular government and permitting the consultation or implementation of the popular will as *per se* violations of sovereignty without inquiring whether and under what conditions that will was being expressed, and how the external action will affect the expression and implementation of popular sovereignty. ... No one is entitled to complain that things are getting too complicated. ... Those who yearn for 'the good old days' and continue to trumpet terms like 'sovereignty' without relating them to the human rights conditions within the states under discussion do more than commit an anachronism. They undermine human rights.

Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1991) 84 AJIL 866.

If we want to take human rights seriously, we cannot give much weight to conspiracies among ruling elites that do not represent the views of their populations. ... [N]o intervention treaties invented by [elites] for their own self-interest ... do not constitute real rules of international law, but, rather are quasi-rules, invented by ruling elites to insulate their domestic control against external challenge.

Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny" (1990) 84 AJIL 516.

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I. INTRODUCTION

I intend to address the issue of the forcible imposition or coercion of democracy in the Americas, what commentators have called variously "pro-democratic invasion",¹ "democracy promotion by invasion",² "democracy promotion by intimidation"³ and, generically, "democracy by force".⁴ My goal for this conference paper is modest. I will be concerned simply to focus on the actions in the past decade by the United States in Central America and the Caribbean Basin as paradigm illustrations of the ideologized use of force during a time period which we increasingly are tending to call the old world order. My reason for doing so is my view that, while these actions took place *during* the so-called old world order, the perpetrators of these acts are inclined to view these acts as normative harbingers of a new world order, the legitimacy of which they would like to see fixed as part of the international legal landscape.⁵

This paper is a preliminary and partial treatment of the above phenomena. In future work, I would hope to respond to the views

¹ O. Schachter, "The Legality of Pro-Democratic Invasion" (1984) 78 AJIL 645: implicitly discussing the invasion of Grenada in 1983 by the United States and a nominal complement representing OECS states, in response to W. M. Reisman, "Coercion and Self-Determination: Construing Charter Article 2(4)" (1984) 78 AJIL 642.

² L. Whitehead, "The Imposition of Democracy" in A. F. Lowenthal, ed., *Exporting Democracy: The United States and Latin America - Themes and Issues* (Baltimore: Johns Hopkins University Press, 1991) 216 at 226: on the December 1989 invasion of Panama by the United States [hereinafter *Exporting Democracy*].

³ Whitehead, *ibid.* at 231: on United States support throughout the 1980s for the *contras* in a low-attrition war against Nicaragua, mixed with direct CIA action such as the mining of the port of Corinto.

⁴ T. H. Carothers, "The Reagan Years: The 1980s" in Lowenthal, *Exporting Democracy*, *supra* note 2, 90 at 101: on both Grenada and Nicaragua. See also T. H. Carothers, *In the Name of Democracy: U.S. Policy Toward Latin America in the Reagan Years* (Berkeley: Univ. of California Press, 1991) at 77-116.

⁵ See the two opening quotations of Reisman and D'Amato.

of Michael Reisman in two editorial comments in the *American Journal of International Law* as well as other of his recent writings.⁶ In that context, I would seek to compare the use of military force by the United States in the Americas to recent and ongoing (at the time of this conference) developments in Haiti. My inclination is to see the response of the Organization of American States (OAS) to the coup against President Aristide as a watershed opportunity to usher in the beginnings of a different regional order and to show by example one direction a new world order can begin to take – an opportunity that, it seems to me, the recent War in the Gulf by and large squandered.⁷ I tend to the view that the difference between old and new orders can be conceived, if somewhat sloganistically, in terms of institutional, normative and attitudinal emphasis on judgment by force, on the one (older) hand, and on the force of judgment, on the other (newer) hand.

My view at this stage is that we should resist endorsing a fundamental realignment in the ways use of force and human rights discourse interact, to the extent that the human rights discourse in question is the particular one of “representative democracy”.⁸

⁶ See W. M. Reisman, “Sovereignty and Human Rights”, *supra* (first opening quotation) and W. M. Reisman, “Coercion and Self-Determination”, *supra* note 1. See also W. M. Reisman, “Some Lessons from Iraq: International Law and Democratic Politics” (1991) 16 *Yale J. Int’l L.* 203.

⁷ B. H. Weston, “Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy” (1991) 85 *AJIL* 516; R. A. Falk, “What Was the Gulf War? A Reconsideration” (August 8, 1991) [unpublished lecture while Olaf Palme lecturer]; R. A. Falk, “Reflections on the Gulf War Experience: Force and War in the United Nations System” (May 28, 1991) [unpublished lecture while Olaf Palme lecturer]; D. D. Caron, “Iraq and the Force of Law: Why Give a Shield of Immunity?” (1991) 85 *AJIL* 89 479.

⁸ Although this is outside the scope of this paper, I would leave open the possibility that a new world order’s United Nations could sanction multi-lateral intervention in situations of the most serious systematic human rights abuses such as genocide (as in Cambodia) or mass executions (Uganda): see “Development of Measures to Prevent and Intervene Against Genocide Through International Co-operation Within the Framework of Competent

I am willing, indeed happy, to concede that democracy or internal self-determination may now be (or, at least, may soon be) considered a binding human rights obligations on all states or, looked at from another angle, an evolving qualitative condition on the "government" criterion for statehood.⁹ However, I expect to advocate a transparent community deliberative, reason-giving and decision-making process (and not simply an *ex post facto* exercise of judgment by the international community¹⁰) with an

International Bodies Such As the United Nations", Draft resolution adopted without a vote by the Committee on Non-Self Governing Territories and Ethnic Questions, 86th Inter-Parliamentary Conference, CONF/86/4-DR.18 (12 October 1991) (subsequently adopted as a resolution without a vote by the Inter-Parliamentary Conference). However, absent explicit restructuring of the *United Nations Charter* (or collectively endorsed reinterpretation of it) to allow for this possibility and to prevent vetoes by one state or a very small minority of states, arguments for lawful unilateral intervention (including, indeed especially, intervention which is collective although outside the direct purview of a stalemated UN) must be considered as legal questions, no less than commentators like Ian Brownlie would consider them as moral questions: see I. Brownlie, "Thoughts on Kind-Hearted Gunmen" in R. B. Lillich, ed., *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973) 139.

⁹ The concession is primarily for sake of argument, but also because it does indeed seem that this is one normative direction that the late 20th century world is rapidly taking. This is nowhere more clearly the case than in the Americas. See, for example, the recent OAS General Assembly Resolution of June 5, 1991, entitled "Representative Democracy" and also the Preamble, Article 2 and Article 3 in the OAS Charter which form the basis for the attention in the American system to representative democracy. See also the references in the recent October 2, 1991, Minister of Foreign Affairs resolution on Haiti to the Commitment of Santiago to Democracy and the Renewal of the Inter-American System. Note should also be taken of the recent involvement of official OAS international election observation (IEO) missions in countries such as Nicaragua, El Salvador, Paraguay, Surinam and, crucially, Haiti. The author participated in the OAS' election observation missions to Nicaragua in 1990 and to El Salvador in 1991.

¹⁰ On the notion of an (interpretive) "community of judgment", see O. Schachter, "Self-Defense and the Rule of Law", (1989) 83 AJIL 259

almost irrebuttable normative presumption against even the multilateral use of military force following an anti-democratic coup.¹¹ This position may strike some as being highly traditional, unimaginative and dinosaur-like for a person of my relative youth. Perhaps so. Yet, to go to the heart of the matter, I want to resist strenuously what I perceive to be a discernible (and ironic) tendency to fuse the idea of force and the force of ideas in these euphoric times.¹² I will be concerned to argue that a truly New World Order would treat Panama and Grenada as features of an old world order not as incidents with generalizable normative force.¹³

The foregoing paragraph was meant to place what follows in context. The arguments for a "force of judgment" paradigm over a "judgment by force" paradigm will have to be left for the future. For the moment, my purpose, as indicated in the opening paragraph, is in some respects a positivistic one, namely, tracking the justifications used in the interventions in Grenada, Nicaragua, and Panama to determine the extent to which the promotion of democracy constituted an element of the *opinio juris* (to use a traditional concept). With respect to each, I will first note the general behaviour of the U.S. with respect to democracy in those countries up until the point at which democracy promotion became one justification for forcible intervention in the 1980s; this will

(especially sections "The Influence of Community Judgment" and "Enhancing Security Through Law and Institutions").

¹¹ The presumption would be rebuttable only where, in the explicit judgment of the community, the usurpation of democracy is intimately tied to the actual or imminent imposition of a regime that would violate human rights to the degree that the general doctrine of (collective) humanitarian intervention would be applicable. These conditions indicate that, in fact, forceful imposition of democracy *per se*, even multilateral, would not be permissible.

¹² A tendency reflected in the approach the Prime Minister of Canada has taken with respect to the Panama invasion and also the current Haiti crisis, where the possibility of military force is coyly not denied.

¹³ See D'Amato, *supra* (second opening quotation), 516, who sees them in these terms despite overwhelming condemnation in both the OAS and UN.

provide a background story of the sort important for my view that interpretation of use of force rules in international law cannot be conducted in the abstract but must be located in a "historical contextualism".¹⁴ I will then describe how the sub-text of the interventions in Grenada, Nicaragua and Panama was, to an important extent, a force-for-(electoral)-democracy discourse which lines up quite closely with some of the kinds of arguments being presented in an academic context with respect to using force for democracy promotion by leading "realist" international lawyers based in the United States. It will also be briefly argued why these arguments cannot be treated as merely academic. These rationales put forward at various levels of rhetoric by the United States and by commentators will be juxtaposed to the "classicist" opinion of the ICJ majority in the *Nicaragua Case*.¹⁵

II. THE EVENTS AND THEIR BACKGROUND

A. GRENADA

The United States had already taken a hostile stance toward Grenada after the takeover of that country by Maurice Bishop and his New Jewel Movement (NJM) and before Bishop's own overthrow by an NJM faction. Pressure against that regime was portrayed

¹⁴ Again, this theme cannot be developed in this paper.

¹⁵ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 (Merits) reproduced at (1986) 25 I.L.M. 1025 [hereinafter *Nicaragua case*]. For commentaries on the case that deal with the issue of the use of force to promote democracy particularly and human rights more generally, see N. S. Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" (1989) 38 I.C.L.Q. 321; F. R. Tesón, "Le peuple, c'est moi! The World Court and Human Rights" (1987) 81 AJIL 173; F. R. Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (Dobbs Ferry, New York: Transnational Publishers, 1988), especially c. 9, "Human Rights and Humanitarian Intervention in the World Court: The *Nicaragua* Decision". The "realist"- "classicist" categories are those productively employed by T. Farer in "Human Rights in Law's Empire: The Jurisprudence War" (1991) 85 AJIL 117.

by the Reagan Administration in terms of rebuffing the advance of Communism and, within the United States, was “publicly portrayed as a policy of promoting democracy”.¹⁶ When the Coard-Austin faction overthrew Bishop and had him and close associates killed, the U.S. diverted a Lebanon-bound marine troop ship to Grenada and invaded. Several hundred “advisers”¹⁷ stayed on for a year to oversee a political purification campaign to rid the island of New Jewel Movement influence.¹⁸ U.S.-supervised elections were held in which the U.S.-preferred candidate won a landslide victory; the CIA covertly funnelled \$675,000 (a lot of money in a small country) to help ensure this victory.¹⁹ If the populace’s vote was also influenced by prospects of American aid, it is worth noting that an initial \$48 million made available for

¹⁶ Carothers, *supra* note 4 at 104. The attitude toward Grenada fell squarely within the Reagan Doctrine: see J. J. Kirkpatrick and A. Gerson, “The Reagan Doctrine, Human Rights and International Law” in L. Henkin *et al.*, *Right v. Might: International Law and the Use of Force* (New York: Council on Foreign Relations, 1989) at 19-37. Kirkpatrick and Gerson insist that the Reagan Doctrine was not a flipside of the Brezhnev Doctrine in that it did not call for forcible institution of liberal democratic regimes *except* by way of the result of counter-intervention to support those who were resisting governments who were receiving military and other assistance from the Soviet or Cubans. Henkin’s portrayal of the Doctrine as being in essence about overthrowing “pro-communist” regimes is consistent with the Kirkpatrick and Gerson version to the extent that political orientation was invariably treated in the paranoid White House as the litmus test for whether there was a Soviet intervention that needed to be countered: L. Henkin, “The Use of Force: Law and U.S. Policy” in Henkin *et al.*, *Right v. Might, ibid.*, 37.

¹⁷ D. R. Robinson, “Letter from the Legal Adviser, United States Dept. of State” (1984) 18 Int’l Lawyer 381. This letter was written in reply to the Committee on Grenada (E. Gordon, R. Bilder, A. Rovine, D. Wallace), “International Law and the United States Action in Grenada: A Report” (1984) 18 Int’l Lawyer 331.

¹⁸ Carothers, *supra* note 4 at 105, citing the book by Watergate-exposing journalist Bob Woodward, *Veil: The Secret Wars of the CIA, 1981-1987* (New York: Pocket Books, 1987) at 337.

¹⁹ Carothers, *ibid.*

“political reconstruction” dropped dramatically to a mere \$200,000 for the two years after the invasion combined.²⁰

B. NICARAGUA

The basic contours of the Nicaragua story are familiar to most international lawyers in this hemisphere. The first part of the story consists of the many decades of U.S. intervention in and control of Nicaraguan affairs; the early years of multiple marine landings gave way to solid support for the Somoza dynasty. This support was only withdrawn near the very end of the Nicaraguan revolution when the U.S. helped orchestrate an OAS foreign ministers' resolution on June 23, 1979, which withdrew support from the Somoza government and called for installation of a government to be representative of all of the groups opposing Somoza; this government would then be expected to hold elections “as soon as possible”.²¹ The Junta of the Government of National Reconstruction (amongst whose ranks were the Sandinistas or FSLN) responded positively on July 12, 1979, and in a telegram to the OAS “ratified” some of the goals which had “inspired their government”, including the plan to call free elections.²²

Not many years passed before the U.S. became the bankroller and logistical mind behind the *contras* who were waging a brutal and costly war against the Sandinista government. Especially from the mid-1980s onward, in order to justify the *contra* aid, the U.S. (the White House and then Congress) began to cite the June 23, 1979, OAS Foreign Ministers resolution as the “formal basis for the removal of the Somoza regime and the installation of the

²⁰ Carothers, *ibid.* at 121, n. 31.

²¹ *Nicaragua Case*, *supra* note 15, para. 167. The U.S. proposed, but failed to get endorsement for, an OAS “peacekeeping” force in 1979: Whitehead, *supra* note 2 at 231. It had succeeded in 1965 in having the OAS endorse its intervention in the Dominican Republic.

²² *Nicaragua Case*, *ibid.*

Government of National Reconstruction".²³ In scarcely distinguishable political and legal discourses, the Sandinistas were alleged to have violated the July 12, 1979, democratic commitment.²⁴ This was the position taken despite the fact that elections had been held in 1984 which credible international observers had pronounced fair and sufficiently representative of the popular will; in the face of this evidence, the U.S. denied the fairness of the elections and often pointed to the fact that several opposition parties had removed themselves from the campaign (at no small urging from the U.S. which actively tried to thwart the elections²⁵). A half decade of martial law and brutal warfare followed, as did stalwart attempts of various Latin American states through the Contadora process to peacefully resolve the Nicaraguan situation and, indeed, problems throughout the Central American region. The 1984 elections were treated as either fraudulent or virtually a non-occurrence in mainstream U.S. political discourse. Nicaragua is referred to as undemocratic prior to the elections of 1990 supervised by the massive UN-OAS-Carter Center election-observing troika; sometimes this assumption was clearly grounded in a stance taken on human rights abuses in Nicaragua, including the state of martial law in force for much of the period, as opposed to being based on a rejection of the 1984 election results.

The 1990 elections (presidential, national assembly and municipal) emerged from the Contadora process after it was quite clear that U.S. aid for the *contras* was going to end or tail off sharply, in the wake of the democratic subversions and perversions (such as the Iran-Contra affair) which the Administration had wrought in the United States itself. External pressure from the U.S. through its

²³ Formal "finding" by Congress of July 29, 1985 cited and discussed in *Nicaragua Case, ibid.*, para.168.

²⁴ In the early 1980s, the focus of arguments from the Administration was on the interdiction of the flow of arms to El Salvador rebels from Nicaragua, which was with little doubt occurring: Whitehead, *supra* note 2 at 232-233. This was tied to the counter-intervention-against-communism Reagan Doctrine.

²⁵ Whitehead, *ibid.* at 233: the U.S. knew Sandinistas would probably win.

low-attrition war and economic boycott also likely contributed to the calling of the elections and, more significantly, was also an omnipresent factor in voters' calculus as to whether to vote for the ruling Sandinistas or, as it turns out, the winning, U.S.-backed UNO coalition.²⁶ The consensus among observers was that the elections were almost immaculately conducted.²⁷ This result cannot entirely

²⁶ UNO (a 17-party coalition) won around 60% of the vote while the Sandinistas polled close to 40%. The U.S. appropriated large sums of money to support the UNO campaign, although a significant proportion of it may not have got to UNO in time to be put to use in the campaign.

²⁷ It is crucial to note, however, that there are deeper considerations with respect to an election's fairness than the formal fairness of the registration, voting and counting process – for instance Sandinista control of the media, on the one hand, and U.S. coercion, on the other hand. On the need for a non-formalistic view of international election observing, see International Human Rights Law Group, *Guidelines for International Election Observing* (Washington, D.C.: IHRIG, 1984) [prepared by Larry Garber]. This relates directly to the problem with developing an intervention doctrine based on a formalistic concept of democracy that is exclusively election-oriented. Thomas Carothers' analysis of the Reagan years emphasizes the formalistic conception of democracy which the United States sought to vindicate in Latin America, and indeed which has motivated various waves of official attention to Latin American democracy in Washington:

[T]he Reagan administration held that a country is a democracy when it has a government that came to power through reasonably free and fair elections...The elections-oriented conception of democracy... ignores the crucial question of how much real authority a particular elected government has – whether, for example, an elected government's authority is curtailed in practice by the military, the economic elite, or other power sectors. Additionally, it gives drastically short shrift to the issue of the kinds and degree of political participation that exist within the country in question...The remarkable endurance of the institutional configuration of U.S. democracy leads Americans to equate the U.S. version of democracy with the idea of democracy itself and to believe that if a country adopted U.S.-style forms of government it has become a democracy. ... To the extent the United States has supported democratic change in Latin America in this century, it has generally done so as a way of relieving pressure for more radical political and economic change. The impulse to promote democracy thus has a built-in tension: the impulse

be explained in terms of Sandinista hubris and must at least in part cast doubt on the United States' insistence that the Sandinistas were not at all democratically inclined.²⁸

C. PANAMA

Although possessing its own distinctive features (notably the presence of the Panama Canal), the story of U.S.-Panama relations are not unlike those with Nicaragua.²⁹ In terms of the 1980s, it is important to note that presidential elections in 1984 were rigged (as attested by international election observers³⁰) with "the head of the electoral tribunal resign[ing] rather than certify[ing] the results which were imposed by the National Guard under the direction of General Noriega"; the U.S. did not protest and, indeed, it appears had a role in selecting the winning presidential candidate.³¹ A year

is to promote democratic change but the underlying objective is to maintain the basic order of what, historically at least, are quite undemocratic societies. The United States mitigates this tension by promoting very limited, top-down forms of democratic change that do not risk snowballing into uncontrollable populist movements.

Carothers, *supra* note 4 at 117-118.

²⁸ Whitehead, *supra* note 2 at 235.

²⁹ Secretary of War Taft wrote to President Roosevelt in 1908 with respect to rights that should be protected in a proposed treaty with Panama: "We should be given direct control over elections, so as to permit us, should we desire, to intervene and determine who is fairly elected." Quoted in Whitehead, *ibid.* at 226.

³⁰ Whitehead, *ibid.* at 228. None were from national organizations like the OAS and UN. This phenomenon, crucial to any post-Cold War vision of the world, did not begin until the later 1980s. International election observing was pioneered by the NGO community, notably the Washington-based International Human Rights Law Group: IHRLG, *Guidelines*, *supra* note 27.

³¹ Whitehead, *ibid.* at 228. For a non-committal view on whether there was proven fraud in the 1984 election results, see the "bipartisan" National Republican Institute for International Affairs and National Democratic Institute for International Affairs, *The May 7, 1989 Panamanian Elections* (1989) at 17-18 [Foreword by Jimmy Carter and Gerald Ford].

later, after the fraudulently-elected president had tried, it appears, to assert some independent civilian authority,³² Noriega overthrew him and, for four years, a series of nominal presidents held office with Noriega as the power behind the throne. This state of affairs, no less than the 1984 election, was more than tolerated in Washington who had for years been paying Noriega (on the CIA payroll) as an intelligence source, as a supporter of the U.S. military presence in Panama and, it seems, also for assistance to the Nicaraguan *contras*.³³

It was only when Noriega began to become a public relations liability of a large order, capped off by grand jury indictments in Florida courts (which the Administration had not itself initiated), that economic pressure and a high rhetorical war ensued to try to oust Noriega from his position, although the Administration "was not trying to change the Panamanian military's long-standing domination of Panamanian political life".³⁴ Despite causing severe damage, economic pressure did not succeed in getting rid of Noriega who, in May 1989, orchestrated an even more clearly fraudulent election (than that of 1984) which international election observers, including the team co-led by former U.S. President Jimmy Carter, pronounced had actually been won by Guillermo Endarra.³⁵ The U.S. recognized Endarra as the legitimate head of

³² Notably by launching an inquiry into the murder of Dr. Hugo Spadafora Franco alleged to have been killed on Noriega's orders: NRIIA and NDIIA, *ibid.* at 18. The *Inter-American Commission on Human Rights* subsequently found Panama responsible under the *American Convention on Human Rights* for Spadafora's torture-murder: Resolution No. 25/87, Case 9726 (Panama), September 23, 1987.

³³ Carothers, *supra* note 4 at 111.

³⁴ Carothers, *ibid.* at 112.

³⁵ NRIIA and NDIIA, *supra* note 31. Note that the OAS did not have its own mission in Panama, but, after receiving a letter from Carter about the stolen election, its Meeting of Consultation of Foreign Ministers adopted a resolution which condemned the election fraud and authorized a conciliation mission to seek to achieve a transfer of power while at the same time "exhort[ing] all states to refrain from any action that may infringe the

government. Seven months later, the U.S. invaded, employing what one TV commentator referred to as the largest S.W.A.T. team in history, eventually "arrested" Noriega (spiriting him back to Florida to face drug charges in a domestic United States court) and facilitated the assumption of power by the Endarra government.

III. PRO-DEMOCRATIC JUSTIFICATIONS?

A. THE NORMATIVE JUSTIFICATIONS OFFERED BY THE UNITED STATES

The above descriptions are crucial for understanding the context in which any responsible observer has to consider any claimed international legal right to use military force to promote democracy in Latin America, or, I would argue, in similar contexts in which there are unequal relationships between societies (for example, France in Africa or India in South Asia). An equally important foundation to be laid is that of the normative discourse relating to the use of force in the three contexts. Each situation is characterized by a sub-text of democratic justification although the formal legal justification which the U.S. ultimately settled on for international consumption seemed to rely on more traditional grounds, with the possible exception of Panama.

1. Grenada

In Grenada, the U.S. officially presented three grounds which were said, in combination, to justify the intervention in all its facets: (1) invitation from the Governor General of Grenada, (2) rescue of U.S. nationals, and (3) collective action of the OECS.³⁶ Yet, there

principle of nonintervention in the internal affairs of States": see OEA/Ser.F/II.21, Doc. 8/89, rev.2, 17 May 1989 reproduced in NRIIA and NDIIA, *ibid.* at 123. Conciliation having failed and no further collective action having been taken by the OAS, the United States invaded six months later.

³⁶ Excerpt from U.S. Dept. of State Justification for Grenada Action, U.S. Digest, c. 14, Part 1 in (1984) 78 AJIL 661; reiterated in Legal Adviser Robinson's letter to the Gordon Committee on Grenada, *supra* note 17.

is abundant evidence that the United States very publicly justified its action in terms that suggest a democracy rationale. President Reagan referred to an effort "to restore order and democracy".³⁷ At the UN, a context in which one would expect sticking close to the formal legal script, Ambassador Kirkpatrick in part justified the invasion in terms of a combined democracy-human rights rationale.³⁸

2. Nicaragua

As for Nicaragua, the democracy rhetoric (interwoven with counterinterventionist Reagan Doctrine) was front row and centre in domestic political discourse in the United States, especially when it came time to solicit *contra* funds each year from Congress. It is unclear whether the U.S. justificatory discourse aimed externally at the rest of the world ever seriously embraced the democracy reasoning. The judicial style of the ICJ majority in the *Nicaragua Case* is, however, extremely instructive in this regard. In its reasons, it addressed arguments that the U.S. might conceivably raise, the U.S. having withdrawn from the merits phase of the case. The Court deals at length with the argument based on the collective self-defence (of El Salvador) which was clearly the U.S.' main prong of legal attack. But, the Court then goes on to address what possible arguments for use of force could be derived from the above-mentioned 1985 U.S. Congressional finding on the situation in Nicaragua and proceeds to disavow three possible claims:³⁹ (1) pro-democratic intervention (based either on the

³⁷ Carothers, *supra* note 4 at 91, 121, n. 32.

³⁸ Tesón, *Humanitarian Intervention*, *supra* note 15, c. 9, "Humanitarian Intervention: State Practice" at 192-194. See also Farer, *supra* note 15 at 122, taking the view that the Grenada sub-text was democratic self-government, and therefore resolutions of condemnation in the OAS and the UN did not foreclose the possibilities of humanitarian intervention in situations of massive human rights abuse.

³⁹ Rodley, *supra* note 15, discusses these passages collectively as dealing with "humanitarian intervention". I will break them down into three separate arguments that the Court appeared to consider, all of which nonetheless very

1979 “commitment” to electoral democracy or on the various references to “representative democracy” in the OAS Charter);⁴⁰ (2) anti-totalitarian “ideological intervention”;⁴¹ (3) human rights-motivated intervention (what might be called humanitarian intervention “proper”).⁴² What is quite fascinating from our perspective is the manner in which the Court raised each of these arguments on its own motion only to categorically dismiss them as possible lawful grounds for the use of force⁴³ and then go on

much overlapped. The International Court of Justice itself did not employ the specific term “humanitarian intervention”.

⁴⁰ *Nicaragua Case*, *supra* note 15, paras. 257-262.

⁴¹ *Ibid.*, paras. 263-266.

⁴² *Ibid.*, paras. 267-268.

⁴³ The three relevant passages are as follows.

Re. claim (1):

[E]ven supposing that such a political pledge [to representative democracy in Art. 3(d) of the OAS Charter] had had the force of a legal commitment...and even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State. (para 262).

It should be said that the finding of the Court that Art. 3(d) contains a “political” not “legal” commitment appears particularly formalistic. Indeed, given that it falls into a Chapter styled “Principles”, this may indirectly cast some doubt on the “legal” status of the Art. 2(4) use of force prohibition in the UN Charter which is also found in a Chapter styled “Purposes and Principles”. Here, I prefer the interpretation of Judge Schwebel in dissent who viewed Art. 3(d) as containing a legal commitment which he did not seem to suggest, to his credit, yielded anything more than a right to (verbally) demand changes based on that commitment. In the Court’s favour (only slightly) is the fact that the OAS Charter’s Chapter IV is entitled “Fundamental Rights and Duties of States” and contains further more specific enunciations of the basic “Principles”, including with respect to the use of force (e.g. Art. 18). Such a further specification does not occur in the UN Charter.

to draw attention to the fact that these were not, in any case, among the *legal* arguments advanced by the U.S.⁴⁴ My own interpretation

Re. (2):

The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system. (para 263)

Re. (3):

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again the training, arming and equipping of the *contras*. (para 268).

The concern with this paper in effect is the force-for-Art.3(d)-democracy argument rejected by the Court, that is claim (1). It should be evident that nothing turns on my dismissal of the Court's view that the Art. 3(d) commitment is merely "political". In my view, "representative democracy" should be viewed as a fundamental legal pillar of the American system – at the same time as the other provisions in the OAS Charter which categorically preclude the use of force except for reasons of classical self-defence from external attack. I will not be directly concerned in this paper with interpretation of the Charter text, except to make the following observation. If one takes a text at all seriously (and original intention only a little seriously), the fact that representative democracy has such a prominent place in the OAS Charter *at the same time* as the prohibition on the use of force (except in self-defence) makes a "force-for-democracy" argument virtually unsustainable.

⁴⁴ Re version (2):

The Court also notes that these justifications, advanced solely in a political context which is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence. ... The Court is not entitled to ascribe to states legal views which they do not themselves formulate. (para. 266)

Such ascription of views is, of course, exactly what the Court had been doing in four long paragraphs before expressing this law-versus-politics caveat.

is that the Court, recognizing the fluidity of the international normative process (despite its own formalistic rhetoric), felt compelled to address (and nip in the bud) arguments which were threatening to break out as a full-blown legal discourse, even if they were being advanced primarily for domestic political purposes. The bottom line is that, throughout the Nicaraguan ordeal, there were democracy-based arguments for the use of force inhabiting one of those intractable middle grounds between law and politics. In a sense, the Court took judicial notice of this and attempted to put

Also re. version (3):

The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent state, which is based on the right of collective self-defence. (para 268)

It is interesting, however, that the Court did not explicitly make such caveats with respect to version (1), perhaps implicitly suggesting that the U.S. could be interpreted to have been advancing a *legal* argument that it had the right to use force to enforce the various alleged legal commitments made by Nicaragua. Importantly, this is the area of most relevance to the force-for-democracy debate and the current Haiti crisis, revolving as it does around the re-energized OAS commitment to representative democracy.

That being said, one can over-emphasize the significance of the fact that the Court did not lodge a specific "political-not-legal" caveat in its discussion of version (1). Earlier in the judgment, the Court had stated in what seemed to be quite general terms that any rights of intervention asserted by the U.S. were "statements of international policy, and not an assertion of rules of existing international law" (para. 207) and that "the United States has, on the legal plane, justified its intervention expressly and solely by reference to the 'classic' rules involved, namely, collective self-defence against an armed attack" (para. 208). These comments were made by the Court in evaluating a potential rule of law which would allow external intervention to support (politically and morally worthy) opposition forces in non-decolonization contexts. While conceptually distinct from intervention to support human rights and democratic values (*i.e.* not necessarily through the medium of internal opposition forces), there should still seem to be an implicit overlap between the Court's discussion at paras. 206 to 209 and that at paras. 257 to 269.

paid to the discourse or, perhaps, contribute to the normative arguments that opponents of using force for democracy could employ.

3. Panama

Finally, with respect to Panama, the most recent intervention, I would submit that the force-for-democracy claim began to take on normatively-confident airs. The State Department put forward four justifications, phrased as "objectives":

The United States' objectives were: (1) to protect American lives; (2) to assist the lawfully and democratically elected government in Panama in fulfilling its international obligations; (3) to seize and arrest General Noriega, an indicted drug trafficker; and (4) to defend the integrity of United States rights under the Panama Canal treaties.⁴⁵

In his speech to the nation on December 20, 1990, President Bush used somewhat more colloquial language about defending or restoring democracy as being one of the four objectives;⁴⁶ prominent in all major public statements by the President was the "restoring or defending democracy" rationale. This is the closest yet to a direct force-for-democracy rationale that I know of in the post-Charter era.⁴⁷

It should be noted that, if the four "objectives" are indeed to be understood as legal justifications, objective two was phrased in terms that approximate the kind of invitation rationale we have seen

⁴⁵ U.S. Digest, c. 14, Part 1 (1990) 84 AJIL 595.

⁴⁶ *Ibid.*

⁴⁷ This is all the more significant given that, in 1983 after the Grenada invasion, the State Department went out of its way to state that "humanitarian intervention" was *not* one of the three justifications for the Grenada invasion: U.S. Digest, *supra* note 36. This is reiterated in the Robinson letter to the Grenada Committee, *supra* note 17. Between Grenada and Panama, Mr. Robinson had been replaced by Mr. Sofaer as Legal Adviser to the Department of State.

(and seen abused) so many other times, from Afghanistan to Grenada.⁴⁸ Before looking at the significance of objective (2), it should be noted that there was a noticeable paring-down of the legal justifications in President Bush's letters to Congress⁴⁹ and to the United Nations Security Council.⁵⁰ In each, two of the four initial grounds were elevated to what look now to be the official justifications. The first and penultimate paragraphs of the letter to the Security Council read:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my government, to report that United States forces have exercised their inherent right of self-defence under international law by taking action in Panama in response to armed attacks by forces under the direction of Manuel Noriega. As President Bush stated this morning, this United States action *is designed to protect American lives and our obligations to defend the integrity of the Panama Canal treaties.* ...

United States forces will use only the force necessary to *assure the safety of Americans and integrity of the Panama Canal treaties.* All feasible measures have been taken to minimize the risk of civilian damage or casualties.⁵¹

Of course, if force-for-democracy is not in fact an Article 51 argument but an interpretive gap in the Article 2(4) prohibition on the use of force, then arguably the Security Council letter (required by Article 51) leaves it open; however, the letter to Congress also isolates only these two grounds. Yet, the democracy rationale still

⁴⁸ I say "approximate" because it seems clear that no such "official" invitation was received, nor is it farfetched to think that now-President Endarra would not wish to be associated with asking for U.S. military assistance.

⁴⁹ U.S. Digest, *supra* note 45.

⁵⁰ *Ibid.*

⁵¹ United Nations Security Council, "Letter Dated 20 December 1989 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council", UN Doc. S/21035 [emphasis added].

does not disappear from the United States' justificatory arguments. While both letters do drop completely the outrageous claim of a right to "arrest" Noriega in order to bring him to trial in the United States, each still keeps the democracy question as part of the normative background by pointing out that "[t]he United States undertook this action after consultation with the democratically-elected leaders of Panama" (the Security Council letter) and that "[the action] was welcomed by the democratically elected government of Panama" (the letter to Congress).

It may eventually be that the combined get-Noriega-and-save-democracy claim will simply be seen to piggyback on the two other (supposedly) legal grounds. But also possible is that the Noriega grab may also be tied to and justified by a new conception of democracy promotion that seeks, in one fell swoop, to fuse the right to use force with respect for sovereignty: the right to treat the legitimate elected government as if it were the state for all purposes including the right to invite outside military assistance (which right the International Court of Justice in *Nicaragua* explicitly recognized as a right of states⁵²) and not only in cases when a democratic government has actually taken office only to be overthrown (as with Haiti). While the word "invitation" is noticeable by its absence in both the four-point State Department justification and the subsequent letters, it is clear that embedded in the emerging United States normative discourse is an association between restoring democracy and the consent of the legitimate political leaders. So, the possible normative move which we may be witnessing is one that completely re-defines statehood according to evolving legitimacy criteria (in the OAS region, "representative democracy") such that states as the United States and Canada can purport to be implementing the wishes of the "democratically elected government" rather than simply going in and "installing democracy" in violation of "state sovereignty".⁵³ The next normative step to take

⁵² *Nicaragua Case*, *supra* note 15, para. 246.

⁵³ It is worth noting that a transformation of the concept of "sovereignty" implies a parallel transformation of the scope of the right of peoples to "self-

would be to begin to develop other surrogates for "invitation" where there is no election as a reference point (particularly an internationally supervised one) or where the winners of the election are not clear, such as presumptions of consent of the populace.⁵⁴

determination". This latter transformation could have a profound effect on the development of a new invitation doctrine given that there already exists considerable normative support for a duty of states to support peoples engaging in self-determination struggles. Paragraph 5 of Principle (e) of the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* provides as follows:

Every state has the duty to refrain from any forcible action which deprives peoples referred to above in elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, *such peoples are entitled to seek and to receive support* in accordance with the purposes and principles of the Charter.

Annex to Res. 2625 (XXV) of the UN General Assembly (24 October 1970), reproduced in I. Brownlie, ed., *Basic Documents in International Law*, 3d ed. (Oxford: Clarendon Press, 1983) 42 [emphasis added]. Given that a duty to give support exists for all states, this second sentence is rarely interpreted as including a duty to give direct military intervention in support. Although there might be no duty, it would be possible to interpret this sentence as allowing for a discretionary power to intervene in response to a request from a self-determination movement. Leaving aside the debatable legal status and uncertain scope of paragraph 5 as well as the traditional understanding that it is premised on a rather narrow "colonial" definition of the right of self-determination, the more enthusiastic advocates of using force for democracy might seek normative support by substituting an evolving meaning of "self-determination" into this passage.

⁵⁴ In a unilateralist world of *ex post facto* judgments, we would at least expect to continue to see, apart from anecdotal media accounts, the "public opinion polling" of the population such as occurred after Grenada and Panama to demonstrate the ecstasy of the population at being liberated. Such is also implicitly the way in which the 1990 Nicaraguan elections were viewed in establishment quarters in the U.S. — as a vindication of the use of military might to force a consultation of the populace.

From a Canadian perspective, it is significant that our Prime Minister seems to have moved Canada into this parallel force-for-democracy discourse. "The Prime Minister was advised of the American action early this morning through a phone call from President Bush."⁵⁵ After this early morning wake-up call, it would seem, from an outside observer's perspective, that the Department of External Affairs had to fashion a position to meet the commitment of support that the Prime Minister had already given the President.⁵⁶ The initial communique expressed both regret and sympathy for the United States' action (how more Canadian can you get?). While putting most emphasis on the threat to American lives, democracy was the subject of two of the five paragraphs. Later, in the House of Commons, Secretary of State Clark seemed to hone the legal argument along the same lines as seems to have occurred south of the border in the formal letters to the Security Council and to Congress, by referring to the Panama Canal treaty and the threat to U.S. citizens as the "unique" factors which justified intervention. Despite the "uniqueness" of the case, Canada "unswervingly" supported the principle of non-intervention. But, the democratic subtext was without doubt very much part of the support Canada gave the United States – Canada along with Great Britain and El Salvador, the only other states to vote against UN and OAS resolutions condemning the invasion.⁵⁷

B. ACADEMIC ARTICULATION

As already mentioned in passing several times, leading academic commentators are fashioning interpretations of UN Charter Article 2(4) that allow force for democracy or, at least, force against

⁵⁵ Communique 313, Secretary of State for External Affairs, December 20, 1989.

⁵⁶ Whatever the nature of the PM's intuitions, the fact that he did not even give a reply conditional on a legal opinion from the Department of External Affairs is disturbing for anyone even mildly afflicted by the rule-of-law bug.

⁵⁷ "Panama", (Oct.-Dec. 1989) Canadian International Relations Chronicle 29.

tyranny. To this point, I have referred interchangeably to two of them, D'Amato and Reisman, whose quoted views open this paper, but for purposes of this presentation I will limit myself to Reisman whose arguments are directed specifically at using force for democracy and are also very convincingly argued given his premises.⁵⁸

⁵⁸ D'Amato insists that he is *not* arguing for the right to impose (or defend by intervention) any form of government, including any principle that permits intervention to impose a democratic form of government: "[T]he question we should ask is not what intervention is *for* but what it is *against*. I argue that human rights law demands intervention against tyranny": D'Amato, *supra* (second opening quotation), 519. To be fair to D'Amato's views, he does seem to wish to be able to judge all forms of governance by human rights standards which at least allows him to recognize that formal electoral democracy can be a thin veneer for all kinds of tyrannical oppression (witness Guatemala and El Salvador). Accordingly, it would seem that he declines to put lack (or stealing) of elections *alone* in the camp of the kinds of human rights violations which would trigger the right to intervene. While I will take D'Amato at his word, I remain dubious that there is any real distinction between "intervention against tyranny" and "intervention for democracy" when, in situations like Panama, in large measure the context for determining that "tyranny" has occurred is the fact of active usurpation of the democratic vote. Tesón, concerned to respect as much as he can the majority decision in the *Nicaragua Case*, decides not to follow Reisman all the way down the path suggested in Reisman's 1984 article (Reisman, "Coercion and Self-Determination", *supra* note 1) which advocated using force to promote "internal self-determination" (read, democracy) and seems to be willing to draw a bright-line (against intervention) where democracy *per se* is the only motivation. He argues in *Humanitarian Intervention*, *supra* note 15 at 238:

[T]he use of force for democratic purposes will in many cases be disproportionate to the evil that it is designed to suppress. Indeed, denying political participation is less serious, and therefore less disrespectful in the Kantian sense, than the violation of more basic civil and political rights. Alternative, non-forcible means of pressure should therefore be attempted.

He goes on to explain at page 238 why, in his view, Grenada cannot be reduced to pro-democratic intervention because "in Grenada the new rulers had unmistakably established the incipient foundations of a totalitarian dictatorship".

In two editorial articles in the *American Journal of International Law*, Michael Reisman has presented the case for using force for democratic promotion.⁵⁹ In 1984, his goal was to focus on the text of Article 2(4) of the UN Charter and argue that it should not be interpreted to prevent a general prohibition on the unilateral use of force by states. In the absence of effective collective security mechanisms in the UN Charter, states must be allowed to unilaterally advance community goals, at the pinnacle of which he places the principle of self-determination (“the ongoing rights of peoples to determine their own political destinies”) understood as including an internal, or democratic, dimension. He calls for a contextualized evaluation of each application of coercion to see whether it advances or undermines this fundamental principle. Coming immediately after the Grenada invasion as this article did, it can be viewed as an implicit defence of that action, and indeed was read as such by Oscar Schachter in his cutting critique in reply.⁶⁰

Six years later, the backdrop for a new Reisman comment is the breakdown of the Cold War in the period which included the Panama invasion.⁶¹ This time, rather than simply asserting self-determination (in all its facets) as being at the pinnacle of the world order system, he describes the development of a new conception of sovereignty: “Although the venerable term ‘sovereignty’ continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but – not surprisingly – it is the people’s sovereignty

⁵⁹ Reisman, “Coercion and Self-Determination”, *supra* note 1; Reisman, “Sovereignty and Human Rights”, *supra* (first opening quotation). See as well his editorial: W. M. Reisman, “International Law after the Cold War” (1990) 84 *AJIL* 859.

⁶⁰ Schachter, “Prodemocratic Invasion”, *supra* note 1.

⁶¹ Which he indirectly defends in his piece by criticizing what he saw as the archaic attempt in the OAS of the Panamanian representative to set up “state sovereignty” against the “popular sovereignty” stolen in the fraudulent elections by Noriega: see Reisman, *supra* (first opening quotation), n. 22.

rather than the sovereign's sovereignty."⁶² He puts much emphasis on the development of international election observing (IEO) missions mounted by the UN and OAS as the culmination of this trend toward the piercing of the classical ("monarchical and elitist") sovereign veil. He sees them (correctly, I would contend) as a new institution for constitutive recognition and, by way of corollary, the basis for withholding of recognition (much like as in Rhodesia, where the issue was minority discriminatory rule not democracy *per se*). However, importantly for our purposes, he also sees the evaluations of such missions as providing the crucial proof of the popular will which can then be used to justify intervention from outside; without such evidence, the invader might well be suppressing the popular will no differently than the perceived internal usurper of power.⁶³

Consistently with his New Haven School approach, he notes that all kinds of contextual considerations may argue against intervention, although the central point is that one of them definitively is *not* some concern with a more classical notion of sovereignty. Infringement of this conception of sovereignty can therefore be factored out of the contextual calculus.⁶⁴ In listing all the contextual

⁶² *Ibid.* at 869.

⁶³ Reisman also notes the problem of the invader having "stables" of leaders waiting in the wings to be promoted, and cites the Soviets for this practice. In a context in which the use of force is American force, it is telling that Reisman does not give any examples of such an historical or potential practice in this hemisphere.

⁶⁴ Although I have set aside D'Amato's views, it should be mentioned that he, too, appeals to contextualization. His contextual analysis seems to revolve around proportionality. He argues that if the U.S. had used greater military might, fewer Panamanians would have been killed. In this kind of framework, the use of the military becomes subject to debates about how effective the force would be or was. This is a discourse which seems to be cousin to the "smart bomb" mentality that emerged from the Gulf war. One wonders if D'Amato would give some weight in his contextual calculus to allowing the military to experiment a little for effectiveness in real, live conditions, so that they will know more for "next time". This is not an academic point. Stealth

factors that would be valid to consider,⁶⁵ he is careful to point out: "This is not to say that every externally motivated action to remove an unpopular government is now permitted, or that officer corps that feel obsolescence hard upon them can claim a new *raison d'être* and start scouring the globe for opportunities for "democratizing" interventions."⁶⁶

Further on, he discusses the significance of international election observation (IEO) missions for the kind of contextual evaluations he encourages decision-makers to make. On the one hand, as already suggested, such IEO missions "contain" (counter-balance) the systemic instability created by conditioning various areas of international law (here, use of force doctrine) to human rights and democracy-based contextualizations; the stabilizing effect occurs because IEO evaluations "credibly and unequivocally indicate the wishes of a majority of the people".⁶⁷ On the other hand, Reisman acknowledges the ambiguity of this indicator and implicitly cautions against overreliance on it:

When the internationally supervised elections result in an absence of consensus on who should govern, *or* the integrity of the elections is doubtful, *or* there have been no elections, *or* a civil insurrection

fighter bombers were used in Panama for no apparent purpose other than to test features (bombing accuracy) unrelated to their primary purpose (evading detection): see N. Chomsky, *Deterring Democracy*, (New York: Verso, 1991) at 166.

⁶⁵ Notably, "the contingencies allegedly justifying the unilateral use, the availability of feasible persuasive alternatives, the means of coercion selected, the level of coercion used (the classic test of necessity and proportionality), whether the objectives of the intervener include internationally illicit aims, the aggregate consequences of inaction and the aggregate consequences of action". Earlier, he also states that "[c]ross-border military actions should certainly never be extolled, for they are necessarily brutal and destructive of life and property". If one were charitable, this might be interpreted as a kind of presumption against military force which would be factored into the contextual factor he refers to as "the means of coercion selected".

⁶⁶ Reisman, *supra* (first opening quotation) at 871.

⁶⁷ *Ibid.*

has left diverse groups vying for power, no one can be sure that the unilateral intervener from the outside is implementing popular wishes. ... In practice, there may be a factual 'grey' area between unequivocal expressions of popular will through internationally supervised,⁶⁸ observed and validated elections, on the one hand, and the atrocities that warrant humanitarian intervention, on the other. Situations falling into the grey area will simply not lend themselves to unilateral action

Reisman ends by noting that collectivized decision-making in centralized institutions could overcome these grey area problems, but returns to the theme of his 1984 article which is to argue that, in the transitional phase before such collective decision-making is a reality, the attention of international lawyers should be directed to establishing and developing contextual democratic and human rights-based criteria for unilateral action,⁶⁹ including the use of force. To Reisman, waiting for multilateralism is an abdication of moral and (it would seem) professional responsibility "[b]ecause rights without remedies are not rights at all".⁷⁰

C. THE PARALLEL POLITICAL AND ACADEMIC DISCOURSE: WHY BOTHER?

I have attempted to demonstrate the development of a use of force discourse around United States actions in Central America and the Caribbean Basin which draws some sustenance from the idea of promoting democracy; at least one influential scholar is articulating a similar discourse. One commentator has sought solace in the fact that humanitarian intervention "has been a doctrine defended in recent years by commentators, rather than states".⁷¹ It is true that the United States, in its official justifications, has shied away from unequivocally putting forward democratic self-determination (or

⁶⁸ *Ibid.*

⁶⁹ Including "methods for assessing popular will and making judgments about divergences": *ibid.* at 875-876.

⁷⁰ *Ibid.* at 875.

⁷¹ Rodley, *supra* note 15 at 332.

even other kinds of humanitarian considerations) as *legal* bases for using force against Panama or Grenada or even Nicaragua. Yet, lurking in the background has always been the democracy rationale, which has been played up for domestic consumption even as the pure legal arguments have been pared down somewhat for international consumption.

It may well be the case that this selective argumentation practice does have the rhetorical effect of strengthening the asserted legal prohibitions on unilateral pro-democratic intervention, and this is not to be undervalued. I take quite seriously the particular conception of international law, advocated most eloquently by Oscar Schachter, according to which one must take at face value the legal justifications offered by states for their actions in order to characterize them.⁷² A corollary of this is that if a state uses force for illicit reasons (say, just for example, a police action to arrest a drug dealer) but justifies its action in terms of self-defence or some other more-or-less accepted ground, that state both opens itself up to scrutiny of how the claim meshes with the facts *and* helps strengthen the normative force of the basic rule to which the state has declined to seek an exception.⁷³ As a matter of legal theory, it seems to me unhelpful (to put it mildly) to try to speak in any manageable sense of an international normative order in the way D'Amato wishes to, that is by privileging what states actually "do" whatever they may "say".⁷⁴ It is important to note exactly what kind

⁷² Schachter, "Self-Defense", *supra* note 11.

⁷³ *Ibid.*

⁷⁴ See D'Amato, *supra* (the opening quotation) as an example of this theory of law which D'Amato has actively promoted in many other writings. By and large, his view has been directed at the identification of custom but has clearly been extended to the realm of treaty interpretation in a way which goes beyond either evolutionary or purposive interpretation by, in effect, ignoring textual language because of illicit (*i.e.* classical sovereignist) motives underlying the text. Presumably, D'Amato would argue that the motives had only become illicit (so as to allow departure from the text) with the passage of time and the corresponding gradual incursion of human rights values into classical sovereignty doctrine.

of claims are articulated self-consciously by state actors and self-consciously responded to by other state actors if one is interested in making international law as transparent as possible and in forging a relatively autonomous discourse in international relations. One cannot simply dismiss out of hand the fact that the vast majority of states, in the General Assemblies of the UN and OAS, condemned in very strong language the Grenada and Panama invasions (especially Panama). Perhaps the biggest concern of all in this regard is the implicit "gunman" theory of law in D'Amato's doing-over-saying theory. If all that most states can "do" is protest the military adventures of a powerful state while that powerful state can actually physically "do" the invasion, then that incident (not encountered by physical actions of some sort that evince other states' conviction that this act is illegal) becomes norm-generating.⁷⁵ Verbal protest becomes insufficient to stave off a normative development.

Despite the foregoing, the above description of the parallel but converging legal and political discourses of justification are meant to illustrate the point that one must have a fluid enough idea of law to see how "political" justifications are increasing the operative ones in various places that count. In more traditional terms, one has to be constantly aware of the fact that state actors themselves can begin to transform previously "political" justifications into "legal" ones. But, very much different from D'Amato's approach, I am only advocating that so-called political justifications be examined to see if they are in fact sending the message that this is how the state actors in question are conceptualizing their act in normative terms. In assessing the desirability of acceding to these legal claims, one will of course have to be aware of *what in fact* is likely to go on under the cloak of the claim without having to accept that the fact that such things go on make them the law, as D'Amato would. Rather, these are reasons why the claimed rule is desirable or not,

⁷⁵ D'Amato tells us that "[a] major customary international law development since 1948 was the intervention by the United States in Grenada in 1983, and a second one is the Panamanian intervention of 1989": D'Amato, *supra* (second opening quotation) at 523.

or reason to judge the state to be in violation of the rule (if it is in fact recognized as existing already). Indeed, it is in part because the democracy claim would *not* be truly descriptive of what really motivates the intervention that it is dangerous and naive to recognize it as the rule.⁷⁶

Ultimately, my message is that to ignore the parallel discourse that uses non-statist paradigms to justify intervention is to take refuge in an overly rigid distinction between law and politics, between legal and political discourse. It is significant that the initial justification in Panama referred to democracy and subsequent justifications always mentioned the restoration of the democratically-elected government. It is also extremely significant that the International Court of Justice in the *Nicaragua case* addressed the democracy (and human rights) justification among its list of arguments which it would consider in the absence of the United States arguing them on its own. I recognize that the academic debate for many traditional lawyers, or simply lawyers not caught up in the vortex of legal debate in the United States, seems to be about policy or morality or, at most, that old positivist haven of last resort, *lex ferenda*. In a very real sense, that is indeed what it is about. But, equally, to take solace in this fact is, in my view, to adopt a distinctly ostrich-like perspective. If only because American legal culture, influenced by its constitutional legal culture and many other variables, is inclined to ideologize international law, the debates that seem to have been myopically centred on U.S. foreign policy and which have preoccupied many leading U.S. international lawyers must be engaged by other international lawyers of the Americas. It is an unstable, if not false, victory to take refuge in the fact that the more messianic interpretations of the law from south of the border are not agreed with by other state elites or the mainstream of the interpretive community of international lawyers when the will and the means to intervene coalesce in one site of decision-making, namely Washington (with occasional chimes heard from Ottawa).

⁷⁶ See Chomsky, *supra* note 64 at 158-163; Whitehead, *supra* note 2 at 229.

A broader dialogue must be entered which can influence the interstate dialogues taking place within the OAS, and in the UN as well.

A considerable chunk of international law is best thought of as being discursive or communicative in nature and the two interacting fields of discourse with which we are concerned here, use of force and democratic self-determination (combining aspects of human rights law and statehood criteria), are perhaps the prime examples. In such a framework, the line between policy, morality, law and basic politics is fluid to say the least. We may therefore be better off thinking in terms of "normativity" rather than law pure and simple, in terms of relative persuasiveness in a process of giving of reasons rather than an analytical exercise of looking to so-called sources of law to identify what a rule currently *is* in some static and time-crystallized sense. And even if we purport to be engaging in the latter form of more traditional positivistic analysis, invariably we will also end up doing the former, by making implicit choices about what arguments "count" more (*i.e.* those that count as "sources" and thereby send that particular normative signal we label "law") and, in any case, by using policy arguments to bolster one's arguments.⁷⁷

Allow me to be clear about one thing: it is my firm opinion that, if one takes at all seriously the generally-accepted sources of international law and their grounding in positivistic notions of state sovereignty as an organizing principle of the international system, then state practice, high judicial opinion and relevant texts do not support the force-for-democracy claim. But I would insist that my own analysis, useful though it may be to persuade those who agree with the legal paradigm I am using (or willing to use) and its fundamental assumptions, would be missing the point. The point is in part that these are, normatively speaking, quasi-revolutionary, paradigm-shifting times, when arguments that seem to challenge current interpretive understandings can take root and grow. We are not simply talking about a substantive area of law in which the line between law in the making and firm law can quickly and imperceptibly be

⁷⁷ See Brownlie, "Gunmen", *supra* note 8, as a classic example.

crossed. We are talking about re-conceptualization of the fundamentals of the system itself. There was a time when various versions of transnationalism, including the McDougal-Reisman version, were sufficiently at odds with the community of understandings that gave shape to international norms that they could be dismissed as being unorthodox, however brilliant and perhaps appealing. Today, however, the notions of "post-Cold War" and "New World Order" have captured something of everyone's imagination, I wager to say, and have, I would argue, fostered a kind of value-laden boldness that is almost missionary among those who feel their values "won" the Cold War against the Soviet bloc and are now sweeping through the South.

The sad irony is that it was the force of ideas which ushered in this post-Cold War era, not the idea of force. However, ironic or not, Professors Reisman and D'Amato will have helped persuade those particular decision-makers whose views and actions translate into official words and powerful deeds while those of us who resist fusing the goal of democracy with the means of forcible imposition will be left to sputter in protest that the 'law' is otherwise. As it is, my intuition is that academic opinions like those of Michael Reisman have already influenced (if only by creating less normative resistance for) the United States' hemispheric juridical foreign policy.⁷⁸

⁷⁸ Some very crude measure of this can be seen in the fact that Jeane Kirkpatrick was herself an academic whose views caught President Reagan's attention and landed her the job as U.S. Ambassador to the UN: see J. J. Kirkpatrick, "Dictators and Double Standards", (Nov. 1979) *Commentary* 29. See also the very recent Kirkpatrick, "The Use of Force and the Law of Nations", (1991) 16 *Yale J. Int'l L.* 583. Michael Reisman is now the Bush Administration's appointee to the Inter-American Commission on Human Rights.