

The Legality of Nicolás Maduro’s Capture: International Law, Jurisdiction, and Immunity

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Abstract

This article examines the international legal issues raised by the capture of Nicolás Maduro during Operation Absolute Resolve in January 2026 and his forcible transfer to the United States for criminal proceedings. Drawing on treaty provisions, customary international law, and international and domestic case law, the analysis addresses three interrelated questions. First, it assesses the compatibility of the operation with the prohibition on the use of force and the principle of non-intervention, focusing on Article 51 of the United Nations Charter and the contested “unwilling or unable” doctrine. Second, it considers the grounds and limits of U.S. jurisdiction over alleged crimes committed abroad, including the male captus, bene detentus principle and contested claims to universal jurisdiction. Third, it examines personal and functional immunity, with particular attention to executive recognition and the “one voice” doctrine. The article argues that the domestic possibility of prosecution does not, in itself, establish the international legality of the preceding military operation. It highlights the tensions between sovereign equality, transnational criminal accountability, and unilateral coercion, while emphasizing the continuing importance of independent judicial scrutiny and the rule of law.

Keywords: *unwilling or unable state doctrine, executive recognition power, one voice doctrine, customary international law.*

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1. Introduction: The Factual Framework of “Operation Absolute Resolve” and the International Legal Order

In early January 2026, under the codename “Operation Absolute Resolve,” the USA, through its Armed Forces, federal agencies and intelligence services convened for the purpose, carried out a unilateral military and police intervention in Venezuelan territory aimed at capturing the country’s incumbent President, Nicolás Maduro Moros, and his wife, the “first combatant” Cilia Adela Flores de Maduro, followed by their immediate forced transfer to US soil to face a criminal trial before the U.S. District Court for the Southern District of New York (SDNY). This revived the delicate question of the foundations of international law. As Luís Heleno Terrinha wrote, “[t]he operation (...) confronts international law with its greatest ghost: that of its (lack of) bindingness and capacity for enforceable application in the face of great powers. In this respect, the problem it raises is not only one of violation of international law (...), but rather of its true delegitimization.”²

Indeed, launched without the consent of the UN and without a mandate from the Security Council, “Operation Absolute Resolve” appears to have involved an unequivocal violation of Article 2, paragraph 4, of the Charter of the United Nations. Furthermore, it also appears to have violated the principle of non-intervention, enshrined in Article 19 of the Charter of the Organization of American States (OAS), of which the USA is a member, and whose terms are even more stringent than Article 2, paragraph 4, of the Charter of the United Nations, denying any State or group of States the right to intervene: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.”³

The USA justified the intervention, citing serious accusations based on the concept of narcoterrorism, conspiracy to import cocaine across borders, ille-

² Luís Heleno Terrinha, “‘Absolute Resolve’ e deslegitimação do direito internacional,” *Jornal Económico*, January 22, 2026, <https://jornaleconomico.sapo.pt/noticias/absolute-resolve-e-deslegitimacao-do-direito-internacional/> (accessed May 28, 2026).

³ On the principle of non-intervention and Article 19 of the OAS Charter, see Mohamed S. Helal, “Intervention, Force & Coercion: A Historical Inquiry on the Evolution of the Prohibition on Intervention,” *International Law Studies* 106 (2025): 206–300, <https://digital-commons.usnwc.edu/ils/vol106/iss1/9/>; and Edmundo Vargas Carreño, “El principio de no intervención,” in *XXX Curso de Derecho Internacional: El Derecho Internacional y el mantenimiento de la paz y seguridad internacionales* (Washington, DC: Organization of American States, 2004), 135–178, https://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXX_curso_derecho_internacional_2003_Edmundo_Vargas_Carreno.pdf.

gal trade in high-caliber firearms, and criminal association with the Revolutionary Armed Forces of Colombia (FARC) guerrilla organization and the so-called “Cartel de los Soles”. According to the US Department of Justice (DOJ), Maduro allegedly used the Venezuelan State apparatus and military forces not for purposes of sovereign governance, but rather as a logistical and institutional protection platform to flood the US market with narcotics, using the resulting revenue to consolidate his autocratic power.

This factual situation brings into opposition two major international law paradigms: on the one hand, the classic Westphalian model of public international law, based on the principles of sovereign equality of States, territorial integrity and non-intervention in internal affairs (enshrined in Article 2 of the Charter of the United Nations)⁴ and, on the other hand, the doctrine of unilateral extraterritorial enforceability traditionally developed by US case law, particularly in its self-proclaimed “war on drugs”.

It is a brief legal analysis of this confrontation that I propose in the following lines, focusing on three essential questions raised by “Operation Absolute Resolve”:

- The legality, under international law, of the military incursion into Venezuela to capture and forcibly transport Nicolás Maduro and Cilia Flores to the USA;
- The competence of US jurisdiction to judge and apply US criminal law to the alleged crimes of Maduro and Flores, committed in Venezuela;
- The legal possibility of judging Nicolás Maduro given the sovereign immunity he enjoyed as the then-sitting President of Venezuela.

2. The Legality of Maduro’s Abduction under International Law and the “Unwilling or Unable State” Doctrine

In the dogmatic realm of public international law, the armed incursion of the USA into Venezuelan territory appears to constitute a clear violation of Article 2, paragraph 4, of the Charter of the United Nations, which prohibits the threat or use of force against the territorial integrity or political independence of any State, except with the prior express authorization of the Security Council under Chapter VII of the Charter, or when the requirements of legitimate self-defense established in Article 51 of the latter and in Article 22 of the OAS Charter are met.

The USA, however, invoked the so-called doctrine of the Unwilling or Unable State, reducing it to a form of legitimate self-defense, claiming that the

⁴ On the Westphalian paradigm, see Luís Moita, “A Critical Review on the Consensus around the ‘Westphalian System,’” *JANUS.NET, e-journal of International Relations* 3, no. 2 (2012): 17–42, http://observare.ual.pt/janus.net/en_vol3_n2_art2; and Andreas Osiander, “Sovereignty, International Relations, and the Westphalian Myth,” *International Organization* 55, no. 2 (2001): 251–287, <https://doi.org/10.1162/00208180151140577>.

Venezuelan State apparatus had been placed at the service of organizations (especially the "Cartel de los Soles") that directly and immediately threatened U.S. national security through the massive trafficking of narcotics (in particular, fentanyl and cocaine).

Primarily theorized by Ashley S. Deeks⁵, the doctrine of the Unwilling or Unable State is based on the traditional idea that if a sovereign State does not want to or cannot prevent its territory from being used by non-state actors as a launching pad for armed attacks against another State, the latter cannot be legally obliged to tolerate such aggression, and has the legitimate right to self-defense.

Daniel Bethlehem⁶ systematized and listed the fundamental assumptions of this doctrine, in terms that would be globally adopted by the legal advisors of the Department of State.

Apparently starting from the general and consensual assumptions to justify legitimate self-defense and the idea that, as a rule (outside of cases of consent by the State itself for foreign intervention in its territory, or a mandate from the United Nations Security Council for this purpose), it is not lawful for a State to attack another, Bethlehem expands on the assumptions of legitimate self-defense and introduces a break with the classical conception of *jus ad bellum*, arguing that the non-state legal status of the aggressor (a terrorist organization or a transnational organized crime cartel, for example) does not preclude the inherent right of the victim State to guarantee its national security by resorting to armed force⁷.

It is precisely this premise that underlies the theoretical foundation of the Unwilling or Unable State doctrine, justifying the use of force in the territory of a State from which the non-state actor carries out its activities, whenever that State fails to fulfill its duty to neutralize the threat or proves powerless to do so. In principles 11 and 12 of his list⁸, Bethlehem specifies the requirements for this legitimate self-defense intervention, arguing that "[the] requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the nonstate actor or is otherwise *unwilling* to effectively restrain the armed activities of the nonstate actor such as to leave the state that has a necessity to act in self-defense with no

⁵ Ashley S. Deeks, "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense," *Virginia Journal of International Law* 52, no. 3 (2012): 483–550, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326.

⁶ Daniel Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106, no. 4 (2012): 769–777, <https://doi.org/10.5305/amerjintlaw.106.4.0769>.

⁷ Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack," 775 (principles 1–3): "1—States have a right of self-defense against an imminent or actual armed attack by nonstate actors; 2—Armed action in self-defense should be used only as a last resort in circumstances in which no other effective means are reasonably available to address an imminent or actual armed attack; 3—Armed action in self-defense must be limited to what is necessary to address an imminent or actual armed attack and must be proportionate to the threat that is faced."

⁸ Bethlehem, "Self-Defense Against an Imminent or Actual Armed Attack," 776.

other reasonably available effective means to address an imminent or actual armed attack. (...)” and that “[the] requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is *unable* to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack (...)”.

As mentioned, the principles of the Unwilling or Unable State doctrine have become frequently invoked by the Department of State to justify U.S. interventions in foreign territory without a legitimizing mandate from the United Nations Security Council, as happened in the operation that culminated in the elimination of Osama bin Laden in Pakistan in 2011, or in the air raids against the *Daesh* in Syrian territory from 2014 onwards, and as happened again in the abduction of Nicolás Maduro and Cilia Flores in early 2026, which is the subject of this essay.

The truth, however, is that the International Court of Justice (ICJ) has systematically rejected the unilateral extensive interpretation of Article 51 of the UN Charter implied in the Unwilling or Unable State theory, consistently reaffirming the requirement of direct attribution of aggression to a State to establish an act of international self-defense. Thus, in the landmark ruling *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), the ICJ determined that an armed attack giving rise to the right of self-defense requires extreme gravity (scale and effects) and must be directly attributable to a sovereign State⁹.

Similarly, in the Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, it expressly stated, in paragraph 139, that Article 51 of the UN Charter governs a strictly interstate relationship (attacks by one State against another State), considering the invocation of legitimate self-defense against non-state forces whose actions are not organically attributable to a sovereign territorial entity to be legally inoperative¹⁰.

And in 2005 the ICJ reaffirmed the same thesis in the case *Armed Activities on the Territory of the Congo* (*DRC v. Uganda*)¹¹, proclaiming that Uganda's incursions into Congolese soil to combat the rebel militia Allied Democratic Forces (ADF) violated Article 2, paragraph 4, of the UN Charter, reiterating that the institutional weakness or incapacity of a territorial State (unable State) does

⁹ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, 14, para. 195, <https://www.icj-cij.org/case/70>.

¹⁰ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 136, para. 139, <https://www.icj-cij.org/case/131>.

¹¹ International Court of Justice, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, I.C.J. Reports 2005, 168, paras. 146–147, <https://www.icj-cij.org/case/116>.

not, in itself, preclude the illegality of unilateral intervention by third powers.

This explains the fundamental opposition separating the Westphalian model of international law, recognized and affirmed by the ICJ, from the pragmatic realist paradigm of asserting power and interests that dominates U.S. foreign policy. It also highlights the specter we recalled at the outset with Luis Heleño Terrinha, one that perpetually haunts international law: the specter of the frequent lack of enforceability regarding its norms and decisions whenever they run counter to the interests of dominant powers and no means exists to enforce them. This specter can be acknowledged. International law is law, and despite the crises that have beset it, its legal nature is not in question. Enforceability (or the lack thereof) does not constitute the essential core of the concept of law. As João Baptista Machado wisely put it, “Law does not depend on Force in its validity, in its specific meaning or in its essence; it depends on it only in its existence. It is, therefore, a purely *de facto* dependence, not a *de iure* dependence, that is, situated at the level of validity or legitimacy.”¹²

As I mentioned in another essay, norms and court decisions from international bodies, particularly the United Nations and the ICJ, bind the member States themselves, even when they act in defiance of them¹³. That is why the abduction of Maduro and Flores, while a full assertion of the USA’s absolute military dominance in the Americas, was not framed by the Trump administration as a purely arbitrary and unconstrained exercise of force. The very international legal legitimization of “Operation Absolute Resolve” required the U.S. government to hand over the trial of the detainees to the country’s independent judiciary. The matter thus shifted to the U.S. domestic legal system. We will now attempt to summarize how the issue is structured within that framework and the questions it raises.

3. The *Male Captus, Bene Detentus* Principle in the North-American Legal Order

Captured and forcibly transferred to U.S. territory, Nicolás Maduro and Cilia Flores were presented for criminal trial in the U.S. District Court for the Southern District of New York (SDNY), on charges of conspiracy to commit narcoterrorism, a crime defined and punished by Statute 21 U.S.C. § 960a(b) (2018); importation of cocaine, a crime defined and punished by Statute 21 U.S.C. § 963; use, carrying and possession of a firearm related to the crime of drug trafficking, defined and punished by Statute 18 U.S.C. § 924(c); and money laundering, a

¹² João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador* (Coimbra: Almedina, 1983), 41.

¹³ Paulo de Brito, “Droit international: contre vents et marées,” in *Le droit international en transition: Contributions à la 4e Conférence sur le droit comparé et international*, ed. Cătălin-Silviu Săraru and Cristina Elena Popa Tache (Paris: L’Harmattan, 2024), <https://www.editions-harmattan.fr/catalogue/livre/le-droit-international-en-transition/77582>.

crime established in Statute 18 U.S.C. §§ 1956 and 1957.

Notwithstanding the possible illegality, in light of international law, of the act of military intervention in Venezuela, the internal criminal procedure system of the USA does not summarily reject receiving the indictment and ruling on it, under the terms of federal law. Following the Anglo-Saxon tradition, U.S. courts are governed by the classic principle *male captus, bene detentus* ("badly captured, well detained"), according to which the jurisdictional competence of a court to try a defendant is not affected or prejudiced by the illegality, irregularity or violation of international law committed in the act of his/her capture or transfer to the territory of the State of the forum.

In practical terms, the principle defends the autonomy of the jurisdiction in relation to the manner in which the defendant is subjected to the proceeding, prioritizing the effectiveness of the criminal proceeding and (if applicable) the punishment of particularly serious crimes over formal regularity and the strict legality of the act of physically apprehending the individual. The premise is that the power of a criminal court to subject an individual to trial is not invalidated by any irregularities or illegalities committed in the act of his/her detention and/or forced extradition from abroad.

Perhaps most notably exemplified by the celebrated Eichmann case, the U.S. case law for this orientation can be traced back to two landmark rulings:

The case of *Ker v. Illinois* (119 U.S. 436, 1886)¹⁴ in which the U.S. Supreme Court determined that a defendant kidnapped in Peru by a private detective and forcibly brought to the state of Illinois lacked a constitutional basis to challenge the jurisdiction of the state criminal court, since his mere physical presence in the court was sufficient to initiate proceedings.

The case of *Frisbie v. Collins* (342 U.S. 519, 1952)¹⁵ in which, even considering the Federal Kidnapping Act, the same understanding was extended to interstate kidnappings carried out by law enforcement officers, establishing that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction (...). No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."¹⁶

¹⁴ *Ker v. Illinois*, 119 U.S. 436 (1886), <https://supreme.justia.com/cases/federal/us/119/436/>.

¹⁵ *Frisbie v. Collins*, 342 U.S. 519 (1952), <https://supreme.justia.com/cases/federal/us/342/519/>.

¹⁶ On the Ker-Frisbie doctrine, see Andrew B. Campbell, "The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs," *Vanderbilt Journal of Transnational Law* 23, no. 2 (1990): 385, <https://scholarship.law.vanderbilt.edu/vjtl/vol23/iss2/5/>; Kenneth E. Levitt, "International Extradition, the Principle of Speciality, and Effective Treaty Enforcement," *Minnesota Law Review*

More recent and fundamental, due to the immediate analogy with the Nicolás Maduro case, which also involves the violation of a foreign State's national sovereignty, is the ruling in *United States v. Alvarez-Machain* (504 U.S. 655, 1992)¹⁷. In that case, the Drug Enforcement Administration (DEA) planned and funded the abduction of a Mexican national, physician Humberto Alvarez-Machain, from Mexican territory, forcibly transporting him to the United States to stand trial for the murder of a federal agent. By a 6–3 vote, the Supreme Court concluded that, although the abduction violated general principles of international sovereignty, it did not bar the defendant's trial on U.S. soil, as the bilateral extradition treaty did not explicitly prohibit such forcible captures¹⁸.

Along these lines, at a hearing held on March 26, 2026, federal judge Alvin Hellerstein (presiding over the case) formally rejected the defense's motion seeking the dismissal of charges against Nicolás Maduro and challenging the U.S. court's jurisdiction¹⁹.

4. Universal Jurisdiction, Crimes Against *Jus Cogens* and the *Filartiga v. Peña-Irala* Case

Alongside the *male captus, bene detentus* principle, to legitimize the foreign capture and forced submission of Maduro and Flores to the U.S. jurisdiction, the Trump administration also faces the additional need to justify the right to try in the USA, according to its domestic law, foreign citizens who committed crimes in other sovereign States.

76, no. 4 (1992): 1017–1040, <https://journals.law.umn.edu/mlr/vol76/iss4/international-extradition-the-principle-of-specialty-and-effective-treaty-enforcement>; C. Jedson Nau, “Jurisdiction—The Short-Lived Death of the Ker-Frisbie Doctrine,” *Vanderbilt Journal of Transnational Law* 9, no. 1 (1976): 131–145, <https://scholarship.law.vanderbilt.edu/vjtl/vol9/iss1/3/>; and Carlos M. Vázquez, “Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position,” *Notre Dame Law Review* 86, no. 4 (2011): 1495–1634, <https://scholarship.law.nd.edu/ndlr/vol86/iss4/3/>.

¹⁷ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), <https://www.law.cornell.edu/supremecourt/text/504/655>.

¹⁸ On *United States v. Alvarez-Machain*, see Loubna W. Haddad, “Superpower Extraterritorial Abduction: The Alvarez-Machain Case,” *St. Thomas Law Review* 5, no. 2 (1993): 543–570, <https://scholarship.stu.edu/stlr/vol5/iss2/10/>; Michael Slattery, “Government Sanctioned Abductions: *United States v. Alvarez-Machain*,” *NYLS Journal of International and Comparative Law* 16, no. 1 (1996): 115–144, https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol16/iss1/7/; Candace R. Somers, “*United States v. Alvarez-Machain*: Extradition and the Right to Abduct,” *North Carolina Journal of International Law and Commercial Regulation* 18, no. 1 (1992): 213–234, <https://scholarship.law.unc.edu/ncilj/vol18/iss1/7/>; and Stephen M. Welsh, “*United States v. Alvarez-Machain*: The Implications of International Abductions by the United States,” *Mercer Law Review* 44, no. 3 (1993): 1023–1045, https://digitalcommons.law.mercer.edu/jour_mlr/vol44/iss3/16/.

¹⁹ Janon Fisher and Michael O’Keeffe, “Judge Won’t Drop Charges against Former Venezuelan President Nicolás Maduro,” *Newsday*, accessed May 31, 2026, <https://www.newsday.com/news/new-york/nicolas-maduro-cilia-flores-court-bih7i6uf>.

The material basis invoked to justify extending the domestic criminal framework to acts entirely committed abroad by non-national citizens is rooted in the historical evolution of the concept of universal jurisdiction and in the *erga omnes* obligations arising from peremptory norms of international law (*jus cogens*). Traditionally reserved for piracy on the high seas, slave trade, and genocide, the category of *hostis humani generis* (enemies of humanity) has been progressively broadened in international criminal practice to include in the list of agents subject to transnational jurisdiction the perpetrators of systematic torture and the leaders of large-scale cross-border narcoterrorism networks.

In this matter it is decisive the case *Filartiga v. Peña-Irala*²⁰, decided by the U.S. Court of Appeals for the Second Circuit, which established the modern dogmatic foundations for the extraterritorial liability of foreigners.

Dolly and Joel Filartiga filed a civil lawsuit against Américo Norberto Peña-Irala, a former police inspector from Paraguay, who was in New York, accusing him of the torture and death of Joelito Filartiga on Paraguayan soil. The lawsuit was based on the Alien Tort Statute (ATS), a 1789 Statute that grants jurisdiction to federal courts over civil wrongs committed by foreigners in violation of the law of nations. In the landmark ruling, Justice Irving Kaufman established the fundamental legal principle: “Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.”²¹

Although the *Filartiga* case was a civil one, its conceptual basis migrated directly into U.S. federal criminal law. The U.S. Congress and courts used this argumentative framework to legislate and validate legal types of crimes with absolute extraterritorial effect (such as the provisions of Title 18, Chapter 113B, of the U.S. Code, on terrorism, and Title 21, 21 U.S.C. §960A, on narcoterrorism), arguing that certain criminal conduct by foreign citizens threatens global security and the stability of the institutions of all States, legitimizing the exercise of criminal proceedings by the court that apprehends the offender.

In the case of Nicolás Maduro, the DOJ has argued that his regime's strategic alignment with drug cartels and armed terrorist factions transcends mere Venezuelan domestic crime, constituting a violation of international conventions ratified by almost all nations, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention

²⁰ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), <https://hrp.law.harvard.edu/wp-content/uploads/2011/04/filartiga-v-pena-irala.pdf>.

²¹ Jeffrey M. Blum and Ralph G. Steinhardt, “Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Peña-Irala*,” *Harvard International Law Journal* 22 (1981): 53–113.

of 1988) and the Convention against Transnational Organized Crime (Palermo Convention of 2000, effective since 2003), thus conferring, in the name of the universal jurisdiction derived from *jus cogens*, a basis of material legitimacy for his submission to the criminal jurisdiction of the USA. This is a controversial and non-consensual position, but it does not represent a break, but rather a continuity, with the traditional paradigm of interpretation and application of U.S. law.

The final question remains: Nicolás Maduro was the acting President of Venezuela, enjoying, under customary international law, sovereign immunity which, by submitting him to trial at the SDNY, the USA would be violating. I will conclude this essay by addressing it.

5. Head of State Immunity and Its Exceptions. Personal vs. Functional Immunity. The Cases *Arrest Warrant*, *Pinochet* and *Noriega*

Even if the multiple international legal difficulties to submit Nicolás Maduro to trial in U.S. courts, following the military incursion into Caracas, his detention and forced extradition to U.S. territory, were overcome, a core of fundamental legal questions raised by "Operation Absolute Resolve" remains: the obstacle that sovereign immunity may pose to that trial, a structural pillar of international relations and customary international law, codified in the work and projects of the UN International Law Commission (ILC)²².

5.1. *Ratione Personae* Immunity and the Executive Recognition Power

The first immunity is personal immunity or *ratione personae*, which protects a restricted circle of high-ranking State officials (traditionally, the so-called *troika*: Head of State, Head of Government, and Minister of Foreign Affairs) during the effective exercise of their official functions. This is an absolute status-based immunity, which covers any and all acts, whether public or private in nature, prior to or concurrent with the mandate, preventing any foreign criminal court from initiating or pursuing criminal proceedings against its holder.

In the 19th and 20th centuries, American law tended to admit sovereign immunity in a strongly restrictive manner. Examples of this are the cases *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)²³, in which judge John Marshall determined that a French warship in the port of Philadelphia enjoyed immunity from the jurisdiction of American courts, declaring, however, that this immunity stemmed from an implicit license granted by a friendly nation to an-

²² International Law Commission, "Immunity of State Officials from Foreign Criminal Jurisdiction," United Nations, https://legal.un.org/ilc/summaries/4_2.shtml (accessed June 1, 2026).

²³ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), <https://supreme.justia.com/cases/federal/us/11/116/>.

other, and could be revoked if that assumption changed; and the case *The Santissima Trinidad* (1822)²⁴, where it was decided that the immunity granted to ships or agents of foreign States is not absolute, ceasing if there are acts of aggression, piracy, or conspiracy against the host State.

Also in the 20th century, the USA supported efforts to prosecute former leaders who violated the laws of war, denying them any immunity. President Wilson supported the intention to try the Kaiser of Germany after the First World War and, subsequently, after the end of the Second World War, the USA established itself as the mentor of the doctrine established by the Nuremberg Tribunal which expressly declared that the authors of war crimes, crimes against peace and humanity could not benefit from immunity, taking refuge in their official status²⁵.

At the beginning of the 21st century, however, the traditional position of the USA would change substantially, following the ICJ ruling in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] (also commonly referred to as the *Arrest Warrant case* or the *Yerodia case*²⁶) which decided on the complete immunity from criminal jurisdiction, before the courts of third States, of Ministers of Foreign Affairs and Heads of State in office, solemnly and expressly proclaiming that this immunity subsists absolutely, even when the ruler is accused of committing war crimes or crimes against humanity²⁷.

Following the ICJ's reaffirmation of the absence of exceptions to immunity from foreign criminal jurisdiction for Heads of State, the U.S., following the majority of States and courts, also began to subscribe to the broader view of "total immunity."

In this context, the current indictment of Maduro and the will to prosecute him criminally in U.S. courts represent, at least apparently, a retreat from the official position recently adopted and a return to the doctrines of the 19th and 20th centuries.

The official justification, denying the reversal or retreat, is based on the non-recognition of Maduro as President of Venezuela, after the formal decision of the Department of State to that effect, considering his election fraudulent, combined with the constitutional doctrine of Executive Recognition Power and its reception by the federal court.

According to Article II, Section 3, of the U.S. Constitution, it is the exclusive prerogative of the President to diplomatically recognize foreign sover-

²⁴ *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), <https://supreme.justia.com/cases/federal/us/20/283/>.

²⁵ Miguel Manero de Lemos, "Head of State Immunity: United States v. Maduro," *Völkerrechtsblog*, February 27, 2026, <https://doi.org/10.17176/20260228-144926-0>.

²⁶ International Court of Justice, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, 3, <https://www.icj-cij.org/case/121>.

²⁷ *Arrest Warrant of 11 April 2000*, paras. 60–61 (distinguishing immunity from impunity and identifying circumstances in which prosecution may occur).

eigns and governments. In U.S. case law, categorically reaffirmed in the *Zivotofsky v. Kerry* (576 U.S. 1, 2015) case²⁸, this prerogative is exclusive, discretionary, not subject to judicial review, and absolutely binding on the courts (political question doctrine).

The basis is the idea that granting the President the power to receive ambassadors and public ministers implies, by its nature, the power to decide which entities are legitimate to send such representatives, thus equating that to the power of formal recognition. Furthermore, for functional reasons and international legal security, the conduct of foreign policy requires unity and speed, attributes that are prerogatives of the executive branch. "Recognition is a topic on which the Nation must 'speak ... with one voice' (...). That voice must be the President's", summarized Justice Anthony Kennedy in the case *Zivotofsky v. Kerry*²⁹.

The theory of recognition and the One Voice Doctrine directly contradict the dominant legal thinking, according to which it follows from customary international law that the status of Head of State, and the immunities associated with it, derive from the sovereignty of the State he/she represents, and not from the discretionary act of recognition by third States.

In this sense, Article 3 of the Convention on Rights and Duties of States (inter-American), signed at Montevideo on December 26, 1933, stipulated that "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."

Indeed, within international law, there is a justified fear of the risk of abuse of non-recognition (gaming the law): if unilateral non-recognition by a third State is a legally sufficient reason to extinguish the personal immunity of an effective ruler, the principle of sovereign equality (*par in parem non habet imperium*) will be devoid of content. It will suffice for a more powerful State to withdraw recognition of a foreign leader, in order to, for mere political or geopolitical convenience, capture and subject him/her to the criminal jurisdiction of its domestic courts, generating serious instability in international relations. Because of this fear, non-recognition is theoretically considered insufficient to remove the immunity *ratione personae* of a Head of State in the effective exercise of his/her office, since immunity protects the function of external representation of a sovereign community that, in fact, that individual leads.

The reality, however, is that the doctrine of recognition and One Voice

²⁸ *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), <https://supreme.justia.com/cases/federal/us/576/1/>; see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

²⁹ On *Zivotofsky v. Kerry*, see Curtis A. Bradley, "Historical Gloss, the Recognition Power, and Judicial Review," *AJIL Unbound* 109 (2015): 2–9, <https://doi.org/10.1017/S2398772300001057>; and Ingrid Wuerth, "Zivotofsky ex rel. Zivotofsky v. Kerry," *American Journal of International Law* 109, no. 3 (2015): 636–642, <https://doi.org/10.5305/amerjintellaw.109.3.0636>.

has always been the prevailing discourse in American practice, which promptly formulated the official U.S. reservation to the Convention on Rights and Duties of States (inter-American), delivered by the U.S. Secretary of State, Cordell Hull, at the Plenary Session of December 22, 1933, and formally appended to the text of the treaty upon its signing on December 26, 1933, at the VII International American Conference in Montevideo, encompassing Article 3 of the Convention. In this context, although no definitive judicial decision has yet been issued on the merits of Nicolás Maduro's invocation of Head of State immunity, it is expected that at the hearing scheduled for June 30, 2026, the SDNY will declare that Nicolás Maduro does not possess the status of Head of State in office, consequently denying him the requested immunity.

5.2. *Ratione Materiae* Jurisdiction

With personal immunity set aside, the discussion remains regarding functional immunity or *ratione materiae* (conduct-based). This type of immunity protects all agents and officials of the State, perpetually, with respect to acts performed in an official capacity in the exercise of sovereign functions (*acta jure imperii*).

The dogmatic question becomes whether the commission of serious international crimes or acts of narcoterrorism can be legally qualified as an "official act of the State" protected by this immunity.

The paradigmatic case in this area is the ruling of the British House of Lords in the case *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147³⁰.

When analyzing the extradition request issued by Spanish judge Baltasar Garzón against the former Chilean dictator Augusto Pinochet (who was temporarily in British territory and no longer enjoyed personal immunity because he had ceased to be Head of State), the college of judges (law Lords) concluded that immunity *ratione materiae* does not and cannot cover international crimes against *jus cogens* that break with the foundations of the international legal order, since the systematic practice of crimes against humanity, specifically torture and the enforced disappearance of persons, is absolutely incompatible with the legitimate functions of a Head of State under contemporary international law; and, on the other hand, the 1984 Convention against Torture expressly criminalizes acts committed by public officials, and functional immunity cannot, without contradiction, be granted to an official for an act whose punishment is imposed by the Convention itself.

Although delivered by a British court and not an American one, the Pinochet precedent provides the doctrinal basis of Anglo-Saxon law to dismiss any

³⁰ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [2000] 1 AC 147 (HL), March 24, 1999, <https://www.iclr.co.uk/wp-content/uploads/media/vote/1996-2014/ac2000-1-147.pdf>.

claim by Maduro to invoke functional immunity for crimes committed while he led the Venezuelan regime. The continued violation of mandatory norms of international law negates the public nature of the act, stripping the former Venezuelan leader of his immunity *ratione materiae*. He will thus be left to deny the very accusation of committing acts that constitute criminal conduct.

Without prejudice to the transposability of the British doctrine established in the Pinochet case to the internal legal order of the USA, the American case law itself has set the boundaries of immunity *ratione materiae*, in the case *United States v. Noriega*³¹, specifically addressing the articulation between Head of State's immunities and drug trafficking.

General Manuel Antonio Noriega, *de facto* commander of the Panamanian Defense Forces and Head of State, was captured by the U.S. Armed Forces during the 1989 military invasion of Panama ("Operation Just Cause") and taken to the United States District Court for the Southern District of Florida (S.D. Fla.) on charges of conspiracy and drug trafficking. Noriega argued in his defense that he enjoyed absolute sovereign immunity as Head of State and that his capture violated treaties and international law. The United States Court of Appeals for the Eleventh Circuit (11th Cir.), however, summarily rejected these arguments, proclaiming that drug trafficking and money laundering did not constitute official acts of the Panamanian State (*acta jure imperii*), but rather private criminal activities of a commercial nature (*acta jure gestionis*), carried out for the illicit enrichment of the ruler himself and his accomplices; and concluding that customary international law does not extend functional immunity to crimes of a purely commercial nature and transnational organized crime.

The legal similarity between the Noriega and Nicolás Maduro cases, due to direct involvement in the "Cartel de los Soles", suggests it is expected that, here too, the SDNY will reject the functional immunity of the former President of Venezuela, since, in the face of the indictment, it will always be concluded that the management of cocaine export routes and association with armed terrorism are not covered by the definition of sovereign functions of a State.

6. Conclusion

The case of Nicolás Maduro's capture and trial in the United States of America starkly exposes the epistemological and practical chasm that divides contemporary international law. In the domain of political realism (*realpolitik*) and American common law, federal courts operate as effective instruments for punishing autocratic cross-border rulers, managing to overcome the obstacles of sovereign immunities through the political dissociation promoted by the Execu-

³¹ *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), <https://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/>; *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), <https://caselaw.findlaw.com/court/us-11th-circuit/1089768.html>.

tive Recognition Power and the pragmatic application of the principle *male cap-tus, bene detentus*. It is therefore expected that the SDNY forum, anchored in the case law of *Filartiga* and *Noriega*, will deny Maduro any sovereign immunity, personal or functional, accepting the indictment and submitting him to trial in the USA to answer for the crimes he is charged with.

Conversely, from the perspective of pure public international law and the binding customary rules that shape it, "Operation Absolute Resolve" remains flawed by an incurable original illegality. The unilateral extraction of a Head of State in the effective exercise of his functions, regardless of the nature of the respective regime, constitutes a dangerous precedent of fragmentation of the international legal order, where military force replaces the formal procedures of extradition and judicial cooperation.

In this context of division, the trial of Maduro may represent a turning point in the Westphalian paradigm that has dominated Western international legal philosophy, keeping alive and haunting the ghost of the very delegitimization of international law itself.

For now, it is necessary to conclude with a note of optimism: the abduction of Maduro and Flores did not exempt the U.S. executive from being obliged to present and submit the detainees to the independent jurisdiction of a judicial body. At the end of the day, the rule of law is still in place.

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