Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic – Trends in Political Accountability and Transnational Criminal Law

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EXTRATERRITORIAL JURISDICTION AND
SOVEREIGN IMMUNITY ON TRIAL:
NORIEGA, PINOCCHET, AND MILOSEVIC—
TRENDS IN POLITICAL ACCOUNTABILITY
AND TRANSNATIONAL CRIMINAL LAW

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Abstract: Prosecutions of former heads of state are becoming increasingly common. In 1990, the United States arrested and convicted General Manuel Noriega, the Panamanian leader, on drug charges. United States v. Noriega set a powerful precedent, rejecting traditional immunity and jurisdiction defenses. In recent years, domestic and international tribunals alike have similarly exercised jurisdiction over foreign leaders, such as Augusto Pinochet and Slobodan Milosevic. While many in the international community praise these recent developments, others warn of the erosion of national sovereignty and justice without limits.

INTRODUCTION

From the commencement of legal proceedings, United States v. Noriega1 presented a drama of international proportions.2 Much of this drama was attributed to General Manuel Noriega’s status as the de facto leader of Panama and to the unusual circumstances that brought him before the courts of the United States.3 Never, prior to 1990, had a foreign head of state been brought to the United States to stand trial for offenses committed outside the country.4

On February 14, 1988, a federal grand jury sitting in Miami, Florida indicted Noriega and twelve co-conspirators on twelve counts of

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1 746 F. Supp. 1506 (S.D. Fla. 1990), aff’d, 117 F.3d 1206 (11th Cir. 1997).
3 Id.
engaging in a criminal enterprise in violation of U.S. racketeering and
drug laws.\textsuperscript{5} The indictment alleged that Noriega participated "in an
international conspiracy to import cocaine and materials used in pro-
ducing cocaine into and out of the [United States]."\textsuperscript{6} Furthermore,
Noriega was alleged to have exploited his official position as com-
mander-in-chief of the Panamanian Defense Forces (PDF) by receiv-
ing payoffs from the Colombia-based Medellin Cartel (Cartel) in ex-
change for his assistance.\textsuperscript{7} Specifically, the indictment alleged that
Noriega protected cocaine shipments from Columbia through Pan-
amo to the United States, arranged for the sale and shipment of ether
and acetone, chemicals used for the production of cocaine, to the
Cartel, provided a refuge and base of operations for members of the
Cartel in Panama, and assured the safe passage of millions of dollars
in narcotics proceeds from the United States.\textsuperscript{8} All of these activities
allegedly were undertaken for Noriega's own personal profit.\textsuperscript{9}

As a result of the indictment and the unusual circumstances of
the case, the U.S. District Court for the Southern District of Florida
was presented with several issues of first impression.\textsuperscript{10} These issues
were brought to the forefront in a series of defense motions to dis-
miss.\textsuperscript{11} In these motions, Noriega asserted that the case against him
should have been dismissed, arguing that: (1) the district court lacked
jurisdiction; (2) sovereign immunity precluded the exercise of juris-
diction; (3) prisoner of war status precluded jurisdiction; (4) he was
captured and brought before the court as a result of an illegal military
invasion that was "shocking to the conscience"; (5) a violation of in-
ternational treaties had occurred; and (6) the indictment against him
was politically motivated.\textsuperscript{12}

This Note discusses two troubling questions answered by the
court in denying Noriega's motion to dismiss and the subsequent
affirmation of his conviction: (1) How was the exercise of jurisdiction

\textsuperscript{5} Noriega Gives Up Leader in Panama, Leaves Embassy, Flown to Florida, St. Louis Post-
Dispatch, Jan. 4, 1990, at 1A [hereinafter Dispatch].
\textsuperscript{6} United States v. Noriega, 746 F. Supp. 1506, 1510 (S.D. Fla. 1990) [hereinafter
Noriega I].
\textsuperscript{7} John M. Goshko, Bush Confronts Dilemma Over Panama; President Must Choose Between
Actions Likely to Fail or to Endanger U.S. Interests, WASH. POST, May 10, 1989, at A23. The PDF
was approximately 15,000 in strength. Id.
\textsuperscript{8} Noriega I, 746 F. Supp. at 1510.
\textsuperscript{9} Id.
\textsuperscript{10} Id. at 1511.
\textsuperscript{11} See id.
\textsuperscript{12} See id.
rationalized?; and (2) How did the court resolve the issues of immunity?

Discussing these questions, this Note focuses on the issues of extraterritorial jurisdiction and sovereign immunity. The legality of the invasion of Panama by means of Operation Just Cause, while discussed for background relevancy, does not represent a major issue of discussion. Part I provides the historical background prior to court action, including the history of the military invasion. Part II discusses the procedural history of the Government’s case against Noriega in both the district court and the Eleventh Circuit. Part III considers the present state of extraterritorial jurisdiction and analyzes the court’s reasoning in finding jurisdiction over Noriega. Part IV discusses immunity of three types and their application to the Noriega case: foreign sovereign immunity, head of state immunity, and act of state immunity. Part V analyzes the issues presented in this controversial case. Prior to conclusion, Part VI will compare the Noriega case to possible future litigation among the international community and Slobodan Milosevic, the former de facto leader of the former Yugoslavia, and Augusto Pinochet, the former leader of Chile.

I. BACKGROUND

From the early 1970s to 1989, General Noriega rose to progressively higher positions in the Panamanian government, first as chief of military intelligence and later as commander-in-chief of the PDF. As a result of his position, Noriega came into contact with members of the Colombia-based Medellin Cartel in the early 1980s. Thereafter, Cartel operatives and Noriega met and arranged for the shipment of cocaine through Panama into the United States. In addition to the shipments of cocaine, the parties arranged for the transportation of chemicals necessary for narcotic manufacturing and substantial cash proceeds from drug sales in the United States. This relationship proved financially rewarding for Noriega, who amassed a personal

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13 United States v. Noriega, 117 F.3d 1206, 1210 (11th Cir. 1997) [hereinafter Noriega II]. Noriega also had a long tenure as a Central Intelligence Agency informer prior to the indictment. See DISPATCH, supra note 5. The United States later publicly acknowledged that the CIA and the U.S. Army had paid Noriega approximately $320,000 over his career. Larry Rohter, More Than an Ex-Dictator’s Future at Stake as Trial of Noriega Begins, N.Y. TIMES, Sept. 5, 1991, at D24 [hereinafter Rohter I].

14 Noriega I, 746 F. Supp. at 1211.

15 Id.

16 Id.
fortune of approximately twenty million U.S. dollars located in European banks.17

Following Noriega's indictment in February 1988, then Panamanian President Eric Arturo Delvalle discharged Noriega from his post as commander of the PDF.18 However, Noriega refused to step down, and Delvalle was subsequently removed from power.19 Following these events, Noriega successfully frustrated a March, 1988 coup attempt to remove him from power.20

While these events transpired, American President George Bush pondered steps to remove Noriega from power.21 While members of Congress called for tough measures, Bush feared that any action would likely be ineffective or pose significant risks to U.S. interests in Latin America; anything resembling an invasion could have resulted in sabotage to the Panama Canal.22 Furthermore, Bush had limited time in which to decide since the administration of the Canal was due to be transferred to an ethnic Panamanian administrator in 1990, and the Senate would likely disapprove of any candidate nominated by Noriega.23 More direct solutions came under consideration, however, when the indictment, American threats, sanctions, and negotiations failed to persuade Noriega to step down, but rather aggravated the economic ruin that had befallen Panama.24

On December 15, 1989, the Panamanian National Assembly, led by a machete-wielding Noriega, publicly declared that a state of war existed between the Republic of Panama and the United States.25 Following this declaration, on December 16, 1989, numerous attacks on Americans occurred in Panama, including the murder of U.S. Marine Corps. Lieutenant Roberto Paz and the beating of U.S. Navy Lieuten-

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17 Id.
18 Id. at 1209.
19 Noriega II, 117 F.3d at 1209–10. The United States continued to recognize Delvalle as the leader of Panama until the election of Guillermo the following year. Id. at 1210.
20 Rohter I, supra note 13.
21 Goshko, supra note 7.
22 Id.
23 Id.
24 See generally id. (citing that American sanctions had not had any effect upon Noriega, who was independently wealthy as a result of his dealings with the Medellin Cartel).
On the morning of December 20, 1989, the democratically elected leadership of Panama, led by Guillermo Endara, announced the formation of a government, assumed power, and welcomed U.S. assistance to remove Noriega. Immediately recognizing Endara as the legitimate head of the Panamanian state, Bush ordered the deployment of 11,000 additional forces to join the 13,000 already present in Panama on December 20, 1989, as Operation Just Cause, with a defined mission to: (1) protect American lives; (2) defend democracy; (3) ensure the integrity of the Panama Canal Treaties; and (4) apprehend Noriega and bring him to trial on the drug related charges for which he was indicted in 1988.

Hoping to be granted political asylum, Noriega took refuge in the Vatican Embassy on December 24, 1990, moments before a U.S. Special Forces unit arrived at his residence to seize him. Vatican officials refused to surrender Noriega, and he refused to leave on his own accord. Once the U.S. Army located Noriega at the Embassy, units launched a form of psychological attack by playing loud rock music.

Finally, Noriega surrendered on January 3, 1990, after the Vatican threatened to lift its diplomatic immunity and invite Panamanian security forces to arrest him if he did not leave voluntarily. Accompanied by papal nuncio Monsignor Sebastian Laboa, Noriega surrendered to the U.S. Army and was taken by helicopter to nearby Howard Air Base, and from there by C-130 to Homestead Air Force base in Florida. Following the surrender, thousands of Panamanians celebrated in the streets, with President Endara expressing relief to be

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27 Noriega I, 746 F. Supp. at 1511. Endara had won the Panamanian presidential election held several months earlier, the results of which were nullified by Noriega. Id.
28 President's Letter, supra note 25.
29 Noriega I, 746 F. Supp. at 1511.
30 President's Letter, supra note 25.
31 Noriega I, 746 F. Supp. at 1511.
33 Sheppard & Campbell, supra note 4.
34 Toronto, supra note 32.
35 Id. The playing of music was discontinued after Embassy staff complained of harassment. Id.
36 See id.
37 Sheppard & Campbell, supra note 4.
38 Toronto, supra note 32.
39 Id.
"rid of this criminal." Following the invasion, where 25 U.S. service-
men, 300 PDF members, and 300 Panamanians were killed, President Bush promised that Noriega would receive a fair trial, in what proved to be yet another battle between the United States and Noriega.

A. Justification for Just Cause

Following Noriega’s capture, debate ensued over the legality of American actions in Panama. President Bush argued that the events leading up to the invasion made it clear that not only were the lives and welfare of American citizens at risk, but that the continued safe operation of the Panama Canal was in jeopardy. Thus, with narrowly defined objectives, Bush argued that the invasion was justified as an exercise of self-defense pursuant to United Nations (U.N.) Charter Article 51, directly attributing the hostile acts against American servicemen to Noriega’s dictatorship. Moreover, Bush asserted that Noriega’s arrest would send “a clear signal that the U.S. [was] serious in its determination that those charged with promoting the distribution of drugs cannot escape the scrutiny of justice.”

The debate concerning the legality of Operation Just Cause centered upon the interpretation of Articles 2(4) and 51 of the U.N. Charter. Article 2(4) of the Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .” However, scholars argued that the Charter, through Arti-

40 Dispatch, supra note 5.
41 Rohter I, supra note 13.
42 Toronto, supra note 32.
43 Dispatch, supra note 5.
44 Toronto, supra note 32.
45 See generally Sofaer, supra note 26.
46 President’s Letter, supra note 25.
47 President’s Letter, supra note 25. Bush stated several objectives, including: (1) protection of American lives; (2) defense of democracy in Panama; (3) ensuring the integrity of the Panama Canal Treaties; and (4) the apprehension of General Noriega to bring him to trial on drug related charges in the United States. Id.
48 Id. Article 51 provides that, “[n]othing . . . shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .” U.N. Charter art. 51, para. 1.
49 President’s Letter, supra note 25.
50 Dispatch, supra note 5.
51 See Sofaer, supra note 26, at 282.
52 U.N. Charter art. 2(4), para. 1.
article 51, preserves the right of self-defense as inherent, and that states commonly used force to defend not only their territory but also their nationals and property. Thus, it was argued, the acts of aggression against Lieutenants Paz and Curtis, in addition to numerous other acts of hostility, justified the use of American self-defense to defend U.S. nationals. Furthermore, as a result of Noriega’s repudiation of the United States' rights under the Panama Canal Treaties and their support of President Endara, the United States was authorized to take action, pursuant to these 1977 Treaties, for the purpose of protecting its troops stationed in Panama and for defending and operating the Canal.

However, critics of the American invasion made themselves heard in an equally assertive voice. Opponents claimed that the state of tension existing at the end of 1989 did not present an imminent danger to the United States, and therefore, the invasion was not a necessity. Furthermore, the invasion was not a proportionate response to the incidents of the time, the most serious of which was the murder of Lieutenant Paz. While these incidents were tragic, critics argued, they did not warrant the launching of a full-scale attack the likes of which had not been seen since the Vietnam War. In addition, it was

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54 Sofaer, supra note 26, at 284 n.12. The following classified violations occurred between 1988–1989: (1) a U.S. Army sergeant, detained for allegedly fighting with a Panamanian citizen, was reported to have been beaten with a rubber hose; (2) a U.S. Army sergeant allegedly was attacked and forced into a car trunk by a Panamanian dressed in military uniform, who then proceeded to rape the sergeant’s wife; (3) PDF members allegedly fired shots through the window of a home occupied by a U.S. Army officer; (4) a member of the U.S. Navy was detained by the PDF for a parking violation and allegedly beaten after refusing to relinquish his watch and ring; and (5) a PDF member fired a shot into a vehicle carrying the children of U.S. Defense Department employees. Id.

55 See id. at 285.

56 Id. at 290. It is claimed that Noriega repudiated American rights in the Canal when he publicly declared, on December 20, 1989, “only one territory and only one flag.” Id.; see also Panama Canal Treaties, Sept. 7, 1977, U.S.–Pan., 33 U.S.T. 1–491.

57 Sofaer, supra note 26, at 290.

58 Id. at 287.


60 Id. at 497.

61 See id.

62 Id.
argued that the restoration of democracy in Panama was not a practice supported by even the most expansive reading of Article 51.63

II. PROCEDURAL HISTORY OF THE CASE

Noriega was indicted by a federal grand jury sitting in Miami in February, 198864 and charged with: (1) engaging in a pattern of racketeering activity in violation of the RICO statutes, 18 U.S.C §§ 1962(c) and (d); (2) conspiracy to distribute and import cocaine into the United States, in violation of 21 U.S.C § 963; (3) distributing and aiding and abetting the distribution of cocaine, intending that it be imported into the United States, in violation of 21 U.S.C § 959 and 18 U.S.C § 2; (4) aiding and abetting the manufacture of cocaine destined for the United States, in violation of 21 U.S.C § 959 and 18 U.S.C § 2; (5) conspiring to manufacture cocaine intending that it be imported into the United States, in violation of 21 U.S.C § 963; and (6) causing interstate travel and use of facilities in interstate commerce to promote an unlawful activity, in violation of 18 U.S.C § 1952(a)(3) and 18 U.S.C § 2.65

Subsequent to the indictment and prior to Noriega’s arrest, in April, 1988, Judge Hoeveler of the Southern District of Florida granted Noriega’s motion to allow for special appearance of counsel.66 The court held that Noriega had the right to challenge the validity of the indictment without surrendering himself, and agreed to hear the motion even though courts had not allowed fugitive defendants to make special appearance of counsel in the past.67 This special request was granted because the defense motion was claimed to go to the heart of the government’s case and the court’s jurisdiction, and because of the extraordinary circumstances of the case.68 Moreover, Judge Hoeveler encouraged the government to welcome the appearance of special counsel or any procedure that would negate the perception that Noriega’s prosecution was politically motivated.69

In February, 1988, the defense brought a motion to dismiss the jurisdiction of the court even though Noriega maintained control of

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63 Id. at 498.
64 Dispatch, supra note 5.
65 Noriega I, 746 F. Supp. at 1510.
66 Id.
68 Id. at 137–38.
69 Id. at 138.
 Panama. Although the defense conceded that American courts had generally upheld exercises of jurisdiction over acts in other countries intended to have effects in the United States, the defense asserted that jurisdiction did not apply in the case against Noriega because he was the leader of a sovereign nation. In its motion, the defense argued that even though Noriega was not a democratically elected leader, his position as the acknowledged de facto leader of Panama qualified him for immunity since there was no bright line to determine who was entitled to immunity. Moreover, the defense contended that the exercise of jurisdiction was unreasonable in light of the interests of other nations, and that the indictment was based on impermissible political and foreign policy considerations.

The Government responded, however, that many of the acts claimed in the indictment were alleged to have occurred within U.S. territory. Furthermore, the prosecution contested Noriega's claim of immunity because Panama had not requested this status for Noriega, and many of his acts were undertaken allegedly for his own personal gain. Judge Hoeveler was of the opinion that the Government's case was not without merit. Hoeveler, in his June 8th omnibus order dismissing Noriega's preliminary motion, stated that the jurisdictional question was entirely separate from whether Noriega was immune from prosecution as head of state. Thus, the court held that jurisdiction could be found, as extraterritorial jurisdiction was upheld in the past over foreigners who conspired or intended to import narcotics into the United States. Jurisdiction was reasonable in light of the
activity in question and the importance of regulating that activity. Given the serious nature of the drug epidemic, jurisdiction was not unreasonable, as the defense had claimed. Furthermore, the court opined that Noriega was not entitled to immunity because he was never recognized as the legitimate political leader of Panama; to allow immunity regardless of a leader’s source of power would allow illegitimate dictators the benefit of protection from their seizure of power. This Note focuses on this motion and the issues of immunity and extraterritorial jurisdiction.

With the preliminary motion dismissed, and Noriega’s subsequent surrender and capture, Noriega was formally arraigned in the U.S. District Court for the Southern District of Florida in January, 1990. After entering an innocent plea, trial was set to begin in September, 1991. Months later, on April 9, 1992, Noriega was convicted on eight of ten counts by a jury of nine women and three men after five days of deliberations and sentenced to a total of forty years. Subsequently, the district court denied Noriega’s motion for a new trial, and his conviction and sentence were affirmed on appeal.

III. EXTRATERRITORIAL JURISDICTION & THE GENERAL

In the preliminary motion to dismiss, the defense stated five reasons why the District Court should divest itself of jurisdiction. One of the major issues the court needed to resolve was that of extraterritorial jurisdiction. As stated, this issue was considered entirely separate from the issue of immunity, which is discussed in Part IV below.

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80 See id. at 142.
81 See id.
82 Id.
83 A brief overview of the motion is provided here to give the reader a broad framework of the action.
84 See Sheppard & Campbell, supra note 4.
85 Id.
87 Id.
88 Noriega II, 117 F.3d at 1210.
89 Id. at 1222.
90 Id.
91 Noriega I, 746 F. Supp. at 1511–12. The bases for the motion to dismiss were: (1) lack of jurisdiction; (2) claim of immunity; (3) prisoner of war status; (4) illegal military action; and (5) violation of due process. Id.
92 Id. at 1509.
93 Id. at 1512.
Jurisdiction is commonly used to describe the court’s authority to affect legal interests. There are three categories of jurisdiction: (1) jurisdiction to prescribe is the ability of a state to make its laws applicable to activities, relations, and status of persons or a person’s interests in property; (2) jurisdiction to adjudicate is the authority of a state to subject particular persons or things to its judicial processes; and (3) jurisdiction to enforce is the authority of a state to use its resources to induce or compel compliance with its laws. The issue confronting the Noriega court concerned jurisdiction to prescribe.

International law has given principal attention to a state’s jurisdiction to prescribe law in criminal matters. There are numerous theories of jurisdiction to prescribe. The territorial theory allows for jurisdiction over persons, things, or acts that takes place within the territorial boundaries of the state. Under the nationality theory, a state may prescribe law over persons or things that share its nationality. Moreover, customary international law, under the nationality theory, permits a state to exercise jurisdiction over its subjects wherever they may be located. The protective principle expands these traditional bases of jurisdiction by emphasizing the effect of an offense committed outside the territory of a state and allows the exercise of jurisdiction where conduct is deemed harmful to the national interests of the forum state. Most European countries have accepted this approach, including Austria, Denmark, Finland, France, Spain, Sweden, and Greece. Thus, any state may impose liability,
even among persons who are not its nationals, for conduct outside its borders that has effects and consequences within its borders that the state reprehends. For example, the United States would have jurisdiction over an individual who, standing in Canada, shoots and kills an American in the United States. Even more liberal, the passive personality principle of jurisdiction extends jurisdiction over offenses where the victims are nationals of the forum state. Lastly, the universal principle, the most controversial basis, allows for jurisdiction in any forum that obtains physical jurisdiction over the person of the perpetrator of certain offenses considered particularly heinous or harmful to humankind, such as genocide, war crimes, slavery, piracy, and the like. Although relatively new, jurisdiction by the passive personality and universal principles is not precluded by norms of customary international law, and generally, a state may utilize these bases so long as it is not prohibited by international law.

However, a state is not without limits in its exercise of jurisdiction. International law provides that a state may not exercise jurisdiction to prescribe when doing so would be unreasonable. Whether jurisdiction is unreasonable is determined by weighing a non-exhaustive list of factors, including the link of the activity to the regulating state, the foreseeable effects in that state, the character of the activity to be regulated, and the extent to which the regulation is consistent with the patterns and practice of the international system. Although the proper limits of jurisdiction over transnational

the integrity of the governmental functions that are generally recognized as crimes by developed legal systems. Restatement, supra note 95, § 402 cmt. f.

107 United States v. Aluminum Co. of Am. et al., 148 F.2d 416, 443 (2d Cir. 1945).
108 Noriega I, 746 F. Supp. at 1513.
109 Blakesley, supra note 102, at 1111. The United States has recognized the passive personality principle at least where the state has a particularly strong interest in the crime. United States v. Fawaz Yunis, 924 F.2d 1086, 1091 (D.C. 1991).
110 Blakesley, supra note 102, at 1111. In February, 2001, the International Criminal Tribunal for the Former Yugoslavia, finding three Bosnian Serbs guilty of the rape and torture of women during the Bosnian War, for the first time ruled that rape was a crime against humanity, opening a whole new category of war crime that may be amenable under a more liberal basis of jurisdiction such as the universal principle. See Peter Finn, Watershed Ruling on Rape; Serbs Found Guilty of “Crime Against Humanity,” Wash. Post, Feb. 23, 2001, at A01.
111 See Fawaz Yunis, 924 F.2d at 1091.
113 See generally Restatement, supra note 95, § 403.
114 Id. § 403(1).
115 Id. § 403(2).
activity have been questioned, extraterritorial prosecutions commonly have included serious offenses, such as the traffic of narcotics.

Even among U.S. courts, there is little consensus on how far extraterritorial jurisdiction should extend. However, all courts recognize that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial exercise of jurisdiction. At least one court has adopted a "direct or substantial effect test," relevant in the case against Noriega, which holds that jurisdiction should be supported in any case where the effects are more than insubstantial and indirect.

With these background principles in mind, the district court addressed the issue "whether the [United States] may exercise jurisdiction over Noriega's alleged criminal activities." Noriega's challenge to the court's jurisdiction was that such an exercise was unreasonable under any standard of international law since he did not personally perform any illegal acts within the United States. In deciding this issue, the court refrained from looking at Noriega's official status, instead focusing entirely upon the conduct at issue as alleged in the indictment.

In addition to possessing the power to reach the conduct in question under customary international law, a court seeking to exercise extraterritorial jurisdiction also must determine whether the crimes under which the defendant is charged are intended to have extraterritorial effect. The court held that all of the crimes under which Noriega was charged were so intended, since the drug statutes applicable were designed to stop the importation and distribution of narcotics. Moreover, the RICO statute, 18 U.S.C § 1962(c), (d), as well

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117 See Restatement, supra note 95, § 403 reporter's note 8.
119 Id. at 609.
120 See id. at 611.
121 Noriega I, 746 F. Supp. at 1512.
122 Id.
123 Id.
124 Id.
125 See id. at 1515–19 (providing that a statute is given extraterritorial effect where Congress intends so; in the absence of such intent, courts may infer the power to exercise extraterritorial jurisdiction under the statute).
as the Travel Act, 18 U.S.C § 1952(a)(3), express a clear congressional intent to apply extraterritorially.126

More importantly, however, a court must rationalize the exercise of jurisdiction with the custom and practice of international law.127 In the United States, jurisdiction may be exercised over a foreign defendant who merely conspires or intends to import narcotics into the nation’s territory.128 This “intent” doctrine has resulted in the exercise of jurisdiction over persons who had intended, but failed, to import narcotics into the United States, because the purpose of narcotics law is to prevent smugglers from succeeding in introducing their illegal shipments.129

On a more traditional level, the court held that several principles of customary international law supported jurisdiction over Noriega.130 First, the indictment charged Noriega with several acts that occurred within the territory of the United States, such as the purchase of a Lear jet in Miami that was subsequently used to transport cocaine and proceeds to and from Panama.131 These facts would support the exercise of the most traditional basis of jurisdiction, the territorial principle, which allows for the exercise of jurisdiction over acts occurring within a state’s territory.132 Secondly, the court found that jurisdiction was justified under the protective principle,133 which permits the exercise of jurisdiction over acts that threaten the existence of the state and have potentially deleterious effects in that state.134 It was evident, in Hoeveler’s opinion, that the acts allegedly attributed to Noriega would have certain and harmful effects in the United States, as a result of the alleged importation of 2141 pounds of cocaine into Miami.135

127 See id. at 1512.
128 Id. at 1513 (citing United States v. Postal, 589 F.2d 862, 862 (5th Cir. 1929)).
129 Id. at 1513 (citing United States v. Wright-Barker, 784 F.2d 161, 168 (3d Cir. 1986)).
130 See Noriega I, 746 F. Supp. at 1513.
131 Id. at 1513–14.
132 HENKIN, supra note 94, at 1049.
133 See generally Noriega I, 746 F. Supp. at 1514.
134 See HENKIN, supra note 94, at 1049.
135 Noriega I, 746 F. Supp. at 1514.
IV. THE IMMUNITY QUESTION

At the turn of the twentieth century, the international law of state immunity was broader than today. In general, under an absolute theory of immunity, a state and its property were entitled to immunity from the judicial process of another state. Around 1900, however, a new concept of sovereign immunity emerged. Throughout the twentieth century, the immunity of a state and its leaders narrowed under the widely accepted restrictive theory of immunity. Under this restrictive theory, a distinction is made between public and private acts, with a state entitled to immunity for the prior, but not the latter. In developing this new theory, the formulating courts reasoned that immunity was intended to apply only to acts involving state sovereignty. They described those acts as public acts, political acts, or acts done *jure imperii*. Such acts were distinguished from private acts or acts *jure gestionis*, such as commercial acts, where immunity was not intended to extend.

As with states, public officials are entitled to immunity for acts executed in their official capacities. However, consistent with the restrictive theory of immunity, public officials are amenable to suit for acts in their private capacities or for those undertaken for their own personal gain. The test as to whether a public official is personally

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137 Id.
138 Id.
139 See id.
140 Id.
141 Sweeney, *supra* note 136, at ii.
142 Id.
143 Id. In *Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v. The Netherlands*, decided June 11, 1903, the Supreme Court of Belgium stated the difference between public and private acts as follows:

Sovereignty is involved only when political acts are accomplished by the state. . . . However, the state is not bound to confine itself to a political role, and can . . . buy, own, contract, become creditor or debtor, [become criminally liable], and engage in commerce. . . . In the discharge of these functions, the state is not acting as public power, but does what private persons do, and as such, is acting in a civil and private capacity.

*Id.* at ii-iii.
144 Id. at viii.
145 See id.
liable in litigation is whether the act of the official is sufficiently connected with the state as to make it an action by the state. 146

The restrictive theory of immunity has gained wide acceptance since its inception. 147 Long applied by states such as Austria, Belgium, Egypt, France, Italy, and Switzerland, 148 nearly all non-communist states now accept the restrictive theory. 149 The shift to restrictive application can be found elsewhere. 150 In Great Britain, for example, the State Immunity Act of 1978 conformed British law to that of most other developed countries. 151 The Council of Europe also has made use of the restrictive theory through the promulgation of the Convention on State Immunity and Additional Protocol. 152

The United States has also accepted the restrictive theory. 153 Initially, U.S. courts adhered to the absolute theory of sovereign immunity under which a foreign state enjoyed immunity from all suits in federal courts. 154 During the nineteenth century, U.S. courts relied upon suggestions from the State Department when deciding whether to extend immunity, thereby resisting the growing international practice of restrictive applications. 155 However, in 1952, the United States formally adopted the restrictive theory of immunity after the publication of the Tate Letter, which advised U.S. courts not to grant immunity over non-governmental activities of states. 156 Thus, from 1952 until 1977, a foreign state made party to litigation in the federal courts was required to request a claim of sovereign immunity through the State Department. 157 If the claim was recognized, the State Department would communicate its decision to the appropriate court. 158 However, this structure proved awkward, since it resulted in a prac-

146 Sweeney, supra note 136, at 7.
147 See Restatement, supra note 95, § 451 cmt. a.
148 Id., reporter's note 1.
149 Id., cmt. a.
151 Id.
152 Id. at 1368.
153 See generally Chuidian v. Philippines Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990).
154 Id.
156 See id. at 13–14.
157 Id. at 15.
158 Id. at 14.
159 Id. at 15.
tice whereby the State Department, rather than the courts, determined whether to dismiss a suit based on a claim of immunity.\textsuperscript{160}

To remedy these conflicts, Congress enacted the Foreign Sovereign Immunities Act of 1976\textsuperscript{161} (FSIA) in October, 1976.\textsuperscript{162} The FSIA codified the law of sovereign immunity and removed the State Department's role in immunity determinations.\textsuperscript{163} Henceforth, the FSIA and the presiding judge's interpretation thereof became the basis for obtaining jurisdiction over a foreign state entity in the U.S. courts.\textsuperscript{164}

The FSIA sets forth the general rule that a foreign state shall be entitled to immunity except as otherwise provided.\textsuperscript{165} In general, an exception is permitted, and thus immunity inapplicable, where a foreign state has waived immunity (pursuant to contract or appearance), or where the action is based on commercial activity.\textsuperscript{166}

However, the FSIA does not mention head of state immunity nor foreign sovereign immunity in the criminal context, both of which were vital to the exercise of jurisdiction over Noriega.\textsuperscript{167} Thus, as the Eleventh Circuit illustrated in rejecting Noriega's appeal, the court must look to the Executive Branch for guidance when considering claims of immunity by a head of state or where criminal matters are being prosecuted.\textsuperscript{168}

In its preliminary motion to dismiss, the defense asserted several theories of immunity, including head of state immunity, diplomatic immunity, and the act of state doctrine.\textsuperscript{169} As with the other arguments presented by the defense, the court found these arguments fruitless.\textsuperscript{170} With the FSIA inapplicable to these issues, the court was compelled to look to the patterns and practices of customary international law.\textsuperscript{171}

\textsuperscript{160} Chuidian, 912 F.2d at 1110.
\textsuperscript{162} Chuidian, 912 F.2d at 1110; see also Stevenson et al., supra note 155, at 17. The FSIA became effective January 19, 1977. Id.
\textsuperscript{163} Chuidian, 912 F.2d at 1110.
\textsuperscript{164} Id.
\textsuperscript{165} Stevenson, supra note 155, at 18 (citing 28 U.S.C. § 1604).
\textsuperscript{166} 28 U.S.C. § 1605 (a)(1),(2).
\textsuperscript{167} Noriega II, 117 F.3d at 1212; see Ved P. Nanda, Human Rights and Sovereign Immunities (Sovereign Immunity, Act of State, Head of State Immunity and Diplomatic Immunity)—Some Reflections, 5 ILSA J. INT’L & COMP. L. 467, 470 (1999).
\textsuperscript{168} Noriega II, 117 F.3d at 1212.
\textsuperscript{169} See Noriega I, 746 F. Supp. at 1519.
\textsuperscript{170} See generally id. at 1519–25.
\textsuperscript{171} See generally Nanda, supra note 167, at 470.
A. Head of State Immunity

Customary international law has long held that a head of state is not subject to the jurisdiction of foreign courts in actions relating to official acts. The rationale behind such custom is to promote international equality, respect among nations, and freedom of action by heads of state without fear of repercussions. However, as the Noriega court illustrated, criminal activities such as the trafficking of narcotics could not be considered an official act.

In order to benefit from head of state immunity, a government official must be recognized by the immunizing state as the head of state. However, recognition is considered a discretionary function, with there generally being no legal duty to recognize the validity of a state or its leader. In Noriega's case, it was evident that the General was merely the commander of the PDF, and was never recognized by the Panamanian Constitution or the United States as Panama's head of state. Panama had not even sought immunity on behalf of Noriega through the State Department. Even if recognized as the de facto leader of Panama, the court opined, the grant of immunity is a privilege that may be freely withheld by the United States.

Thus, because the FSIA did not control head of state immunity determinations, the court looked to the Executive Branch for guidance. By pursuing Noriega's capture and prosecution, the court reasoned, the Executive Branch had affirmatively manifested its intent to deny any form of immunity for Noriega. Unlike Lafontat v. Aristide, which resulted in the dismissal of a civil case against the President of Haiti due to the State Department's suggestion of applying head of state immunity to the defendant's status, there was no such suggestion in the case against Noriega.

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172 Noriega I, 746 F. Supp. at 1519 (citing In re Grand Jury Proceedings, Doe #700, 817 F.2d 1108, 1110 (4th Cir. 1987)).
173 Id.
174 Id.
175 Id.
177 Noriega I, 746 F. Supp. at 1519.
178 Noriega II, 117 F.3d at 1212.
179 Noriega I, 746 F. Supp. at 1520 (citing Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)).
180 Noriega II, 117 F.3d at 1212.
181 Id.
183 Nanda, supra note 167, at 476. Cases such as these are more common than one might expect. For example, in the winter of 2001, two such cases made headlines in the
Another basis of Noriega's immunity claim was that his actions were precluded under the act of state doctrine. The act of state doctrine provides that a court will generally refrain from examining the validity of the acts of another state within its territory. This principle also extends to governmental acts of state officials vested with sovereign authority. However, Noriega could not benefit from this form of protection because he was unable to establish that his alleged actions were taken on behalf of Panama. The court rejected the act of state defense, unable to see how Noriega's alleged drug trafficking could conceivably constitute a public action for the benefit of Panama. Rather, in the Eleventh Circuit's opinion, Noriega's alleged acts, if true, were for his own personal enrichment.

1. Extradition

In his defense, Noriega also asserted that the District Court should have divested itself of jurisdiction because narcotics trafficking international press. In a French case, a French prosecutor urged France's highest court to protect Libyan leader Muammar Gaddafi from prosecution for the 1989 bombing of a French DC-10 airliner over Niger in which 170 people died, fearing that such a prosecution would open a "Pandora's box" of possible suits against France. Reuters, French Prosecutor Urges Immunity for Gaddafi, N.Y. TIMES, Feb. 27, 2001, available at http://www.nytimes.com/reuters/world/international-france.htm. In another case, the Bush Administration moved to grant President Mugabe of Zimbabwe immunity from a civil suit accusing him of torture, ordering murders, and terrorism, citing the principle of reciprocity. Jim Wolf, U.S. Seeks to Shield Mugabe from Suit, BOSTON GLOBE, Feb. 26, 2001, at A6. Additionally, a Belgian court also sought to test the limits of universal jurisdiction, attempting to indict Israeli Prime Minister Ariel Sharon for allegedly allowing the massacre of Palestinians during the Lebanon invasion. Victors' Justice, NEWSDAY, July 8, 2001, at B1-B2.

The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state. . . . [The doctrine's] 'constitutional' underpinnings . . . [arise] out of the basic relationship between branches of government in a system of separation of powers.


Id. at 1522.
was not one of the crimes listed in the operating extradition treaty between the United States and Panama.\textsuperscript{191} However, in addition to being contemplated by subsequent treaties between the United States and Panama, crimes of narcotics trafficking are recognized as extraditable offenses under international law.\textsuperscript{192}

Nevertheless, it is obvious to even the casual observer that the means by which Noriega came before the court was not by traditional extradition.\textsuperscript{193} In the United States, however, the manner by which a defendant is brought before the court normally does not affect the ability of the government to try him.\textsuperscript{194} This tenet of law, known as the \textit{Ker-Frisbie Doctrine}, holds that a court is not deprived of jurisdiction over a forcibly abducted defendant.\textsuperscript{195} In \textit{Ker}, the defendant was forcibly kidnapped in Peru and brought to the United States.\textsuperscript{196} There, the Court refused to divest itself of jurisdiction, holding that it was idle to claim that a fugitive from justice had the right to remain in another country.\textsuperscript{197}

In addition, the \textit{Noriega} Court held that a known exception, the \textit{Toscanino} exception, was inapplicable.\textsuperscript{198} In \textit{United States v. Toscanino},\textsuperscript{199} the court held that due process required that the \textit{Ker-Frisbie} doctrine must yield and the court must divest itself of jurisdiction where a defendant is brought before the court as the result of the government’s deliberate and unreasonable invasion of the accused’s constitutional rights.\textsuperscript{200} There, a criminal defendant was interrogated for several days by Justice Department agents and thereafter abducted from Uruguay.\textsuperscript{201} However, the \textit{Noriega} Court distinguished \textit{Toscanino}, holding that there were neither allegations of mistreatment of Noriega nor conduct so egregious that it shocked the conscience; therefore, the exception did not apply.\textsuperscript{202}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{191} \textit{Noriega I}, 746 F. Supp. at 1528.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{See id.} at 1529.
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} \textit{See Ker v. Illinois}, 119 U.S. 436, 444 (1886).
\item \textsuperscript{196} \textit{Id.} at 438.
\item \textsuperscript{197} \textit{Id.} at 442.
\item \textsuperscript{198} \textit{See Noriega I}, 746 F. Supp. at 1532.
\item \textsuperscript{199} \textit{United States v. Toscanino}, 500 F.2d 267 (2d Cir. 1974).
\item \textsuperscript{200} \textit{Id.} at 275.
\item \textsuperscript{201} \textit{Id.} at 270. The defendant was forced to walk up and down a hallway for several hours at a time, had alcohol flushed into his eyes, his fingers pinched with pliers, and was severely beaten. \textit{Id.}
\item \textsuperscript{202} \textit{Noriega I}, 746 F. Supp. at 1531 n.27.
\end{enumerate}
\end{footnotesize}
Despite these holdings, Noriega asserted on appeal that such a forcible abduction in the presence of an extradition treaty was unconscionable.203 Nonetheless, the court quickly disposed of this argument, holding that the presence of an extradition treaty that did not prohibit abductions was nearly irrelevant on the matter.204 The court, relying on *United States v. Alvarez-Machain*,205 held that a federal court might acquire jurisdiction over a criminal defendant abducted from a foreign country notwithstanding the existence of an extradition treaty.206

V. Justifications & Shortcomings

The *Noriega* Court has been criticized for its failure to clarify the role of the judicial branch in determining head of state immunity.207 In essence, the court effectively increased judicial discretion on this issue through its determination of executive intention.208 In doing so, the court has provided the country, indeed the world, with a guiding opinion that may be used in future head of state immunity determinations involving Ángel Pinochet of Chile and Slobodan Milosevic of the former Yugoslavia.209 Critics argue that the court should have followed a "default-no-immunity rule," which sets forth that, absent Executive Branch guidance, a court should not grant immunity, and should refuse to weigh the issue itself.210 Although the same result of no immunity for Noriega would have occurred, the approach taken by the *Noriega* Court in carving out a role for itself to determine executive intention will undercut the political and foreign affairs role of the Executive Branch and may increase the likelihood of inconsistent determinations.211 In refusing to acknowledge head of state immunity for Noriega, the court created a new category of executive suggestion in cases where the Executive Branch remains silent—non-verbal manifestation of executive intent.212 The legal problem, however, was that

203 See *Noriega II*, 117 F.3d at 1212-14.
204 See id. at 1513.
207 *Separation of Powers*, supra note 2, at 846.
208 Id. at 852.
209 See generally id.
210 Id.
211 Id.
212 *Separation of Powers*, supra note 2, at 854.
the court failed to articulate any clear standard for determining executive intent in head of state cases, leaving great discretion for both federal courts and international tribunals.213 Thus, difficult problems may result in the future when courts continue to determine executive intent when that branch remains silent, imputing to the Executive Branch intent that it had not explicitly expressed.214 Yet, others contest that the court should interpret head of state immunity issues in the same manner as they adjudicate matters within the FSIA.215

VI. RAMIFICATIONS FOR SOVEREIGN LEADERS

Judicial proceedings involving domestic courts and foreign former heads of state are not unique to the United States.216 In the years that followed the Noriega decision, similar issues of immunity and extraterritorial jurisdiction were revisited in the context of judicial proceedings against former Chilean dictator Augusto Pinochet Ugarte, and are likely to resurface in future criminal proceedings against the former President of Yugoslavia, Slobodan Milosevic.217

A. The Case Against Augusto Pinochet

Although not expressly stated, much of the reasoning applied by the Noriega Court was mirrored by English courts and the House of Lords in the Pinochet case.218 Similar to Noriega, the Pinochet case involved (1) whether Pinochet continued to enjoy immunity for acts committed during his tenure as head of state, and (2) whether customary international law granted the English courts jurisdiction to extradite Pinochet to Spain.219

After seventeen years as Chilean dictator, Pinochet stepped down on March 11, 1990, although he continued to command the military until March 10, 1998.220 Thereafter, the former dictator assumed the

213 Id.
214 Nanda, supra note 167, at 477.
216 See generally Jamison G. White, Nowhere to Run, Nowhere to Hide: Augusto Pinochet, Universal Jurisdiction, the ICC and a Wake-Up Call for Former Heads of State, 50 CASE W. RES. L. REV. 127, 144 (1999).
217 See id. at 145.
219 White, supra note 216, at 145.
220 William J. Aceves, Liberalism and International Legal Scholarship: The Pinochet Case and the Move Towards a Universal System of Transnational Law Litigation, 41 HARV. INT’L L. J. 129,
title of Senator-for-Life and was granted immunity under the provisions of the Chilean Constitution. On July 1, 1996, a Spanish prosecutor filed a criminal complaint against Pinochet, alleging that he caused the detainment, torture, and execution of thousands of Chilean citizens and citizens of other nations. In addition, it was alleged that following the violent overthrow of then Chilean president Salvador Allende, Pinochet authorized the torture of thousands, including not only Chilean citizens, but also citizens of the United States and Spain, as part of an international conspiracy, named Operation Condor, to track down and dispose of political opponents. The complaint further asserted that Spanish courts could properly exercise jurisdiction over Pinochet under the universal principle, which allowed prosecution by any state.

On October 16, 1998, a Spanish magistrate issued an arrest warrant after discovering that Pinochet was present in London recuperating from back surgery. The warrant specifically claimed that Pinochet had caused the murder of seventy-nine Spanish citizens in Chile in the period between 1973 and 1983. Following the issuance of a second warrant, Pinochet was arrested in London on October 16, 1998.

In the Divisional Court, it was initially determined that Pinochet continued to enjoy immunity for acts committed while he was head of state. The issue of immunity was thereafter immediately certified to the House of Lords, where a decision to revoke recognition of immunity was set aside after it was discovered that a link existed between a presiding Lord and a member of Amnesty International, an organization that had intervened in opposition to Pinochet. However, on March 24, 1999, the House of Lords issued the final ruling of the trilogy, holding that Pinochet was not entitled to enjoy immunity for his alleged crimes, since such allegations could not be considered official

160–61 (2000). Pinochet led a military coup against the socialist government of Salvador Allende on September 11, 1973. After seizing power and declaring himself President, Pinochet engaged in a brutal crackdown of opposition groups in an attempt to consolidate political power by torturing and killing both Chilean citizens and foreign nationals. Id.

221 Id.
222 Id. at 162.
223 Byers, supra note 218, at 416–17, 422.
224 See Aceves, supra note 220, at 162–63.
225 Id. at 164.
226 White, supra note 216, at 144–45.
227 Byers, supra note 218, at 415.
228 Aceves, supra note 220, at 165.
229 Id. at 165–66.
acts under international principles of immunity.\textsuperscript{230} Nevertheless, Pinochet would once again escape extradition to face trial in Spain; he was released due to failing health and permitted to return to Chile.\textsuperscript{231} Despite this escape, Pinochet was stripped of his immunity upon his return to Chile by the Chilean Supreme Court on August 8, 2000,\textsuperscript{232} indicted, and placed on house arrest for his alleged crimes.\textsuperscript{233}

In early 2001, the Chilean Supreme Court, which opined that investigators had failed to properly question Pinochet and subject him to psychological interviews, reversed this initial arrest order.\textsuperscript{234} However, Judge Juan Guzman quickly fulfilled those requirements in January, 2001, forcing Pinochet to undergo four days of psychological examination.\textsuperscript{235} After determining that Pinochet’s medical condition was not sufficient to halt judicial proceedings and a personal interrogation of Pinochet,\textsuperscript{236} Judge Guzman reinstated criminal charges against Pinochet stemming from the deaths and disappearances of some seventy-five political prisoners during a helibourne operation known as the “caravan of death.”\textsuperscript{237} Once again, the reinstatement of charges, placement on house arrest, and Pinochet’s plea of not guilty resulted in yet another appeal to the Santiago Court of Appeals, where defense lawyers asked the judges to release Pinochet from house arrest and to quash the charges.\textsuperscript{238} This appeal again resulted in a setback for international proponents of sovereign accountability.\textsuperscript{239} On March 8, 2001, the Court of Appeals dismissed the homicide and kidnapping charges against Pinochet, leaving only the charges relating to Pinochet’s alleged cover-up of such atrocities for possible

\textsuperscript{230} Id. at 166–67.
\textsuperscript{235} Marc Cooper, \textit{As Bush Heads South: Chile and the End of Pinochet}, THE NATION, Feb. 26, 2001, at 11.
\textsuperscript{236} Id. The medical examiners found that Pinochet suffered from “light to moderate vascular dementia”—clinical language for a type of arteriosclerosis. Id.
\textsuperscript{237} Krauss, \textit{supra} note 234.
\textsuperscript{238} See \textit{Chilean Appeals Court Will Not Tender Pinochet Ruling this Week}, AGENCE FR. PRESSE, Feb. 21, 2001, at 1.
\textsuperscript{239} See generally Patrice M. Jones, \textit{Charges Against Pinochet Tossed Out; Court Voids Homicide Counts but Rules Trial for Cover-Up is OK}, CHI. TRIB., Mar. 9, 2001, at N3.
Furthermore, on March 13, 2001, a Chilean judge ruled that Pinochet could be released from house arrest by posting payment of two million pesos, equivalent to $3400.\textsuperscript{241}

Despite the initial willingness of the Chilean judicial system to attempt to bring Pinochet to justice, the reality is that such attempts have proven less effective than desired by international activists.\textsuperscript{242} Many critics became disappointed with the progress of the case against Pinochet when it became apparent that he would face trial only for the lesser charges of covering-up the actions of the caravan of death.\textsuperscript{243} Rather than pursuing the most serious charges, critics alleged, the Chilean courts apparently sought to protect Pinochet in a manner inconsistent with international pressure.\textsuperscript{244} Human rights activists became further outraged when, in July, 2001, a Chilean appeals court ruled that the former dictator was not well enough to stand trial, thereby reducing momentum in a case many believed was facing a slow procedural death.\textsuperscript{245}

In comparison, unlike the \textit{Noriega} case, where the federal courts exercised jurisdiction pursuant to the territorial and protective principles, initial jurisdiction by the Spanish Courts was justified through an exercise of the universal and passive personality principles.\textsuperscript{246} However, similar to \textit{Noriega}, the House of Lords, accepting the position asserted by the Spanish prosecutors, quickly disposed of the defense arguments that Pinochet was immune from jurisdiction of foreign courts for acts committed while he was the head of state.\textsuperscript{247} Although the ultimate outcome is unlikely to please many in the international community, the case against Pinochet has set a powerful precedent likely to be used by other international tribunals seeking to prosecute foreign leaders for human rights violations and other violations of international and domestic law.\textsuperscript{248}

\textsuperscript{240} \textit{ld.}


\textsuperscript{242} \textit{See generally} Jones, \textit{supra} note 239.

\textsuperscript{243} \textit{See id.}

\textsuperscript{244} \textit{See id.}


\textsuperscript{246} \textit{See Byers, supra} note 218, at 417. The alleged crimes of torture were believed to have come under the purview of universal jurisdiction, while the alleged murder of Spanish citizens in Chile was based on the passive personality principle. \textit{Id.; see also} Aceves, \textit{supra} note 220, at 162–63; White, \textit{supra} note 216, at 145.

\textsuperscript{247} Byers, \textit{supra} note 218, at 434.

\textsuperscript{248} Krauss, \textit{supra} note 245.
B. A Harbinger for Milosevic?

In 1994, the U.N. Security Council passed a resolution establishing the International Criminal Tribunal for the Former Yugoslavia (Tribunal), responsible for the investigation and prosecution of war criminals in the former Yugoslavia occurring since January 1, 1991. On May 27, 1999, the Tribunal indicted the former President of Yugoslavia, Slobodan Milosevic and four others, charging them with crimes against humanity and violations of international law. To further the ends of justice, the Tribunal committed to denying head of state immunity claims. Specifically, Milosevic, removed from power in October, 2000 was charged with personal responsibility for ordering, planning, instigating, executing, and aiding and abetting the persecution, deportation, and murder of Kosovo Albanians from January, 1999 to June, 1999. This campaign was allegedly undertaken with the objective of removing a substantial portion of the Kosovo Albanian population from Kosovo in an effort to ensure continued Serbian dominance over the Province.


250 Indictment, Prosecutor of the Tribunal v. Milosevic et al., ¶¶ 90-100 (Int’l Crim. Trib. For the Former Yugoslavia 1999), available at http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited June 26, 2001) [hereinafter Indictment]; Miller, supra note 249, at 562. The conflict in Kosovo began in 1989, when then President Milosevic ordered the Kosovo Assembly to surrender its autonomous status. Id. Throughout 1998, Serbians continued raids and offensives against Albanians in Kosovo. Id. In 1999, the conflict escalated into a full-scale attack, resulting in the exodus of 20,000 Albanians from Kosovo per day. Id. By May, 1999, over 491,000 Kosovo Albanians had fled, were murdered, or were deported. Id. at 561. See also Slobodan Milosevic: Reversal of Fortune (June 28, 2001), available at http://www.cnn.com/SPECIALS/2001/milosevic/stories/milosevic. A warrant for Milosevic’s arrest and freezing of assets was reissued on January 22, 2001. Archive for the Milosevic et al. Case (Jan. 26, 2001), available at http://www.un.org/icty/news/Milosevic/milosevic-cd.htm.

251 Deborah Tedford, Head of War Crimes Tribunal Seeking Evidence of Atrocities, HOUSTON CHRON., Apr. 9, 1999, at A4.


253 Indictment, supra note 250; Charles Trueheart, Hague Indictment Names Serb Chiefs; Milosevic and Four Others Face Kosovo War Crimes Charges, INT’L. HERALD TRIB., May 28, 1999, at 1.

In the winter of 2001, the case against Milosevic followed a path very similar to the Chilean case against Pinochet.255 Despite work on a new Yugoslav law that would remove the ban on the extradition of Yugoslav citizens, thus allowing extradition of Milosevic to the Tribunal, Yugoslav President Vojislav Kostunica publicly suggested that he remained opposed to Milosevic’s extradition.256 Apparently less cooperative with the Tribunal than desired,257 Kostunica maintained in February, 2001 that the first priority was to try Milosevic at home,258 rather than risk angering nationalists by extraditing Milosevic to the Tribunal.259

Despite the reluctance to extradite Milosevic, Yugoslav leaders began purging the legal system of Milosevic loyalists in early 2001.260 The most notable arrest was that of Rade Markovic, the former secret police chief under the Milosevic regime.261 With this arrest, prosecutors hoped that information gained from Markovic would lead to the arrest of Milosevic himself.262

Although the Yugoslav government made positive efforts to commence criminal actions against Milosevic and his inner circle, the Tribunal publicly opposed Kostunica, emphasizing the importance of extraditing Milosevic rather than trying him at home.263 The Prosecutor, Carla del Ponte, insisted that Milosevic was no different from any other person indicted by the Tribunal, and that Yugoslavia was obligated by international law to transfer the former leader to the Hague.264 The Tribunal was primarily concerned that any trial in

258 Kratovac, supra note 256.
259 Savic, supra note 255.
261 See Savic, supra note 255. Markovic was detained in connection with a 1999 attempted assassination of Vuk Draskovic, an opposition leader, the murder of newspaper publisher Slavko Curuvija, id., the assassination of the warlord Arkan and defense minister Pavle Bulatovic, and the disappearance of former President Ivan Stambolic. Vesna Peric Zimonjic, Milosevic Likely to be Arrested Within Days, INDEPENDENT (London), Feb. 26, 2001, at 2.
262 Savic, supra note 255.
263 di Giovanni, supra note 257.
Yugoslavia would neglect the more serious alleged war crimes and focus on domestic charges, such as embezzlement, corruption, and political assassination. The United States reiterated these concerns that the Yugoslav judicial system was not pursuing Milosevic vigorously. Under a measure adopted by the U.S. Congress in 2000, Yugoslavia was required to demonstrate that it was cooperating with the U.N. Tribunal by March 31, 2001, or risk loosing $100 million in U.S. aid and consideration for the International Monetary Fund and World Bank. Nevertheless, Belgrade officials insisted that Milosevic face trial at home prior to any extradition. Critics asserted that this insistence was the result of Kostunica's fear of being labeled a puppet of the west.

On April 1, 2001, just prior to the U.S. deadline for revoking financial aid, Yugoslav special police officers conducted a raid to seize Milosevic from his home. After an exchange of gunfire and lengthy negotiations, Milosevic surrendered to police. Following the arrest, Yugoslav officials reiterated their intent to try Milosevic in Belgrade on various charges relating to abuse of power and corruption. International pressure continued to grow, however, and Kostunica was pressured to transfer Milosevic to the Tribunal to face war crime charges.

Accepting the necessity to cooperate and the lesser of two evils, the Yugoslav cabinet adopted a decree to transfer Milosevic to the Tribunal in June, 2001. Ultimately, Milosevic was transferred to the Hague on June 29, 2001, following an unsuccessful attempt to challenge the constitutionality of the extradition decree in Yugoslav courts. At his initial appearance before the Tribunal on July 3, 2001,
Milosevic refused to enter a plea, and contested "I consider this tribunal [a] false tribunal and [the] indictments false indictments. It is illegal . . . ."276

On November 8, 2001, The Trial Chamber of the Tribunal decided an initial motion to dismiss brought by Milosevic and amici curiae.277 In the motion, Milosevic and amici curiae argued: (1) the Tribunal was an illegal entity because the U.N. Security Council lacked the power to establish it; (2) the prosecutor had not maintained prosecutorial independence, and was therefore in violation of the Tribunal's Statute, Article 16, paragraph 2; (3) the Tribunal was impermissibly tainted with bias against Milosevic; (4) The Tribunal lacked competence to prosecute Milosevic due to his status as the former President of Yugoslavia; (5) the Tribunal lacked competence to prosecute Milosevic due to his unlawful surrender and extradition to the Hague; and (6) the Tribunal lacked jurisdiction.278 The Trial Chamber rejected each of these arguments, relying on Article 7, paragraph 2 of the Tribunal's Statute.279 Specifically, the Tribunal rejected Milosevic's claims of immunity due to his status as the former President of Yugoslavia, stating that Article 7, which rejected head of state immunity, reflected an accepted principle of customary international law.280 Additionally, the Trial Chamber relied on the Pinochet case and the Rome Statute of the International Criminal Court.281

Similar to the developments in the Pinochet case, the Yugoslav judicial system was initially criticized as being reluctant to pursue the more serious charges of war crimes against Milosevic, favoring any

278 Id. 11 26-34 (quoting the Statute, which provides, "the official position of any accused person, whether as Head of State or Government . . . shall not relieve such person of criminal responsibility").
279 Id. 11 28.
280 Id. 11 29-34.
possible trial on lesser charges similar to tax evasion.282 The indictment against Milosevic is similar to the cases against Noriega and Pinochet in that all were former leaders of sovereign nations, thus implicating issues of immunity and jurisdiction.283 As the indictment makes allegations of war crimes, the Tribunal is likely to make an argument justifying jurisdiction under the universal principle.284 It is apparent that the coming Milosevic trial represents the most significant test for the doctrine of universal jurisdiction.285 Since Milosevic has repeatedly refused to recognize the jurisdiction of the Tribunal, the arguments of the Noriega case, which were dismissed by the Trial Chamber, are likely to arise once again, and the Tribunal would be wise to follow the reasoning there set forth.286 As with the Noriega and Pinochet cases, the Tribunal and the Appeals Chamber should deny immunity to Milosevic.287

C. The Future & Ramifications for Sovereign Leaders

The Noriega and Pinochet cases, along with the indictment levied against Milosevic, have limited dramatically the immunity that former heads of state can claim for criminal activity, and also illustrate the international community’s willingness to maintain jurisdiction over criminal acts conducted abroad by such state officials.288 Although the underlying crimes may be fundamentally different, with Noriega convicted of drug related crimes, Pinochet indicted for crimes of torture and human rights violations, and Milosevic indicted for war crimes,289 the indictments and willingness to prosecute former heads of state will likely deter future war crimes, human rights violations, drug trafficking, and other violations of international law, by establishing that those who transgress the norms of customary international law shall be held accountable.290

The case against Noriega and the indictments of Pinochet and Milosevic have affirmed that principles of international criminal ac-

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282 See generally Tightening the Net, JAPAN TIMES, Mar. 8, 2001.
283 See generally Miller, supra note 249, at 564.
284 See generally Blakesley, supra note 102, at 1111.
285 Victors’ Justice, supra note 183.
286 See generally Trueheart, supra note 253.
287 See generally id.
288 See generally Wedgwood, supra note 231, at 845.
290 Mike Cooper, Milosevic Indicted by U.N. Tribunal; Belgrade Rejects Court Ruling, CHATTANOOGA TIMES AND FREE PRESS, May 28, 1999, at A1.
countability apply to heads of state, and furthermore, former heads of state will not be able to hide behind a shield of jurisdictional and immunity challenges.\textsuperscript{291} As a commitment to these ideals, in July, 1998, 120 states adopted the Rome Statute of the International Criminal Court with jurisdiction over war crimes and crimes against humanity.\textsuperscript{292} Although it is questionable whether Noriega's crimes would fall within the jurisdiction of the court, the statute expressly provides that heads of state will not have immunity with respect to crimes under international law.\textsuperscript{293} However, even though an international criminal system promoting universal jurisdiction over crimes would be highly effective in protecting human rights and promoting accountability of heads of state,\textsuperscript{294} most domestic courts are still reluctant to apply universal and other forms of extraterritorial jurisdiction.\textsuperscript{295}

Although the preceding cases, which have begun to use national courts in a new international sense,\textsuperscript{296} have affirmed the fundamental principle of individual accountability for violations of international law,\textsuperscript{297} proceduralists argue that a system of international law without clear parameters restraining the exercise of jurisdiction and tolerating the dishonoring of immunity is akin to no system of justice at all.\textsuperscript{298} Many argue that exercises of extraterritorial jurisdiction and the removal of immunity will lead to an unstable system of international politics.\textsuperscript{299} Such a system of justice may create more problems than it solves.\textsuperscript{300} Is the justice reached in the preceding cases the type that can only be exacted by the victor on the vanquished—the will of the

\textsuperscript{293} See id.
\textsuperscript{294} Aceves, supra note 220, at 134.
\textsuperscript{295} Byers, supra note 218, at 420.
\textsuperscript{296} See Wedgwood, supra note 231, at 834.
\textsuperscript{297} See Aceves, supra note 220, at 169.
\textsuperscript{299} Id. at 44.
\textsuperscript{300} Victors' Justice, supra note 183.
strong imposed on the weak?\textsuperscript{301} What limits should be placed on national sovereignty?\textsuperscript{302} If current trends continue, proceduralists argue, what is to protect current and former heads of states in nations such as Israel, Mexico, and the United States?\textsuperscript{303} Furthermore, what is to prevent countries, such as Iraq and Libya, from issuing warrants for the leaders of the United States?\textsuperscript{304} The question that remains is whether a nation has the authority under international law to judge the policies of other sovereign nations.\textsuperscript{305} What may be at stake, critics argue, is the validity of national sovereignty.\textsuperscript{306}

**CONCLUSION**

Although the *Noriega* case provided controversial issues of first impression, the court’s reasoning is consistent with customary international law. The court rationally justified its exercise of jurisdiction over Noriega through both the territorial and protective principles of extraterritorial jurisdiction. The evidence adduced at trial established that Noriega had purchased a Lear jet and had used it on numerous occasions to fly cocaine into and drug proceeds out of the territory of the United States, thus warranting the exercise of jurisdiction under the territorial principle. Moreover, the evidence established that given the serious drug epidemic presently existing in the United States, the introduction of mass quantities of narcotics into the country surely would result in unwelcome harmful effects, thereby justifying the protective exercise of jurisdiction.

As for the issue of immunity, the court similarly applied rational, widely supported principles of international law. Thus, the court appropriately found that Noriega, who was not recognized as the rightful leader of Panama, should not be afforded immunity under the doctrine of head of state immunity. Likewise, the court rightfully denied immunity under the act of state doctrine since his illegal acts were positively undertaken for his own profit, and not for the benefit of Panama.

Although critics conceivably could protest that the court should have considered Noriega’s status as the *de facto* head of state and former confident of the CIA in weighing whether the exercise of jurisdic-

\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Seyedin-Noor, *supra* note 298, at 43–44.
\textsuperscript{304} Id.
\textsuperscript{305} Davis, *supra* note 150, at 1358.
\textsuperscript{306} Victor’s Justice, *supra* note 183.
tion was reasonable, the court was logical and correct in maintaining that the issues of immunity and extraterritorial jurisdiction should be considered separately. Undoubtedly, this approach and the subsequent Noriega decision provide a warning to future sovereign leaders of foreign nations and guidance to future tribunals called upon to try a foreign head of state for extraterritorial crimes. The practical results of this landmark decision very well may be to increase the accountability of world leaders by the international community, an issue that the English courts have already addressed in the Pinochet indictment, and that foreign international tribunals are sure to examine in the forthcoming prosecutions of Milosevic for universally condemned crimes.

Even if the results of similar suits against former sovereign leaders do not reach the arguable success of the Noriega prosecution, international pressure to hold leaders accountable can result in domestic charges that are somewhat similar to those existing under international and foreign tribunals, as in the Pinochet and Milosevic cases. Due to the actions in the cases surrounding Noriega, Milosevic, and Pinochet, domestic courts across the globe, whether in Chile, Miami, Yugoslavia, or Spain, are growing more inclined to dismember any shield of immunity and hold former leaders accountable for their actions under domestic and international law. However, despite these optimistic actions by domestic courts, the effects are far from optimal. Recent developments in the Pinochet and Milosevic cases have illustrated that domestic courts, while willing to heed international pressures to bring former sovereigns to justice, are unwilling to pursue the most serious of alleged crimes of which the former dictators are suspected by the international community. In both cases, present leaders appeared hesitant to yield entirely to international demands, fearful of aggravating nationalists. For example, while Pinochet is alleged to have ordered the murder and kidnapping of numerous left wing opponents, the Chilean judicial system now does not seem poised to bring him to trial. Similarly, Yugoslavia was initially reluctant to transfer Milosevic to the Hague.

While some action is preferable to inaction, international activists would prefer judicial action to lie somewhere in the middle ground among the present state of events and the drastic remedies pursued by the United States in the Noriega case.

Nevertheless, it is apparent that there is a growing trend towards accountability of former sovereign leaders for their illegal acts while in office. The only question that remains is where the line should be drawn. How does a tribunal balance the interests of international
criminal accountability and the need for reciprocity? Why do states prosecute leaders such as Noriega, Pinochet, and Milosevic, while others do not pursue sovereigns such as Gaddafi, Mugabe, or Bush? Future tribunals of justice will continue to ask these questions as the desirability of political accountability grows. Those tribunals have the difficult task of determining when the interests of justice are sufficient to ignore the policy reasons inherent in the concepts of immunity and jurisdiction.