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To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization

Monica Hakimi^{*}

ABSTRACT

The U.N. Charter establishes that regional arrangements may not take enforcement actions without authorization from the Security Council. Yet the international community does not always enforce this Charter rule. Major international actors repeatedly tolerate deviations from it even as they assert that it allows no exceptions. This Article examines that practice, arguing that two different legal systems govern enforcement actions taken by regional arrangements. One system is reflected in the Charter text and publicly endorsed by major international actors. The second, more nebulous system is based on expectations and demands in the absence of Security Council authorization. Under this second system (here referred to as the operational system), the international community may discreetly tolerate a deviation from the Charter rule depending on the substantive interests at stake, the circumstances surrounding the lack of authorization, and the characteristics of the acting regional arrangement. In the event of a tolerated deviation, however, no actor acknowledges that it is participating in or tolerating a deviation. Instead, international actors resort to a variety of techniques to maintain the integrity of the Charter rule and to suppress acknowledgement of the operational system. After demonstrating that the Charter system and the operational system coexist in this area, this Article examines the general parameters of the operational system. It concludes that, so long as the Security Council remains ineffective in satisfying the international community's substantive legal interests, the

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operational system will—and should—continue to coexist with the Charter system. The application of law in this area, therefore, cannot be fully understood without an appreciation for the role and parameters of the operational system.

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I. INTRODUCTION

International actors have recently looked to regional arrangements to participate more actively in the maintenance of international peace and security.¹ Yet conventional wisdom is that these arrangements may not take enforcement actions unless authorized by the U.N. Security Council.² This wisdom is based on

1. See, e.g., S.C. Res. 1631, U.N. Doc. S/RES/1631 (Oct. 17, 2005); Press Release, United Nations, Regional Organizations to Agree on Stronger Partnerships in Facing Peace, Security Challenges, U.N. Doc. PI/1668 (Jul. 21, 2005), available at <http://www.un.org/News/Press/docs/2005/pi1668.doc.htm>.

2. See, e.g., ADEMOLA ABASS, REGIONAL ORGANISATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: BEYOND CHAPTER VIII OF THE UN CHARTER 27 (2004); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 449–51 (2006); John Norton Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 122, 159 (Cyril E. Black & Richard A. Falk, eds., 1971); Oscar Schachter, *Authorized Use of Force by the United*

the framework for collective security established by the U.N. Charter. The Charter prohibits the use of force against any state,³ except with that state's consent,⁴ in self-defense,⁵ or as authorized by the Security Council under Chapter VII.⁶ If regional arrangements were exempted from this prohibition and thus permitted to take enforcement actions without Security Council authorization, then the Security Council would not have primacy over the maintenance of international peace and security, and the Charter's controls on the use of force would not have their intended effect. The U.N. Charter thus makes explicit that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."⁷

This conventional wisdom, however, paints only part of the picture. On a number of occasions since adoption of the U.N. Charter, regional arrangements have taken enforcement actions without obtaining Security Council authorization.⁸ What's more, the international community⁹ has repeatedly (but discreetly) acquiesced in such actions. Most legal scholars respond to this practice simply

Nations and Regional Organizations, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 65, 87 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991).

3. U.N. Charter art. 2, para. 4.

4. Where a state consents to the use of force in its territory, the use of force is understood not to be "against" the "territorial integrity or political independence" of that state and thus not in violation of the Article 2(4) prohibition on the use of force. It therefore is understood that one state (or group of states) may use force in the territory of another state with that other state's consent. See, e.g., David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 620-23 (1995).

5. U.N. Charter art. 51.

6. U.N. Charter arts. 39-51; see also, Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341, 341 (2003) (summarizing the framework for collective security established by the U.N. Charter); Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923, 931 (2001) (same).

7. U.N. Charter art. 53, para. 1. Article 53 contains an exception to the requirement for Security Council authorization in the case of measures against the "enemy states" of World War II. *Id.* at para. 2. This enemy state clause is now considered obsolete. See, e.g., Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Fiftieth Session of the UN General Assembly*, 90 AM. J. INT'L L. 491, 497 (1996); Carolyn L. Wilson, *Changing the Charter: The United Nations Prepares for the Twenty-First Century*, 90 AM. J. INT'L L. 115, 116, 120-21 (1996).

8. See *infra* Part III; Carsten Stahn, *Enforcement of the Collective Will After Iraq*, 97 AM. J. INT'L L. 804, 811 (2003) ("Regional enforcement action has unquestionably deviated from the letter of the Charter.").

9. This Article uses the phrase "international community" to refer to the whole range of actors that participate in the international legal process, including intergovernmental organizations, non-governmental organizations, and the media. For a discussion on the breadth of the international community, see W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 13 (2000).

by reiterating the Charter rule¹⁰ and, when presented with an enforcement action that deviates from it, either denouncing the action as unlawful or developing intricate rationalizations that the Charter rule has somehow been satisfied or rendered inapplicable.¹¹ A few other scholars argue, either in the particular context of regional enforcement actions¹² or as a more general matter of international law,¹³ that repeated, tolerated deviations mean that the Charter rule no longer constitutes law.

This Article takes a different approach. It argues that the international practice in this area—by which the international

10. See, e.g., Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of the American States*, 42 BRIT. Y.B. INT'L L. 175, 214 (1967). The Charter is silent on whether Security Council authorization must be issued before the regional arrangement undertakes the enforcement action or whether the Security Council may authorize such action retroactively. Many legal scholars now accept that, at least in certain circumstances, the Security Council may retroactively authorize a regional enforcement action. SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* 123 (2001) (listing a number of situations where the Security Council has retroactively authorized the use of force).

These scholars continue to assert, however, that in order for the action to be legal, the Security Council must at some point authorize it. See, e.g., ABASS, *supra* note 2, at 53–54 (Security Council authorization is legally required but may post-date the initiation of regional enforcement action); Moore, *supra* note 2, at 159 (same); MALCOLM SHAW, *INTERNATIONAL LAW* 1154–55 (5th ed. 2003) (same); Georg Ress & Jürgen Bröhmer, *Article 53, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 854, 864–65 (Bruno Simma et. al. eds., 2002) (same, but providing that Security Council authorization may post-date the enforcement action only in exceptional circumstances). A 2004 report commissioned by the U.N. Secretary-General also accepted that the Security Council could retroactively authorize regional enforcement actions. See U.N. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 272(a), U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>. The notion of retroactive authorization is convenient in that it grants international actors a basis for condoning enforcement actions that have later been blessed by the Security Council, but retroactive authorization is incompatible with the goal, embodied in the U.N. Charter, that the Security Council will exercise effective control over regional enforcement actions, with the option of preventing them. See Joachim Wolf, *Regional Arrangements and the UN Charter*, 4 ENCYCLOPEDIA OF PUB. INT'L L. 91, 95 (1992); see also *infra* Part III (discussing the Charter provisions establishing Security Council control over regional enforcement actions).

11. It should be noted that a number of scholars now recognize that the Charter rule does not necessarily govern in the case of regional enforcement actions taken for humanitarian intervention. See, e.g., THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 139 (2002); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 1999 FINNISH Y.B. INT'L L. 141; Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 72 n.323 (2006); Reisman, *supra* note 9, at 15–16.

12. See James Hickey, Jr., *Challenges to Security Council Monopoly Power over the Use of Force in Enforcement Actions: The Case of Regional Organizations*, 10 IUS GENTIUM 66, 77 (2004).

13. See, e.g., Michael Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 958–60 (2005) (reviewing repeated noncompliance with provisions of the U.N. Charter and asserting that eventually “noncompliance shades into nonlaw”).

community endorses the Charter rule as if it allows no exceptions but then sometimes tolerates deviations from that rule—reveals the coexistence of two different legal systems. One legal system, set forth in the Charter, establishes that regional arrangements may not take enforcement actions unless authorized by the Security Council. This system is critical to the U.N. framework for collective security and allows no exceptions. Yet the Charter system has not always been workable, and a second, “operational system”¹⁴ has therefore emerged. Under the operational system, major international actors may discreetly tolerate or even condone deviations from the Charter system in order to satisfy broader legal or policy interests. Whether the international community will tolerate a particular deviation ultimately depends on the substantive interests at stake, the circumstances of the procedural deviation, and the characteristics of the acting regional arrangement.

The lawyerly inclination is to ignore the existence of the operational system and to interpret international practice to mean either that all deviations from the Charter system are unlawful or that the deviations establish a new rule supplanting the Charter system. These interpretations are logical, but neither illuminates the application of law in this area. The former interpretation—that all deviations are unlawful—is at odds with the fact that some deviations are condemned by the international community (in which case the Charter system is enforced), while others are tolerated or condoned. This variance in the international response indicates that the international community has enforcement capabilities that it sometimes declines to exercise. Any study of the law in this area must at least acknowledge this discrepancy and should attempt to explain it. The first interpretation performs neither of these functions.

The latter interpretation—that the deviations establish a new rule—fails to explain the continued reliance on the Charter rule. International actors continue to proclaim that the Charter rule constitutes law in this area, and they continue to rely on it as a rule for decisionmaking. Some regional enforcement actions are authorized by the Security Council.¹⁵ Moreover, where a regional arrangement takes an enforcement action without Security Council authorization, international actors sometimes invoke the Charter rule to condemn that action,¹⁶ and other times endorse the Charter

14. For an analysis of the discrepancies between legal texts and the operational codes that actually govern, see W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES AND REFORMS* 15–16 (1979).

15. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 182 (Malcom Evans & Phoebe Okowa eds., 2004).

16. See *infra* Part III.

rule even as they acquiesce or participate in a deviation.¹⁷ This continued reliance on the Charter rule suggests that it remains in force.

This Article explains these apparent discrepancies in the international practice by reference to the operational system. Under the operational system, international actors may acquiesce in deviations from the Charter system where the deviations satisfy broader legal and policy interests. In these instances, international actors understand the deviation to be "the right thing to do" or "legitimate under the circumstances," despite the inconsistency with the Charter text. At the same time, however, actors recognize that their acquiescence is inconsistent with, and potentially damaging to, the Charter system, which in their view continues to set forth an important legal norm. International actors, therefore, take steps to maintain the integrity of the Charter system and to suppress acknowledgement of the operational system, even in the face of a tolerated deviation.

The result is that the two legal systems coexist: On the one hand, international actors publicly endorse the Charter system and view it as setting forth the rule of decisionmaking. On the other hand, international actors may acquiesce in deviations from the Charter system to satisfy their broader legal and policy interests. Deviations thus may be tolerated or even supported by the very actors responsible for enforcing the Charter system. The critical point, which is central to the relationship between the two systems, is that in the event of a tolerated deviation, no actor acknowledges that it is acquiescing or participating in a deviation. Some of them attempt to justify the action in terms of the Charter system, others act as if the action raises no questions under that system, and still others publicly endorse the Charter system even as they decline to enforce it in the particular case before them.

This Article explains this somewhat paradoxical practice. Part II elaborates on the Charter system and, specifically, on the requirement that regional enforcement actions be authorized by the Security Council. Part II also defines certain critical terms in order to inform the discussions in Parts III and IV. Part III demonstrates that the Charter system and the operational system coexist. It does this by considering four cases in which a regional arrangement used force not in self-defense without obtaining Security Council authorization. In three of the cases, the international community discreetly tolerated or condoned the enforcement actions without acknowledging that it was, in fact, acquiescing in a deviation. Part IV then examines the operational system and argues that, although the system carries certain costs, it will continue to exist so long as the

17. See *infra* Part III.

Security Council remains ineffective in satisfying critical legal and policy interests. An appreciation for the role and parameters of the operational system is therefore necessary to understanding the application of law in this area.

II. THE CHARTER SYSTEM

As mentioned above, the U.N. Charter prohibits the use of force against any state, except with that state's consent, in self-defense, or as authorized by the Security Council under Chapter VII.¹⁸ The Charter makes explicit that this prohibition applies with equal force to regional arrangements.¹⁹ Yet the Charter also recognizes certain roles for regional arrangements in the resolution of local disputes and the maintenance of international peace and security.²⁰ This Part of the Article elaborates on the Charter provisions relating to regional arrangements and defines the Charter's critical terms in this area.

The provisions on "regional arrangements or agencies" appear in Articles 52 through 54 (Chapter VIII) of the U.N. Charter.²¹ Article 52 envisions a relatively robust role for regional arrangements in peacefully settling disputes among their member states.²² It also acknowledges a role for regional arrangements in the maintenance of international peace and security, but this role is circumscribed to matters that are "appropriate for regional action" and to activities that are "consistent with the Purposes and Principles of the United Nations."²³

Having recognized in Article 52 that regional arrangements may play a role in the maintenance of international peace and security, the Charter then reaffirms the primacy of the Security Council in this area. Article 53 provides for the Security Council to exercise control over any regional enforcement action.²⁴ It states, in relevant part: "The Security Council shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of

18. See *supra* notes 3–6 and accompanying text.

19. U.N. Charter art. 53, para. 1.

20. *Id.* at arts. 52–54.

21. *Id.*

22. *Id.* at art. 52, paras. 2–3.

23. *Id.* at art. 52, para 1; see also Waldemar Hummer & Michael Schweitzer, *Article 52, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, supra* note 10, at 807, 822 (stating that "[t]he purpose of Chapter VIII is to grant certain international organizations . . . powers to resolve local disputes . . . within their own jurisdiction and on a local basis, and to serve thereby the purpose of the maintenance of peace and security").

24. U.N. Charter art. 53, para 1.

the Security Council.”²⁵ Article 54 underscores the primacy of the Security Council in the maintenance of international peace and security by providing for the Council to “be kept fully informed” of regional enforcement actions and of other relevant regional activities.²⁶

The primacy that Chapter VIII gives the Security Council reflects the compromise made at the San Francisco Conference, where there were heated debates concerning the proper relationship between, on the one hand, the bodies of the United Nations and, on the other hand, regional arrangements created separately from the United Nations.²⁷ The delegates in San Francisco ultimately agreed to allow regional arrangements to act in self-defense without obtaining Security Council authorization but to require such authorization for enforcement actions.²⁸ Security Council control in this area was considered necessary to prevent isolated regional arrangements from acting without global accountability and without regard for the global interest in international peace and security.²⁹ And although the Security Council and other U.N. organs have recently sought to reinvigorate the role of regional arrangements in peace and security matters, the understanding persists that any regional enforcement action must be authorized by the Security Council.³⁰

The phrase “enforcement action” is not defined in the U.N. Charter and has been the subject of some debate. The drafters of the Charter seem to have intended the phrase to include all coercive measures, regardless of whether they involve the use of armed force.³¹ International practice, however, has been to interpret

25. *Id.*

26. *Id.* at art. 54.

27. *See* Akehurst, *supra* note 10, at 175–76 (noting that three groups of states were particularly eager to obtain special privileges for regional organizations: Latin American states; European states that had concluded bilateral agreements for their mutual protection from Germany; and Arab states, which sought to strengthen the League of Arab States).

28. U.N. Charter arts. 51, 53.

29. *See* Hickey, *supra* note 12, at 76–77.

30. *See, e.g.*, S.C. Res. 1631, U.N. Doc. S/RES/1631 (Oct. 17, 2005) (urging regional arrangements to contribute to conflict prevention and crisis management, “consistent with Chapter VIII of the United Nations Charter,” and reiterating the primacy of the Security Council on matters relating to international peace and security); Press Release, United Nations, Regional Organizations to Agree on Stronger Partnerships in Facing Peace, Security Challenges, U.N. Doc. PI/1668 (Jul. 21, 2005), available at <http://www.un.org/News/Press/docs/2005/pi1668.doc.htm>.

31. *See* Akehurst, *supra* note 10, at 186–87; Ress & Bröhmer, *supra* note 10, at 860 (asserting that the negotiations for the Charter “support the view that all measures . . . are enforcement measures”); *cf.* John W. Halderman, *Regional Enforcement Measures and the United Nations*, 52 GEO. L. J. 89, 116–17 (1963–1964) (asserting that the non-military measures taken by the Organization of American

“enforcement action” to include only military measures and not diplomatic or economic ones.³² This Article thus uses the phrase enforcement action to mean coercive measures that involve the use of armed force and that are not taken in self-defense.

The U.N. Charter also does not define the phrase “regional arrangement or agency.” Early practice was to understand regional arrangements and agencies in contradistinction from self-defense alliances, such as the North Atlantic Treaty Organization (NATO) or the now defunct Warsaw Pact.³³ Whereas regional arrangements and agencies were understood to address matters among their member states and to be governed by Chapter VIII, self-defense alliances were understood to be focused on acts of aggression by third states and to be governed by Chapter VII.³⁴ This distinction, however, has essentially been rendered obsolete, as agencies traditionally conceived in terms of Chapter VIII have assumed functions of collective self-defense, and military alliances have assumed Chapter VIII functions.³⁵

The more workable approach, therefore, is to interpret the phrase regional arrangements or agencies in Chapter VIII in terms of function rather than form.³⁶ Where regional arrangements or agencies act under Chapter VII authority, that Chapter governs. Otherwise, Chapter VIII applies. This approach was implicitly

States (OAS) against the Dominican Republic in 1960 and against Cuba in early 1962 fall “readily within the category of ‘enforcement action’ as defined in the Charter”).

32. See Akehurst, *supra* note 10, at 187; Hickey, *supra* note 12, at 78; Ress & Bröhmer, *supra* note 10, at 860 (noting that when the OAS decided to break off diplomatic relations with the Dominican Republic, and when it expelled Cuba from the Organization, “the majority of member States assumed that the non-military sanctions were not enforcement actions which, from a systematic perspective . . . is a conclusive interpretation”). This interpretation finds support in the fact that, under international law, states may take diplomatic or economic measures without first submitting the issue to the Security Council. It would make little sense indeed if individual states could take diplomatic or economic measures without obtaining Security Council authorization, but states acting collectively could take those measures only after obtaining such authorization.

33. See Hummer & Schweitzer, *supra* note 23, at 819 (discussing the position that NATO is not a regional agency); Christoph Schreuer, *Regionalism v. Universalism*, 6 EUR. J. INT’L L. 477, 490 (1995) (describing the distinction between regional arrangements established to maintain peace and those established for purposes of self-defense).

34. Historically, NATO avoided being characterized as a “regional arrangement or agency” on the understanding that such characterization would render its actions subject to Security Council authorization. See, e.g., Broderick C. Grady, Note, *Article 5 of the North Atlantic Treaty: Past, Present and Uncertain Future*, 31 GA. J. INT’L & COMP. L. 167, 184 (2002); Rosalyn Higgins, *The United Nations Role in Maintaining International Peace: The Lessons of the First Fifty Years*, 16 N.Y.L. SCH. J. INT’L & COMP. L. 135, 140 (1996).

35. See Schreuer, *supra* note 33, at 490.

36. See Akehurst, *supra* note 10, at 180.

adopted by then Secretary-General Boutros Boutros-Ghali in his 1992 *Agenda for Peace*:

The Charter deliberately provides no precise definition of regional arrangements and agencies, thus allowing useful flexibility for undertakings by a group of States to deal with a matter appropriate for regional action which also could contribute to the maintenance of international peace and security. Such associations or entities could include treaty-based organizations, whether created before or after the founding of the United Nations, regional arrangements for mutual security and defence, organizations for general regional development or for cooperation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issue of current concern.³⁷

This Article takes the same flexible approach. Moreover, for ease of reference, it uses the term "regional arrangements" to include the gamut of such entities, on the understanding that a regional agency or organization is simply a more highly developed form of regional arrangement.³⁸

III. REGIONAL ARRANGEMENTS IN ACTION: CASE STUDIES

Part II of this Article reviewed the Charter system on regional enforcement actions. This Part demonstrates that that system coexists with a more informal operational system, under which international actors may discreetly acquiesce in deviations from Article 53, while at the same time taking steps to endorse its mandate. The coexistence of these two legal systems is evident from international practice—cases in which a regional arrangement used force not in self-defense (as that phrase has traditionally been interpreted under the U.N. Charter) and without Security Council authorization. This Part reviews four such cases: (1) the quarantine against Cuba by the Organization of American States (OAS); (2) the intervention in Grenada by the United States, Barbados, Jamaica

37. The Secretary-General, *Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping*, ¶ 61, delivered to the United Nations, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

38. Akehurst, *supra* note 10, at 177. International lawyers have debated whether the arrangements that may act under Chapter VIII must have some geographic identity. Compare Hickey, *supra* note 12, at 79 (arguing that no geographic identity is required), with Akehurst, *supra* note 10, at 177 (arguing that some geographic identity, however loose, is required). An alternative approach is to define regional arrangements, not in terms of geography, but in terms of social, cultural, economic, or political ties. See, e.g., A. LEROY BENNETT, *INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES* 289–94 (1995). The debate has no bearing on this Article, except insofar as an arrangement that lacks any geographic identity may have a more difficult time convincing the international community that it should acquiesce in a deviation. See *infra* Part IV.

and the Organization of Eastern Caribbean States (OECS); (3) the action in Liberia by the Economic Community of West African States (ECOWAS); and (4) the action in Kosovo by NATO.³⁹ For each case, this Part considers the facts giving rise to the regional action, the socio-political context in which it occurred, and the legal debate based on which the international community either tolerated or condemned the use of armed force.

A. Cuba 1962

In 1962, the United States and other members of the OAS imposed a quarantine on Cuba to stop it from receiving missiles from the Soviet Union.⁴⁰ The quarantine was an enforcement action taken without Security Council authorization, but most other states tolerated or even supported the action.⁴¹ The states that openly supported the quarantine acted as if it raised no questions under the Charter system.⁴² Other states, perceptibly uncomfortable with the quarantine as precedent, invoked the Charter system but declined to enforce it against the OAS.⁴³

39. The cases reviewed in this Article are exemplary of international practice in this area, but they do not purport to be exhaustive. Other cases that are sometimes cited as regional enforcement actions taken without Security Council authorization include the 1965 action in the Dominican Republic by the OAS; the 1976 action in Lebanon by the Arab League; the 1981 action in Chad by the Organization of African Unity; and the 1998 action in Sierra Leone by ECOWAS. See, e.g., FRANCK, *supra* note 11, at 159–62 (discussing the Sierra Leone case); GRAY, *supra* note 15, at 72–73 (citing the Dominican Republic, Lebanon, and Chad cases); Zsuzsanna Deen-Racsmany, *A Redistribution of Authority Between the UN and Regional Organizations in the Field of the Maintenance of Peace and Security?*, 13 LEIDEN J. INT'L L. 297, 310–12 (2000) (discussing the Dominican Republic case); Hickey, *supra* note 12, at 95–96 (discussing the Lebanon case). The 1976 action in Lebanon appears to have been taken at least in part with the consent of the Lebanese Government, so there are questions on the extent to which it was an enforcement action. For a more detailed discussion on the Lebanon case, see Hickey, *supra* note 12, at 95–96. See also generally ISTVAN POGANY, *THE ARAB LEAGUE AND PEACEKEEPING IN THE LEBANON* (1987). The 1998 action in Sierra Leone was tolerated, if not commended, by the international community. For a more detailed discussion on that case, see, for example, FRANCK, *supra* note 11, at 159–62. See also generally Lee F. Burger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605 (2001); Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998).

40. See *infra* notes 45–61 and accompanying text.

41. See *infra* notes 72–77 and accompanying text.

42. See *id.*

43. See *id.*

1. Facts and Context

In October 1962, the United States learned that the Soviet Union had deployed medium-range ballistic missiles in Cuba.⁴⁴ On October 22, President Kennedy declared on national television that the presence of those missiles constituted “an explicit threat to the peace and security of all the Americas,”⁴⁵ and he announced a “strict quarantine on all offensive military equipment under shipment to Cuba.”⁴⁶ He also urged the OAS states to meet immediately to discuss the matter.⁴⁷

The OAS states met the next day and adopted a unanimous resolution encouraging member states to participate in the quarantine that President Kennedy had previously announced.⁴⁸ Specifically, the resolution recommended to OAS states that they take necessary measures, including the use of armed force, to ensure

44. John F. Kennedy, President, *The Soviet Threat to the Americas* (Nov. 12, 1962), in 47 DEP'T ST. BULL. 715, 716 (1962) [hereinafter *The Soviet Threat to the Americas*].

45. *Id.*

46. *Id.* at 716. The parameters of the quarantine are set forth in greater detail in President Kennedy's October 23 Proclamation. *See id.* at 717.

47. *Id.* at 718. President Kennedy asserted that the deployment of Soviet missiles in Cuba was inconsistent with the U.N. Charter and with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77 [hereinafter *Rio Treaty*]. The Rio Treaty is a hemispheric security agreement signed before the OAS Charter but having the same geographic scope and some of the same goals and functions as the OAS Charter. Compare *Rio Treaty, supra*, with Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. Given the commonalities between those two instruments, and given that the OAS is the umbrella organization for addressing issues within the inter-American system, action under the Rio Treaty is functionally the same as action by the OAS. Thus, when President Kennedy called for a meeting with respect to the Rio Treaty, he called for a meeting “under the Organization of American States.” *The Soviet Threat to the Americas, supra* note 44, at 718.

48. *See American Republics Act to Halt Soviet Threat to Hemisphere: Statement by Secretary Rusk and the Text of the Resolution*, 47 DEP'T ST. BULL. 720, 722–23 (1962) [hereinafter *American Republics Act*]. The OAS resolution was adopted by the Council on October 23 by a vote of 19-0, with one abstention. The abstainer, Uruguay, approved the resolution the next day, making it unanimous. *Id.* at 722 n.5. At the time the OAS resolution was adopted, Cuba was a member of the OAS and a party to the Rio Treaty. *See* Office of International Law, Charter of the Organization of American States, <http://www.oas.org/juridico/English/Sigs/a-41.html> (last visited Apr. 15, 2007) (listing the state signatories to the OAS Charter, and the date of each state's signature and ratification); Office of International Law, Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), [http://www.oas.org/Juridico/english/sigs/b-29\(1\).html](http://www.oas.org/Juridico/english/sigs/b-29(1).html) (last visited Apr. 15, 2007) (same for the Rio Treaty). Yet Cuba could no longer exercise its vote in the OAS because, in January 1962, the OAS had suspended the Cuban Government's participation on the ground that its “Marxist Leninist allegiance” was not compatible with the aims and principles of the Inter-American System. *See Official Documents: Organization of American States*, 56 AM. J. INT'L L. 601, 610–12 (1962).

that Cuba could not continue to receive missiles from the Soviet Union.⁴⁹ It also declared that the OAS would inform the U.N. Security Council of the OAS action and encourage the Council to dispatch U.N. observers to Cuba to oversee the withdrawal of already-deployed missiles.⁵⁰

Separately, the United States, Cuba, and the Soviet Union each requested an urgent meeting of the Security Council.⁵¹ The United States proposed a draft Security Council resolution calling for the missiles in Cuba to be dismantled and withdrawn, and for U.N. observers to be dispatched to Cuba, consistent with the OAS suggestion.⁵² The Soviet Union also proposed a draft resolution.⁵³ It condemned the quarantine as unlawful and called for the immediate revocation of the decision to inspect ships bound for Cuba.⁵⁴ Predictably, neither draft went anywhere. Security Council deliberations ended with a push by the non-aligned countries for the United States and the Soviet Union to resolve the matter diplomatically.⁵⁵

Meanwhile, the United States and other OAS states had begun implementing the quarantine. Argentina, the Dominican Republic, and Venezuela helped the United States enforce the quarantine; and Colombia, Costa Rica, El Salvador, Guatemala, Haiti, Honduras, and Nicaragua each made its ports and aerodromes available for the quarantine.⁵⁶ On October 26, the United States for the first time boarded a Soviet vessel at the quarantine line.⁵⁷ No missiles were found on board that vessel, and it was allowed to proceed to Cuba.⁵⁸ But the boarding demonstrated to the Soviet Union that the OAS was serious in its intentions.⁵⁹ On October 28, the Soviet Union announced that it would dismantle and remove the missiles from Cuba.⁶⁰

49. *American Republics Act*, *supra* note 48, at 722–23.

50. *Id.*

51. U.N. Doc. S/5181 (Oct. 22, 1962)(U.S.request); U.N. Doc. S/5183 (Oct. 22, 1962)(Cuban request); U.N. Doc. S/5186 (Oct. 23, 1962)(Soviet request).

52. See Letter from Adlai E. Stevenson, U.S. Representative in the Security Council, to Valerian Zorin, President of the Security Council (Oct 22, 1962), *reprinted in U.N. Security Council Hears U.S. Charges of Soviet Military Buildup in Cuba: Statements by Ambassador Adlai E. Stevenson*, 47 DEP'T ST. BULL 723, 724 (1962).

53. S.C. Draft Res., U.N. Doc. S/5187 (Oct. 23, 1962).

54. *Id.*

55. See U.N. SCOR, 17th Sess., 1025th mtg., U.N. Doc. S/PV.1025 (Oct. 25, 1962).

56. Akehurst, *supra* note 10, at 198.

57. Shirley V. Scott & Radhika Withana, *The Relevance of International Law for Foreign Policy Decision-Making When National Security Is at Stake: Lessons from the Cuban Missile Crisis*, 3 CHINESE J. INT'L L. 163, 176 (2004).

58. *Id.*

59. *Id.*

60. *Id.*

2. Legal Discussion

There is no question that the quarantine constituted the threat or use of force under international law.⁶¹ At the time, the United States argued that no Security Council authorization was necessary on the ground that the quarantine was not an enforcement action within the scope of Article 53.⁶² In other words, the United States attempted to justify the quarantine in terms of the Charter system. The United States supported this argument by reference to the decision of the International Court of Justice in the *Certain Expenses* case,⁶³ which it cited for the proposition that enforcement actions may arise only from mandates and not from recommendations of the sort contained in the OAS resolution.⁶⁴

This argument is specious, and *Certain Expenses* does not support it. The question in that case was whether the U.N. General Assembly by itself had the authority to approve expenditures relating to certain peacekeeping operations.⁶⁵ The court determined that the General Assembly had such authority, because the peacekeeping operations were not enforcement actions and, therefore, were not within the exclusive province of the Security Council.⁶⁶ The court's analysis in making that conclusion sheds light on the meaning of the

61. See, e.g., James S. Campbell, *The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 STAN. L. REV. 160, 162 (1963-1964); Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550, 550 (1962-1963); Ludwig Weber, *Blockade, Pacific*, 1 ENCYCLOPEDIA OF PUB. INT'L L. 412, 414 (1992); Ludwig Weber, *Cuban Quarantine*, 1 ENCYCLOPEDIA OF PUB. INT'L L. 882, 883 (1992); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 554-56 (1963). The word "quarantine" is not a term of art under international law, and the United States apparently used it to avoid the legal and political implications of the word "blockade." See Wright, *supra*, at 553 n.32.

62. The legal opinion issued by the U.S. Department of State is available in full at ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* 141-48 (1974). The United States also argued that the quarantine was consistent with the provisions of the Rio Treaty. The United States cited the provisions of that Treaty that authorize the governing organ to take measures (including the use of armed force) in the event of an act of aggression that is not an armed attack or for purposes of maintaining hemispheric peace and security. Rio Treaty, *supra* note 47, at art. 6. State parties generally are required to implement such measures, except that no state may be required to use force without its consent. *Id.* at art. 20. The OAS resolution "recommending" (but not requiring) that member states take all necessary measures, including the use of armed force, therefore was consistent with the Rio Treaty.

63. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151 (July 20) [hereinafter *Certain Expenses*].

64. See U.S. Dep't of State Memorandum: *Legal Basis for the Quarantine of Cuba*, (Oct. 23, 1962), reprinted in CHAYES, *supra* note 62, at 145-46; see also Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 521 (1963) (article by the Deputy Legal Adviser at the U.S. Department of State arguing for the legality of the quarantine).

65. See *Certain Expenses*, *supra* note 63, at 156.

66. *Id.* at 164-66.

phrase "enforcement action" but not in a way that supports the U.S. Government's position. The court made clear that the distinguishing feature of an enforcement action is not that it is implemented by mandate (rather than by recommendation) but that it is undertaken without the consent of the state in which the action occurs.⁶⁷

Certain Expenses thus does not stand for the proposition that only actions implemented by mandate constitute enforcement actions for purposes of Article 53. That proposition is, in any event, absurd. If it were adopted, state participants in regional arrangements would have to obtain Security Council authorization before using force pursuant to some extra-U.N. obligation (e.g., a mandate) but not before using force voluntarily (e.g., pursuant to a recommendation).⁶⁸

In the moment, however, the distinction between mandatory and recommendatory actions served a useful purpose: It allowed the United States to advance a technical, legal justification for the quarantine without overtly undermining the Charter system or establishing a dangerous precedent on the *jus ad bellum*.⁶⁹ Notably, neither the United States nor the OAS attempted to justify the quarantine in terms of self-defense.⁷⁰

67. See, e.g., *id.* at 170 (noting that the word "secure" in the General Assembly's request for a peacekeeping force "might suggest measures of enforcement were it not that the Force was to be set up 'with the consent of the nations concerned'") (emphasis added); *id.* at 170-71 (concluding that the peacekeeping operation in Egypt was not an enforcement action, because it would not "be stationed or operate on the territory of a given country without the consent of the Government of that country") (emphasis added); *id.* at 171 (reiterating that one of the "functions of the United Nations Force [was] . . . to enter Egyptian territory with the consent of the Egyptian Government") (emphasis added); *id.* at 175-77 (explaining that, because the peacekeeping operation in the Congo was undertaken with the cooperation of that Government, it was not an action against any state and, therefore, was not an enforcement action under Chapter VII of the Charter); see also SCOTT DAVIDSON, *GRENADA: A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW* 109 (1987) (asserting that the "key element" in the decision was that "since the U.N. peacekeeping forces were operating with the consent of the relevant host states, their activities did not amount to enforcement action"); John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 155 ("[T]he Court held that peacekeeping actions not directed against a state but undertaken with the permission of constitutional authorities were not 'enforcement actions.'").

68. Cf. John W. Halderman, *Regional Enforcement Measures and the United Nations*, 52 GEO. L.J. 89, 101(1963-1964) (arguing that the "recommendatory aspect" would otherwise be a procedural device through which actors may avoid application of Article 53).

69. Cf. Richard N. Gardner, *A Life in International Law and Diplomacy*, 44 COLUM. J. TRANSNAT'L L. 1, 7 (2005-2006) ("In the midst of the most dangerous confrontation in the history of the Cold War, we lawyers had to create some new international law, or bend some old law if you prefer, but we did not tear a gaping hole in the law that could come back to haunt us.").

70. See CHAYES, *supra* note 62, at 554; Meeker, *supra* note 64, at 523; see also *American Republics Act*, *supra* note 48, at 722-23 (OAS resolution under Article 6 of the Rio Treaty, which applies in the event of an "aggression which is not an armed attack," and not under Article 3 of that Treaty, which applies in the event of an armed

Most other states responded by condoning or at least tolerating the deviation from Article 53. A number of states openly supported the OAS action.⁷¹ Indeed, even China asserted that "it [was] quite within the right of the United States to stop the continuous flow of offensive weapons into Cuba."⁷² These states did not address the Article 53 question and focused instead on the perceived misconduct of the Soviet Union.⁷³ Other states—particularly those that represented the non-aligned group—did assert that the quarantine was unlawful.⁷⁴ Those assertions, however, seemed intended more to uphold the Charter system as a general matter than to enforce it in the particular case of the quarantine. These states were perceptibly uncomfortable with action taken outside the Charter system, and although they asserted that the quarantine was unlawful, they were unwilling to condemn the OAS or to support the draft resolution proposed by the Soviet Union.⁷⁵ These states instead proposed a neutral resolution that was silent on the question of the quarantine's legality and that called for the United States and the Soviet Union to resolve the conflict diplomatically.⁷⁶

Contemporaneous legal scholars also responded positively. Most of them argued that the OAS action was lawful, although not on the grounds advanced by the United States.⁷⁷ Instead, legal scholars

attack). Even though the United States believed that the deployment of Soviet missiles constituted a serious threat, it did not believe that the conditions for invocation of the doctrine of self-defense had been satisfied. CHAYES, *supra* note 62, at 15, 23, 109. The United States was particularly concerned that invoking the doctrine of self-defense in these circumstances would jeopardize the legality of the many U.S. missile sites outside the United States. See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 312 (7th rev. ed. 1997).

71. See, e.g., U.N. SCOR, 17th Sess., 1024th mtg. ¶¶ 8–12, U.N. Doc. S/PV.1024 (Oct. 24, 1962) (French statement in support); *id.* ¶¶ 17–20, 23 (Chinese statement in support); U.N. SCOR, 17th Sess., 1023d mtg. ¶¶ 36–41, U.N. Doc. S/PV.1023 (Oct. 24, 1962) (U.K. statement in support); *id.* ¶¶ 85–86 (Irish statement in support); see also, e.g., Gardner, *supra* note 69, at 7 (asserting that other countries acquiesced in the quarantine); Carl Q. Christol & Charles R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962*, 57 AM. J. INT'L L. 525, 528–29 (1963) (demonstrating that world opinion generally supported the quarantine). But see U.N. SCOR, 17th Sess., 1023d mtg., *supra*, ¶ 42 (Romanian statement that the quarantine was in violation of the U.N. Charter).

72. U.N. SCOR, 17th Sess., 1024th mtg., *supra* note 71, ¶ 23.

73. See *supra* note 71.

74. U.N. SCOR, 17th Sess., 1024th mtg., *supra* note 71, ¶ 74 (statement of the United Arab Republic that the quarantine was unlawful); *id.* ¶¶ 107–10 (Ghanaian statement that the quarantine was an enforcement action in violation of Article 53).

75. *Id.* ¶ 111 (Ghanaian statement that it "[could] not apportion blame for this grave crisis").

76. S.C. Draft Res., U.N. Doc. S/5190 (Oct. 24, 1962) (draft resolution proposed jointly by the United Arab Republic and Ghana on behalf of the non-aligned group).

77. Contemporaneous legal scholars almost uniformly did not adopt the Article 53 argument advanced by the U.S. Government. Indeed, the only legal scholarship that embraced the U.S. Government position on Article 53 is the scholarship written by the then Legal Adviser (Abram Chayes) and Deputy Legal Adviser (Leonard Meeker)

relied on creative arguments based on general use-of-force principles. Some scholars argued that the quarantine was not prohibited under Article 2(4).⁷⁸ Others argued that the quarantine was a lawful act of self-defense, on the understanding that the deployment of nuclear weapons in Cuba constituted either an effective "armed attack" for purposes of Article 51⁷⁹ or an imminent threat of armed attack for purposes of the doctrine of anticipatory self-defense.⁸⁰ These arguments are not absurd, but they require interpreting the Charter in a way that is inconsistent with the security framework it originally established. As Professor Reisman and Andrea Armstrong explain:

The United Nations Charter's prescription with respect to the use of force is essentially binary: either a use of military force is in self-defense, as that concept is conceived in the Charter, in which case it is lawful, or it is not, in which case it is unlawful. As for the right to resort to military measures in self-defense, it materializes only when the state invoking it has suffered an "armed attack," a stricture that does not even extend to the *Caroline* doctrine of anticipatory self-defense.⁸¹

at the U.S. Department of State. See generally CHAYES, *supra* note 62; Meeker, *supra* note 64.

78. See Christol & Davis, *supra* note 71, at 537–39; Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 596 (1963); W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law*, 31 GEO. WASH. L. REV. 335, 381–82 (1962–1963). Article 2(4) of the U.N. Charter provides that states shall refrain from the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4. The argument here is that Article 2(4) did not prohibit the quarantine's use of force because such force was not "against the territorial integrity" of any state or "inconsistent with the Purposes of the United Nations." *Id.* The parameters of the Article 2(4) prohibition of the use of force have been the subject of long-standing controversy in the legal scholarship, but the prevailing view is that the prohibition is intended to be comprehensive and to allow only the exceptions that are specifically delineated. See MALANCZUK, *supra* note 70, at 311.

79. See, e.g., Christol & Davis, *supra* note 71, at 531–32; C.G. Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, 57 AM. J. INT'L L. 588, 589–90 (1963).

80. See, e.g., Campbell, *supra* note 61, at 163–65; Christol & Davis, *supra* note 71, at 531–32; Halderman, *supra* note 31, at 91; MacChesney, *supra* note 78, at 595–96; Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598–600 (1963).

81. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 525 (2006). Some scholars disagree with the position taken by Reisman and Armstrong and instead assert that, in preserving the "inherent" right of self-defense, Article 51 of the U.N. Charter codified the then-existing customary international law right, which included the right to anticipatory self-defense. For a further discussion of this position, see, for example, GRAY, *supra* note 15, at 98–99. This Article takes the position that Article 51 did not incorporate the doctrine of anticipatory self-defense, even though that doctrine may have reemerged as a rule of decision as a result of state practice over the past sixty-some years.

Although international practice subsequent to the adoption of the U.N. Charter may warrant interpreting loosely the Article 2(4) and Article 51 prescriptions, such interpretations do not reflect the original design of the Charter, are extremely controversial among legal scholars, and until recently have generally been avoided by states attempting to justify particular uses of force. That legal scholars almost uniformly adopted these interpretations and overlooked the flaws in the U.S. Government's own legal position demonstrates the influence of the operational system.

B. Grenada 1983

In 1983, the OECS, the United States, Barbados, and Jamaica undertook a military action in Grenada.⁸² Other international actors perceived the action as an unjustified exercise of power by the United States against a much smaller and weaker state.⁸³ They responded almost uniformly by condemning the action as unlawful.⁸⁴

1. Facts and Context

On October 12, 1983, a military coup overthrew the government of Maurice Bishop in Grenada, causing a period of political confusion and public disorder on the island.⁸⁵ On October 19, the so-called Revolutionary Military Council (RMC) announced that it would govern until order could be restored.⁸⁶ Control by the RMC over Grenada's relatively extensive military resources concerned Grenada's Caribbean neighbors.⁸⁷ On October 21, the six other member states of the OECS, plus two neighboring non-member states (Barbados and Jamaica), decided to use force to remove the RMC so long as the United States would agree to participate.⁸⁸ The United

82. See *infra* notes 86-96 and accompanying text.

83. See *infra* notes 98-102 and accompanying text.

84. *Id.*

85. See Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. 131, 131 (1984); Moore, *supra* note 67, at 146.

86. See Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 776 (1992-1993).

87. Maurice Bishop had built up Grenada's military to a level disproportionate to that of its Caribbean neighbors, relying on assistance from Cuba, North Korea, and the Soviet Union. See Moore, *supra* note 67, at 145.

88. Moore, *supra* note 67, at 148; Edward Gordon et. al., *International Law and the United States Action in Grenada: A Report*, 18 INT'L L. 331, 337-38 (1984). In 1983, the member states of the OECS were Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Lucia, Saint Christopher-Nevis, and Saint Vincent and the Grenadines. See U.S. Dept. of State, Bureau of Pub. Affairs, OECS Statement (Oct. 25, 1983), in 83 DEP'T ST. BULL. 67, 67-68 (1983) [hereinafter OECS Statement] (listing the member states other than Grenada). Since then, two other countries, Anguilla and the British Virgin Islands, joined. See Organisation of Eastern Caribbean States, OECS

States, meanwhile, had its own concerns about the RMC and the safety of the approximately 1,000 U.S. nationals on the island.⁸⁹ By October 23, President Reagan made the provisional decision to use military force in Grenada.⁹⁰

During the early morning hours of October 24, the Grenadian Governor-General, who at the time was under RMC-imposed house arrest, requested foreign assistance to restore order to the island.⁹¹ On October 25, U.S. forces and troops from six Caribbean countries landed on Grenada.⁹² Four of the six Caribbean countries (Antigua and Barbuda, Dominica, Saint Lucia, and Saint Vincent and the Grenadines) were OECS member states; the other two (Barbados and Jamaica) were not.⁹³ By October 28, the major military objectives of the operation had been achieved,⁹⁴ and by all published accounts, the people living in Grenada were grateful for the operation's success.⁹⁵

The day the military action commenced, the United States informed the U.N. Secretary-General that it had responded to an invitation of the OECS to "join with the people of Grenada in restoring government and order, and to facilitate the departure of those United States citizens and other foreign nationals who wish to be evacuated."⁹⁶ Neither the United States nor any other country sought Security Council authorization for the action.

The Security Council nevertheless considered the issue, starting late on the evening of October 25, and the reaction against the use of force in Grenada was fierce.⁹⁷ Forty-nine U.N. members that were not on the Security Council asked to speak.⁹⁸ Many were non-aligned

Member States, <http://www.oecs.org/membs.htm> (last visited Apr. 15, 2007). Barbados and Jamaica are not member states of the OECS, but they are member states of the larger Caribbean regional organization (the Caribbean Community and Common Market or CARICOM) to which all OECS members are also members. See Caribbean Community Secretariat, Country Profiles, <http://www.caricomlaw.org/> (follow "Country Profiles" hyperlink) (last visited Apr. 15, 2007).

89. Beck, *supra* note 86, at 771; Moore, *supra* note 67, at 149–50. The RMC had asserted that U.S. nationals would be safe, but the United States was not satisfied, especially once the RMC rejected U.S. proposals for evacuating them. The RMC had already closed the major international airport on the island, so evacuation without special provisions would be difficult. See generally Beck, *supra* note 86, at 771, 776–77.

90. George P. Shultz, U.S. Sec'y of State, News Conference (Oct. 25, 1983), in 83 DEP'T ST. BULL. 69, 70 (1983) [hereinafter News Conference].

91. Beck, *supra* note 86, at 789–90.

92. J. William Middendorf, Statement, OAS, Permanent Council (Oct. 26, 1983), in 83 DEP'T ST. BULL. 72, 72 (1983) [hereinafter Ambassador Middendorf's Statement].

93. *Id.*

94. Gordon et. al., *supra* note 88, at 334.

95. *Id.* at 332; Moore, *supra* note 67, at 151.

96. Letter from the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, U.N. Doc. S/16076 (Oct. 25, 1983).

97. U.N. SCOR, 38th Sess., 2487th mtg., U.N. Doc. S/PV.2487 (Oct. 25, 1983).

98. U.N. SCOR, 38th Sess., 2491st mtg. ¶¶ 1, 8, 393, U.N. Doc. S/PV.2491 (Oct. 27, 1983).

countries and viewed the military action in terms of the unjustified interference by a superpower in the internal affairs of a much smaller and weaker state.⁹⁹ Yet even countries that typically allied with the United States, such as France and the Netherlands, questioned the legality of the action under international law.¹⁰⁰ Indeed, during the three days of discussion before the Security Council, the only states that spoke but did not condemn the action were those that participated in it.¹⁰¹

On October 27, the Security Council voted eleven to one (with three abstentions)¹⁰² on a resolution that would have "deeply deplore[d] the armed intervention in Grenada," and that deemed the action a "flagrant violation of international law."¹⁰³ The resolution did not pass because of the U.S. veto, but the U.N. General Assembly passed an almost identical resolution a few days later.¹⁰⁴

2. Legal Discussion

The states that participated in the Grenada action made different, sometimes evolving, legal arguments in their support. For its part, the OECS issued a statement that it was acting under the defense and security provisions of its foundational treaty.¹⁰⁵ The OECS statement did not explicitly invoke Article 51 of the U.N. Charter, but it and the separate statements of Jamaica, Barbados, and the OECS member states suggested that these states considered themselves to be acting under that Article and not under the Chapter VIII provisions on regional arrangements.¹⁰⁶ By invoking the doctrine of self-defense, the Caribbean countries avoided the question of the

99. *Id.*; U.N. SCOR, 38th Sess., 2489th mtg., U.N. Doc. S/PV.2489 (Oct. 26, 1983); U.N. SCOR, 38th Sess., 2487th mtg., *supra* note 97.

100. U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98, ¶ 365 (Netherlands); U.N. SCOR, 38th Sess., 2489th mtg., *supra* note 99, ¶ 146 (France).

101. *See* U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98; U.N. SCOR, 38th Sess., 2489th mtg., *supra* note 99; U.N. SCOR, 38th Sess., 2487th mtg., *supra* note 97.

102. U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98, ¶ 431 (Togo, the United Kingdom, and Zaire abstaining).

103. S.C. Revised Draft Res., U.N. Doc. S/16077/Rev.1 (Oct. 27, 1983).

104. G.A. Res. 38/7, U.N. Doc. A/RES/38/7 (Nov. 2, 1983).

105. *See* OECS Statement, *supra* note 88, at 67. The OECS statement invoked Article 8 of its foundational Treaty, which authorizes the OECS to act on "matters of external defence and security." Treaty Establishing the Organisation of Eastern Caribbean States art. 8, para. 4, June 18, 1981, 20 I.L.M. 1166.

106. For instance, the OECS statement described the military action as "a preemptive defensive strike" taken in response to the "serious threat to [regional] security" posed by Grenada's military strength in the hands of the RMC. OECS Statement, *supra* note 88, at 68. Jamaica, Barbados, and a number of OECS member states reiterated such assertions of self-defense before the Security Council. *See* U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98, ¶ 14 (Saint Lucia); *id.* ¶ 146 (Barbados); *id.* ¶ 329 (Saint Vincent and the Grenadines); U.N. SCOR, 38th Sess., 2489th mtg., *supra* note 99, ¶ 11 (Dominica); *id.* ¶ 56 (Jamaica).

action's consistency with Article 53. But the self-defense argument is unfounded; the RMC had not used force against any of its Caribbean neighbors, and there was no indication that it intended to do so.¹⁰⁷

For its part, the United States initially focused on policy grounds for the action and particularly on U.S. interests in protecting its nationals and restoring stability to the island.¹⁰⁸ The United States did not articulate its legal case for the military action until February 1984, when the State Department Legal Adviser sent a letter to the American Bar Association for this purpose.¹⁰⁹ The Legal Adviser defended the use of force in Grenada primarily on two grounds. First, he invoked a state's right to protect its own nationals, although he acknowledged that this right by itself would not justify the scope of the Grenada action.¹¹⁰ Second, he asserted that the United States took action at the request of, and therefore with the consent of, the Grenadian Governor-General.¹¹¹

The Governor-General's request for assistance gave the United States a palatable legal argument that did not require it to

107. Indeed, even the United States eschewed the self-defense doctrine as a justification for the use of force in Grenada. Davis R. Robinson, *Letter from The Legal Adviser, United States Department of State*, 18 INT'L LAW. 381, 381 (1984); see also *id.* at 385.

We did not contend that the action on Grenada was an exercise of the inherent right of self-defense recognized in Article 51 of the United Nations Charter We did not assert that Article 2(4) had somehow fallen into disuse or been overtaken by the practice of States.

Id. Moreover, in analyzing the OECS Treaty, the Legal Adviser's letter focuses on provisions of that Treaty not relating to self-defense. *Id.* at 383. Indeed, the letter strongly suggests that Article 8 of the OECS Treaty, which addresses measures taken in collective self-defense, is irrelevant. Note that the letter reflects the considered response of the United States made with the benefit of time; it retreats to some extent from earlier U.S. statements that suggested support for the self-defense argument. See Ambassador Middendorf's Statement, *supra* note 92, at 73 (U.S. statement that the OECS members acted "pursuant to the OECS treaty, which authorizes the OECS to coordinate 'the efforts of Member States for collective defence'" (emphasis added)); News Conference, *supra* note 90, at 69 (noting that the President decided to use military force "in response to the request of [the OECS] and in line with a request that they made pursuant to [the defense and security provisions] of their treaty").

108. See, e.g., Ronald Reagan, President, Remarks (Oct. 25, 1983), in 83 DEPT ST. BULL. 67, 67 (1983) (stating that the United States undertook the military action to protect U.S. and other nationals and to restore law and order to the island); Ambassador Middendorf's Statement, *supra* note 92, at 72-73 (same); News Conference, *supra* note 90, at 69 (same).

109. See generally Robinson, *supra* note 107.

110. *Id.* at 385.

111. See *id.* at 382. The letter sets forth three bases for the action in Grenada: (1) the Governor-General's consent; (2) the competence of regional organizations to use force to maintain peace and security, where invited by the lawful authorities of the state at issue; and (3) the right of states to use force to protect their nationals. *Id.* Because the first and second bases both turn on the consent of the Grenadian Governor-General, this Article treats them as one.

acknowledge its deviation from Article 53 or to adopt an expansive interpretation of traditional use-of-force principles.¹¹² If the Governor-General consented to the military action, then it was not an enforcement action within the terms of Article 53, but rather an activity appropriate for regional arrangements under Article 52.¹¹³ And although there were serious questions as to whether the Governor-General had the authority to consent to the action on Grenada's behalf, there were decent arguments that, following Bishop's death and in light of the infancy of the insurgency, he did.¹¹⁴

The problem was that, in the event, the Governor-General's request appeared to have no impact on the decision to use force in Grenada.¹¹⁵ The OECS states decided to use force on October 21,

112. *Id.* at 386–87.

113. *Id.* at 384. The letter explains:

An issue of far greater import for the development of international law is that of the proper scope of competence of regional organizations to act to restore internal order in a member state. The issue requires careful analysis in circumstances where an organization acts on its own initiative, absent the invitation of the lawful authorities of the State concerned. In the case of Grenada, however, this difficult issue ultimately was not posed. With the invitation of the Governor-General, the member States of the OECS were doing no more collectively than they could lawfully do individually in responding to that request. Thus the limits of what action a regional organization may properly take absent such a request were not tested in this case.

Id.

114. *See, e.g.,* Gordon et. al., *supra* note 88, at 347–51 (recognizing the ambiguity in whether the Governor-General had the appropriate authority); Joyner, *supra* note 85, at 139 (“Whether Governor-General Scoon in fact remained the sole source of governmental legitimacy on Grenada after October 24, 1983 is both arguable and unclear”); Moore, *supra* note 2, at 159–61 (arguing that the Governor-General had the requisite authority); Detlev Vagts, *International Law Under Time Pressure: Grading the Grenada Take-Home Examination*, 78 AM. J. INT’L L. 169, 171 (1984) (“Putting together a reading of the Constitution and a general sense of British Commonwealth traditions, one is left with the impression that probably [the Governor-General] had authority within the Constitution’s terms to take action.”). *But see* Beck, *supra* note 86, at 801 (“[The Governor-General’s] invitation, it seems clear, did not constitute a lawful basis for the American use of force.”). The confusion as to whether the Governor-General had the authority to consent to the action arises in part from the questionable status of the Governor-General under Grenadian law. Under Grenada’s 1974 Constitution, the Governor-General was to exercise the country’s executive authority on behalf of the Queen of England, in whom that authority was vested. Gordon et. al., *supra* note 88, at 348. When Maurice Bishop came to power, however, he suspended the 1974 Constitution and replaced it with a series of “People’s Laws.” One such law addressed the position of the Governor-General. *Id.* It provided that the Governor-General would “perform such functions as [Bishop’s] Government’s may from time to time advise.” *Id.* at 347–48; *see also* DAVIDSON, *supra* note 67, at 19.

115. Professor Beck’s ten-year retrospective on the Grenada action demonstrates that the Governor-General’s request indeed did not impact the decision to take action. *See* Beck, *supra* note 86, at 789 (“Despite what administration officials would later maintain, the Governor-General’s request could have exerted virtually no influence on the U.S. decision. Moreover, given its timing, [the Governor-General’s] invitation could have made no impact at all on the OECS decision to take action.”).

more than two days before receiving the Governor-General's request for assistance.¹¹⁶ Moreover, during the early days of the intervention, the states that participated in it did not focus on that request to justify their action before the Security Council.¹¹⁷ Indeed, when the United States first mentioned the Governor-General's request on October 27 (two days after the action commenced), it did so almost as an afterthought—not to support a legal position (i.e., that Grenada consented to the action), but rather to demonstrate that the RMC was potentially dangerous and had no rightful claim to govern in Grenada.¹¹⁸

The international community thus viewed the Grenada action predominantly in terms of a U.S. abuse of power, and it almost uniformly condemned the action as unlawful.¹¹⁹ The draft Security Council resolution labeling the action as a "flagrant violation of international law"¹²⁰ did not pass because of the U.S. veto,¹²¹ but the General Assembly later passed an almost identical resolution by an overwhelming vote of 108 to nine (with twenty-seven abstentions).¹²² The reaction among international legal scholars was similarly

116. See Gordon et. al., *supra* note 88, at 346–47; *supra* notes 85–90 and accompanying text.

117. Cf. Gordon et. al., *supra* note 88, at 351 ("Whatever may be said of [the Governor-General's] authority . . . the OECS' action is suspect by virtue of the reference in the OECS Secretariat's statement to the organization's request to friendly governments 'to form a pre-emptive defensive strike.'").

118. Specifically, the U.S. ambassador to the United Nations stated, in the context of describing the collective security nature of the action:

[T]he OECS was spurred to action because, as a result of the murder of Mr. Bishop and almost his entire Cabinet, the military power which Grenada has amassed with Cuban and Soviet backing had fallen into the hands of individuals who could reasonably be expected to wield that awesome power against its neighbors. That the coup leaders had no arguable claim to being the responsible government was, indeed, made clear by their own declarations, the failure of other states to recognize them as a legitimate government, and by the fact that the Governor General of Grenada, the sole remaining symbol of governmental authority on the island, invited OECS action.

Jeane J. Kirkpatrick, U.S. ambassador to the United Nations, Statement Before UN Security Council (Oct. 27, 1983), in 83 DEP'T ST. BULL. 74, 76 (1983). Note that Dominica mentioned the Governor-General's request in its October 26 statement before the Security Council, and that Saint Lucia and Barbados mentioned it on October 27. See U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98, ¶¶ 23–25 (Saint Lucia); *id.* ¶ 148 (Barbados); U.N. SCOR, 38th Sess., 2489th mtg., *supra* note 99, ¶ 9 (Dominica). The October 26 statement by Dominica referenced the Governor-General's consent but focused on characterizing the action as one taken in self-defense. The October 27 statements by Saint Lucia and Barbados strongly suggested that the Governor-General's request demonstrated Grenadian consent to the action, but by then the international response had already been determined.

119. See *supra* notes 97–104 and accompanying text.

120. S.C. Revised Draft Res., *supra* note 103.

121. U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98, ¶ 431.

122. G.A. Res. 38/7, *supra* note 104.

intense; almost all of them argued that the use of force in Grenada was unlawful.¹²³

C. Liberia 1990-1992

In 1990, ECOWAS undertook an enforcement action to establish peace in Liberia.¹²⁴ ECOWAS did not obtain Security Council authorization and did not attempt to justify the action in terms of the Charter system.¹²⁵ Nevertheless, the international community reacted positively.¹²⁶ Most international actors overlooked the deviation from Article 53 and commended ECOWAS for its broad efforts to establish peace in Liberia.¹²⁷

1. Facts and Context

The Liberian civil war began in December 1989, when Charles Taylor led a group of rebels, known as the National Patriotic Front of Liberia (NPFL), to overthrow President Samuel Doe.¹²⁸ The NPFL grew quickly, and by the summer of 1990, it and a splinter rebel group, the Independent National Patriotic Front of Liberia (INPFL), controlled almost the entire country.¹²⁹ The fighting caused

123. See, e.g., DAVIDSON, *supra* note 67, at 124-25; Francis A. Boyle et. al., *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172, 174 (co-authored by nine legal scholars); Joyner, *supra* note 85, at 133; Burns H. Weston, *The Reagan Administration Versus International Law*, 19 CASE W. RES. J. INT'L L. 295, 296 (1987); Abram Chayes, *Grenada was Illegally Invaded*, N.Y. TIMES, Nov. 15, 1983, at A35 ("[A]mong international law experts, a group not noted for unanimity, there is remarkably broad agreement that the United States' invasion was a flagrant violation of international law."); Eugene V. Rostow, *Law 'Is Not a Suicide Pact*, N.Y. TIMES, Nov. 15, 1983, at A35. *But see* Moore, *supra* note 2, at 153 (arguing that the military action in Grenada was lawful); *but cf.* W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643-44 (1984) ("Each application of Article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure.").

124. See ECOWAS Authority of Heads of State and Government, Decision Relating to the Establishment of the Standing Mediation Committee, Banjul, Republic of Gambia, A/DEC.9/5/90 (May 30, 1990) [hereinafter ECOWAS Decision Relating to the Establishment], *reprinted in* REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 38-39 (M. Weller, ed., 1994) [hereinafter THE LIBERIAN CRISIS]; see also *infra* notes 135-43 and accompanying text.

125. See Letter from the Permanent Representative of Nigeria to the United Nations to the U.N. Secretary-General, U.N. Doc. S/21485/Annex (Aug. 10, 1990) [hereinafter Letter from the Permanent Representative of Nigeria].

126. See *infra* notes 146-52 and accompanying text.

127. See *id.*

128. See FRANCK, *supra* note 11, at 155.

129. See Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 342-43 (1998).

considerable human casualties: By August 1990, over one million Liberians had been displaced and approximately 5,000 killed.¹³⁰

The conflict in Liberia caused concern among the other ECOWAS states and triggered them to establish a five-member Standing Mediation Committee charged with settling disputes among member states.¹³¹ On July 14 1990, Doe sent the Committee a letter suggesting that ECOWAS introduce peacekeeping forces into Liberia.¹³² The NPFL, however, made clear from the beginning that it would not consent to the presence of any ECOWAS force in Liberia.¹³³

Despite the NPFL's refusal to consent to any ECOWAS action, the Standing Mediation Committee prescribed the terms of a cease-fire and established an armed monitoring group (ECOMOG) to oversee it.¹³⁴ The Committee described ECOMOG as performing a peacekeeping role,¹³⁵ but it did not purport to obtain the consent of the parties to the conflict. On the contrary, it appeared to believe that such consent was irrelevant. Upon leaving the meeting at which ECOMOG was established, the Guinean President stated that ECOWAS "do[es] not need the permission of any party involved in the conflict" for ECOMOG to deploy and that, "with or without the agreement of any of the parties, ECOWAS troops will be in

130. Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795, 816 (2002-2003).

131. ECOWAS was founded in 1975; its member states are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. See U.S. Department of State, Economic Community of West African States, <http://www.state.gov/p/af/rls/fs/15437.htm> (last visited Apr. 15, 2007). See ECOWAS Decision Relating to the Establishment, *supra* note 124 (establishing the Committee); see also THE LIBERIAN CRISIS, *supra* note 124, at xix (stating that the decision to establish the Standing Mediation Committee was triggered by the situation in Liberia). During its first term, the Committee was comprised of the Chairman of the ECOWAS Authority (a representative from The Gambia), and of representatives from Ghana, Mali, Nigeria, and Togo. See ECOWAS Authority of Heads of State and Government, Final Communiqué, Establishment of a Standing Mediation Committee, Banjul, Republic of Gambia (May 30, 1990), *excerpt available at* THE LIBERIAN CRISIS, *supra* note 124, at 39-40.

132. Letter from Samuel K. Doe, President, to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (July 14, 1990), *reprinted in* THE LIBERIAN CRISIS, *supra* note 124, at 60-61.

133. See *BBC Monitoring Report: NPFL to Attend ECOWAS Meeting; Taylor Comments on Hostage-Taking*, Aug. 5, 1990, *reprinted in* THE LIBERIAN CRISIS, *supra* note 124, at 65-66; *BBC Monitoring Report: Taylor Opposes Foreign Intervention; U.S. Marines to Rescue U.S. Nationals*, Aug. 3, 1990, *reprinted in* THE LIBERIAN CRISIS, *supra* note 124, at 63.

134. ECOWAS Standing Mediation Committee, Decision on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, Banjul, Republic of Gambia, A/Dec.1/8/90 (Aug. 7, 1990), *reprinted in* THE LIBERIAN CRISIS, *supra* note 124, at 67-68 [hereinafter ECOWAS Standing Mediation Committee Decision].

135. *Id.*; Letter from the Permanent Representative of Nigeria, *supra* note 125.

Liberia.”¹³⁶ The Committee thus understood the intervention to be an enforcement action—one focused on enforcing rather than keeping a peace.¹³⁷ Indeed, there was not yet any peace to keep.

The ECOMOG force landed in Liberia in late August 1990 without having obtained authorization from the U.N. Security Council.¹³⁸ The force was welcomed by Doe and by the INPFL but came under immediate attack from Taylor’s NPFL.¹³⁹ By mid-September 1990, the fighting between ECOMOG and the NPFL had escalated, and ECOMOG had gone on the offensive.¹⁴⁰ With time, ECOMOG became a major participant in the conflict—staging its own

136. *BBC Monitoring Report: ECOWAS Peace-keeping Force to be Sent to Liberia; Foreigners Released by INPFL*, Aug. 7, 1990, reprinted in *THE LIBERIAN CRISIS*, *supra* note 124, at 66.

137. *See* ABASS, *supra* note 2, at 144; Levitt, *supra* note 129, at 350. At least one scholar has argued that the ECOWAS action was not an enforcement action on the ground that it was undertaken with Liberia’s consent, in the form of Doe’s request for a peacekeeping force. *See* Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, 53 *ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT* 603, 625–26 (1993). This argument is flawed in a number of respects. First, it is doubtful that the nature and scope of the ECOMOG force were consistent with Doe’s request. *See* FRANCK, *supra* note 11, at 156. Second, even if Doe consented to the ECOWAS action, that consent would not have been sufficient, given that Taylor’s NPFL by then controlled almost the entire country and that Taylor himself rejected any ECOWAS presence in Liberia. *See* Levitt, *supra* note 129, at 348–49; Anthony Chukwuka Ofofiele, *Recent Development, The Legality of ECOWAS Intervention in Liberia*, 32 *COLUM. J. TRANSNAT’L L.* 381, 407–08 (1994–1995); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 *DUKE J. COMP. & INT’L L.* 209, 225–28 (1996); *cf.* GRAY, *supra* note 15, at 68–69 (setting forth the generally accepted legal rules prohibiting military intervention in a civil war where control of the state’s territory is divided among warring parties and those parties do not all consent to the intervention). Finally, even if Doe consented to the ECOWAS action, and even if that consent was sufficient to justify the deployment of an ECOWAS peacekeeping force, that consent would not justify the offensive actions (i.e., actions akin to enforcement operations) that ECOWAS undertook once deployed in Liberia. *See infra* notes 141–42 and accompanying text; *see also* Hickey, *supra* note 12, at 96–97 (asserting without support that ECOMOG was initially a peacekeeping force but acknowledging that the operation became an enforcement action over time). Thus, even if the action was initially a peacekeeping operation undertaken with the consent of the relevant parties, the action at some point transformed into an enforcement action.

138. *BBC Monitoring Report: ECOMOG Force Lands; Met by Prince Johnson; Clash with NPFL*, Aug. 24, 1990, reprinted in *THE LIBERIAN CRISIS*, *supra* note 124, at 87.

139. *Id.*; *BBC Monitoring Report: NPFL Delegation in Burkina Faso*, Aug. 27, 1990, reprinted in *THE LIBERIAN CRISIS*, *supra* note 124, at 88.

140. *BBC Monitoring Report: Call for ECOWAS Summit; ECOMOG Given ‘Fresh Mandate,’* Sept. 19, 1990, reprinted in *THE LIBERIAN CRISIS*, *supra* note 124, at 100 (quoting the ECOMOG commander as stating that the ECOMOG force has a “fresh mandate” to “mount a limited offensive in order to protect their positions against attacks by the rebel groups and enforce a cease-fire in Liberia”); *BBC Monitoring Report: ECOMOG on Offensive Against Taylor; ‘Violent Fighting’ in Monrovia*, Sept. 16, 1990, reprinted in *THE LIBERIAN CRISIS*, *supra* note 124, at 99; Wippman, *supra* note 137, at 225.

offensive attacks against the NPFL and supporting anti-Taylor factions¹⁴¹—even as ECOWAS tried to establish a political process for negotiating a cease-fire. In late November 1990, ECOMOG and the Liberian parties to the conflict finally concluded what would be the first of a number of cease-fire agreements.¹⁴²

The U.N. Security Council for the first time considered the Liberian conflict in January 1991, a few months after that initial cease-fire agreement had been signed.¹⁴³ The discussion before the Council was brief; Liberia and Nigeria were the only states that requested the floor, and shortly after the Liberian representative (from an anti-Taylor faction) expressed his appreciation to ECOWAS,¹⁴⁴ the Security Council President issued a statement “commend[ing]” its efforts to “promote peace and normalcy in Liberia.”¹⁴⁵ The Council President issued a similar statement in May 1992.¹⁴⁶

In November 1992, the Security Council adopted its first resolution on the conflict (Resolution 788), which again “commend[ed] ECOWAS for its efforts to restore peace, security and stability in Liberia.”¹⁴⁷ Resolution 788 was particularly supportive of an October 1991 cease-fire, the Yamoussoukro IV Accord,¹⁴⁸ under which the principal parties to the conflict agreed to disarm with ECOMOG supervision.¹⁴⁹ In addition, Resolution 788 invoked Chapter VII to impose an arms embargo on the Liberian parties to the conflict.¹⁵⁰ Over the next five years, the Security Council adopted another sixteen resolutions relating to the situation in Liberia, and virtually every one of them commended ECOWAS for its efforts.¹⁵¹

141. GRAY, *supra* note 15, at 304; Ofodile, *supra* note 137, at 413; Luca Renda, *Ending Civil Wars: The Case of Liberia*, 23 FLETCHER F. WORLD AFF. 59, 69–70 (1999).

142. ECOWAS Authority of Heads of State and Government, Decision Relating to the Approval of the Decisions of the Community Standing Mediation Committee Taken During its First Session from 6 to 7 August 1990, Bamako, Republic of Mali, A/DEC.1/11/90 (Nov. 28, 1990), *reprinted in* THE LIBERIAN CRISIS, *supra* note 124, at 111 [hereinafter ECOWAS Decision Relating to the Approval].

143. U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/PV.2974 (Jan. 22, 1991); Luca Renda, *Ending Civil Wars: The Case of Liberia*, 23 FLETCHER F. WORLD AFF. 59, 69–70 (1999).

144. *Id.*

145. Note, President of the Security Council, U.N. Doc. S/22133 (Jan. 22, 1991).

146. Note, President of the Security Council, U.N. Doc. S/23886 (May 7, 1992).

147. S.C. Res. 788, at 2, U.N. Doc. S/RES/788 (Nov. 19, 1992).

148. *Id.* at 1.

149. Letter from the Permanent Representative of Benin to the United Nations to the President of the Security Council ¶ 6, U.N. Doc. S/24815/Annex (Nov. 17, 1992) [hereinafter Letter from the Permanent Representative of Benin].

150. S.C. Res. 788, *supra* note 147.

151. See S.C. Res. 1116, U.N. Doc. S/RES/1116 (June 27, 1997) (expressing appreciation to ECOWAS and commending the ECOWAS states contributing to ECOMOG); S.C. Res. 1100, U.N. Doc. S/RES/1100 (Mar. 27, 1997) (same); S.C. Res. 1083, U.N. Doc. S/RES/1083 (Nov. 27, 1996) (same); S.C. Res. 1071, U.N. Doc.

2. Legal Discussion

The legal basis for ECOWAS's intervention in Liberia was hardly discussed by the states that participated in it or by the U.N. Security Council.¹⁵² For its part, the ECOWAS Standing Mediation Committee appeared to justify the intervention in broad humanitarian and regional security terms.¹⁵³ It did not address the question of consistency with Article 53. The U.N. Security Council likewise was silent on that question. For months, the Security Council simply ignored the conflict in Liberia, as well as the fact that ECOWAS had taken an unauthorized enforcement action. When the Council finally considered the issue—first in January 1991 and later in its Chapter VII Resolutions—it commended ECOWAS for its efforts to establish peace in Liberia without mentioning the authorization requirement of Article 53.

Some scholars have interpreted the Security Council's commendations to constitute retroactive authorization for purposes of Article 53.¹⁵⁴ This interpretation is convenient because it places the international response to the Liberian conflict within the legal framework of the U.N. Charter. But it is not completely honest. The Security Council did not, in fact, authorize any enforcement action. Resolution 788 invoked the Council's Chapter VII authority, but it did so only to impose the arms embargo and not also to authorize the use of military force.¹⁵⁵ Moreover, there is some evidence that the failure

S/RES/1071 (Aug. 30, 1996) (commending ECOWAS); S.C. Res. 1059, U.N. Doc. S/RES/1059 (May 31, 1996) (same); S.C. Res. 1041, U.N. Doc. S/RES/1041 (Jan. 29, 1996) (same); S.C. Res. 1020, U.N. Doc. S/RES/1020 (Nov. 10, 1995) (same); S.C. Res. 1014, U.N. Doc. S/RES/1014 (Sept. 15, 1991) (same); S.C. Res. 1001, U.N. Doc. S/RES/1001 (June 30, 1995) (same); S.C. Res. 985, U.N. Doc. S/RES/985 (Apr. 13, 1995) (not commending or expressing appreciation to ECOWAS); S.C. Res. 972, U.N. Doc. S/RES/972 (Jan. 13, 1995) (commending ECOWAS); S.C. Res. 950, U.N. Doc. S/RES/950 (Oct. 21, 1994) (same); S.C. Res. 911, U.N. Doc. S/RES/911 (Apr. 21, 1994) (same); S.C. Res. 866, U.N. Doc. S/RES/866 (Sept. 22, 1993) (same); S.C. Res. 856, U.N. Doc. S/RES/856 (Aug. 10, 1993) (same); S.C. Res. 813, U.N. Doc. S/RES/813 (Mar. 26, 1993) (same). It is worth noting that in 1993, after the conclusion of the Contonou Peace Agreement, the Security Council established a U.N. peacekeeping force to complement ECOMOG and to monitor compliance with the cease-fire. See S.C. Res. 788, *supra* note 147.

152. CHRISTINE D. GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 212 (Malcolm Evans & Phoebe Okowa eds., 2000).

153. See ECOWAS Standing Mediation Committee Decision, *supra* note 134, at 67–68; Letter from the Permanent Representative of Nigeria, *supra* note 125.; see also Ofodile, *supra* note 137, at 406–07; M.A. Vogt, *Nigeria in Liberia: Historical and Political Analysis of ECOMOG*, in *NIGERIA IN INTERNATIONAL PEACEKEEPING: 1960–1992*, 204 (M.A. Vogt & E.E. Ekoko eds., 1993).

154. See, e.g., Levitt, *supra* note 129, at 347; Lumsden, *supra* note 130, at 818.

155. S.C. Res. 788, *supra* note 147. One might respond to the lack of explicit authorization in Resolution 788 by arguing that the Security Council implicitly (and retroactively) authorized the enforcement action. Yet this argument depends wholly on the biases of the person making it. One could argue that, by commending ECOWAS,

to authorize the use of force was deliberate. Western diplomats at the U.N. reportedly were prepared to authorize only political, and not military, action in Liberia.¹⁵⁶ Thus, the fact that the Security Council commended ECOWAS for its multifaceted efforts to establish peace in Liberia does not translate into Security Council authorization for the enforcement action per se.¹⁵⁷ And even if it did, the Security Council's authorization in November 1992 would not explain the failure of the international community to enforce the Charter system up to that point.

The less strained analysis is that international actors, including the Security Council, simply overlooked ECOWAS's deviation from Article 53. A number of states publicly commended ECOWAS before the Security Council even considered the matter.¹⁵⁸ Moreover, by the time the Security Council adopted its first resolution, the issue of Security Council authorization was essentially beside the point. By then, ECOWAS had successfully negotiated the Yamoussoukro IV Accord, which evinced that, whatever the parties' original positions concerning an ECOWAS presence in Liberia, they now consented to ECOMOG exercising a peacekeeping role.¹⁵⁹ The Security Council

the Security Council implicitly authorized what had until that point been an unlawful enforcement action. But one could also argue—just as easily if not more so—that, had the Security Council wanted to authorize that enforcement action, it would have done so explicitly. After all, the Council did adopt a Chapter VII resolution that could have but did not serve that purpose.

156. See, e.g., Kathleen Best, *U.N. Moves to Halt Liberian Arms*, ST. LOUIS POST-DISPATCH, Nov. 20, 1992, at 13A (“Western diplomats, including those in the United States, have pushed to limit U.N. involvement to non-military support because they fear being drawn into yet another regional conflict when the international body is already overtaxed.”); Written Testimony by Africa Bureau Deputy Assistant Secretary, Leonard H. Robinson, Jr. to House Foreign Affairs Subcommittee on Africa on US Policy on Liberia (Nov. 19, 1992) (“We have made clear to ECOWAS States that we do not believe a military solution is possible in Liberia.”).

157. Cf. Bruno Simma, *NATO, the UN, and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 11 (1999) (“[T]he fact is that the Security Council, as a political organ entrusted with the maintenance or restoration of peace and security rather than as an enforcer of international law, will in many instances have to accept or build upon facts or situations based on, or involving, illegalities.”).

158. See, e.g., Neil Henry, *Doctors' Group Criticizes U.S. for Not Intervening in Liberia*, WASH. POST, Aug. 16, 1990, at A17 (U.S. support); *Kenya, Uganda to Restore Full Diplomatic Relations*, XINHUA GENERAL NEWS SERVICE, Aug. 17, 1990 (Kenyan and Ugandan support); *Ethiopian President Stresses African Unity*, XINHUA GENERAL NEWS SERVICE, Sept. 1, 1990 (Ethiopian support); *Liberia: ECOWAS Chair Expresses Hope of Peace*, IPS-INTER PRESS SERVICE, Sept. 11, 1990 (Zimbabwean support); *OAU Supports ECOMOG Mission in Liberia*, XINHUA GENERAL NEWS SERVICE, Oct. 24, 1990 (Support of the Organization of African Unity); *Britain Supports ECOWAS Efforts to Restore Peace in Liberia*, XINHUA GENERAL NEWS SERVICE, Nov. 18, 1990 (British support).

159. The Yamoussoukro IV Accord provided for ECOMOG to supervise the encampment and disarmament of all warring factions in Liberia and for those factions to “recognize the absolute neutrality of ECOMOG and demonstrate their trust and confidence in it.” Letter from the Permanent Representative of Benin, *supra* note 149.

therefore could endorse the Accord, as well as ECOMOG's involvement in Liberia, without commenting on the (unauthorized) enforcement action that brought it about.¹⁶⁰ At the time, the Yamoussoukro IV Accord seemed to be the only hope for resolving the brutal conflict in Liberia, and the international community was simply relieved that ECOWAS had taken some initiative.¹⁶¹

D. Kosovo 1999

In 1999, NATO used force without Security Council authorization in order to stop the humanitarian crisis in Kosovo.¹⁶² NATO member states did not address the question of consistency of the action with Article 53, but the deviation from that Article was apparent.¹⁶³ The Security Council had been seized of the Kosovo crisis but had not authorized the use of force.¹⁶⁴ A number of countries, including Russia and China, reacted negatively to NATO's action, but most international actors tolerated it.¹⁶⁵

1. Facts and Context

Until 1989, Kosovo was an autonomous province in the Federal Republic of Yugoslavia (FRY) with a majority ethnic Albanian population. In 1989, Belgrade revoked Kosovo's autonomous status and began subjecting ethnic Albanians to discrimination in public and private employment and in the exercise of civil rights. Kosovar Albanians responded by seeking independence and, beginning in 1996, attacking Serbian police. As the conflict intensified, FRY forces undertook large-scale and frequently indiscriminate measures against the Kosovar Albanians.¹⁶⁶

In March 1998, the Security Council adopted a Chapter VII resolution (Resolution 1160) calling for a political solution to the conflict in Kosovo.¹⁶⁷ The situation continued to deteriorate,¹⁶⁸ and

160. Cf. GRAY, *supra* note 15, at 44 (arguing that the existence of a peace agreement was crucial in establishing the legality of the ECOMOG force); Ress & Bröhmer, *supra* note 10, at 864 (suggesting that the Security Council responded to the ECOMOG intervention as if no authorization were required); Wippman, *supra* note 137, at 226 (same).

161. See FRANCK, *supra* note 11, at 157-58.

162. See *infra* notes 167-81 and accompanying text.

163. See *infra* notes 175-76 and accompanying text.

164. See *id.*

165. See *infra* notes 188-92 and accompanying text.

166. For background on the Kosovo conflict, see, for example, Mikael Nabati, Note, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 771, 783 (2003); Ruth Wedgwood, Editorial Comment, *NATO's Campaign in Yugoslavia*, 93 *AM. J. INT'L L.* 828, 828-29 (1999).

167. S.C. Res. 1160, ¶ 1, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

in September 1998, the Security Council adopted a second Chapter VII resolution (Resolution 1199). Resolution 1199 demanded that the parties to the conflict cease hostilities and take immediate steps to improve the humanitarian situation.¹⁶⁹ It also threatened that the Council would consider additional measures should the ones already mandated not be taken.¹⁷⁰ It soon became clear, however, that Russia (and perhaps also China) would veto any proposed Security Council resolution authorizing the use of force against the FRY.¹⁷¹

NATO thus took steps outside the U.N. framework. On October 9, the NATO Secretary-General announced that, given "that another UNSC Resolution containing a clear enforcement action with regard to Kosovo cannot be expected," NATO "believe[s] that in the particular circumstances with respect to the present crisis in Kosovo . . . there are legitimate grounds for the Alliance to threaten, and if necessary, to use force."¹⁷² This threat appears to have had an impact on the FRY. Soon after it was made, the FRY agreed to comply with the Security Council's earlier resolutions.¹⁷³

The Security Council responded to this development with Resolution 1203, which endorsed and demanded full implementation of the agreements that the FRY had concluded under NATO's threat.¹⁷⁴ At the same time, however, Resolution 1203 underscored that the Security Council has "primary responsibility for the maintenance of international peace and security."¹⁷⁵ This language signaled the clear discomfort of non-NATO states with NATO's threat to use force outside the Charter system.

The humanitarian situation in Kosovo improved briefly in late 1998, but it deteriorated again at the beginning of 1999.¹⁷⁶ After a series of intense negotiations failed to resolve the conflict diplomatically,¹⁷⁷ the FRY launched a massive offensive against the Kosovar Albanians.¹⁷⁸ NATO countered with a bombing campaign that lasted seventy-seven days and ended with a military-technical agreement between NATO and the FRY.¹⁷⁹ The day after that agreement was signed, the U.N. Security Council adopted Resolution 1244, establishing in Kosovo, with the FRY's consent, an

168. See Simma, *supra* note 157, at 6.

169. S.C. Res. 1199, ¶¶ 1–2, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

170. *Id.* ¶ 16.

171. See Simma, *supra* note 157, at 7.

172. *Id.* at 7.

173. *Id.* at 7–8.

174. S.C. Res. 1203, ¶ 7, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

175. *Id.* ¶ 7.

176. Simma, *supra* note 157, at 8.

177. Wedgwood, *supra* note 166, at 829.

178. Nabati, *supra* note 166, at 784.

179. Ress & Bröhmer, *supra* note 10, at 867.

“international security presence with substantial [NATO] participation.”¹⁸⁰

2. Legal Analysis

The NATO member states did not set forth a cohesive legal position to support the enforcement action in Kosovo. The acting Legal Adviser at the U.S. State Department later explained that “no single factor or doctrine seemed to be entirely satisfactory to all NATO members as a justification under traditional legal standards.”¹⁸¹ Thus, the NATO members tended to avoid legal arguments and instead to emphasize a combination of factors that, in their minds, together justified the use of force.¹⁸² This multi-factored approach was pragmatic; by not addressing the basis for their action in international law, the NATO states avoided articulating a position that would weaken the traditional constraints on the use of force and thereby minimized the precedent-setting effects of their action.¹⁸³

180. S.C. Res. 1244, Annex 2, ¶ 4, U.N. Doc. S/RES/1244/Annex2 (June 10, 1999).

181. Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000).

182. These factors included the failure of the FRY to comply with the Security Council's Chapter VII mandates, the exhaustion of efforts to settle the conflict without resort to force, the threat to peace and security in the region, and the danger of a humanitarian disaster in Kosovo. *Id.*; see also U.N. SCOR, 54th Sess., 3989th mtg., at 4-7, U.N. Doc. S/PV.3989 (Mar. 26, 1999) (statements of the Netherlands, the United States, the United Kingdom, and France during the Security Council discussion on whether to adopt a resolution condemning the NATO action); U.N. SCOR, 54th Sess., 3988th mtg., at 4-5, 8-9, 12, 16-18, U.N. Doc. S/PV.3988 (Mar. 24, 1999) (statements of the United States, Canada, the Netherlands, France, the United Kingdom, and Germany during the Security Council discussion on the day the NATO action commenced); Press Release, Dr. Javier Solana, Secretary General of NATO (Mar. 23, 1999), available at <http://www.nato.int/docu/pr/1999/p99-040e.htm>; Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1746-47 (2000) (setting forth the array of justifications that NATO and its member states advanced for the enforcement action). A few NATO states also seemed to articulate, in very general terms, a legal argument based on humanitarian grounds. For example, during the Security Council's March 24 discussions, the U.K. representative stated that the NATO action is legally justified “as an exceptional measure to prevent an overwhelming humanitarian catastrophe.” U.N. SCOR, 54th Sess., 3988th mtg., *supra*, at 12; see also A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 734 (2004) (quoting a different articulation of the same basic U.K. position). The German representative also justified the action “on grounds of overwhelming humanitarian necessity.” See U.N. SCOR, 54th Sess., 3988th mtg., *supra*, at 12. Finally, in its briefings for the provisional measures stage of the case filed by the FRY before the International Court of Justice, Belgium articulated a legal case based on humanitarian intervention. See GRAY, *supra* note 15, at 42-43.

183. See Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 468-69 (2003) (noting that the United States, Germany, and other European countries were concerned about the potential precedent-setting effects of the NATO action); Matheson, *supra* note 181, at 301.

Yet one would be hard-pressed to demonstrate that NATO's enforcement action was consistent with the design of the U.N. Charter.¹⁸⁴ Article 53 makes clear that regional arrangements may not take enforcement actions without Security Council authorization.¹⁸⁵ In the case of Kosovo, the Security Council did deem the situation to constitute a threat to international peace and security, but it did not authorize any enforcement action.¹⁸⁶ Russia, China, and a few other states underscored this point during Security Council deliberations; they argued that NATO's action was unlawful because it lacked Security Council authorization, and they called on NATO to cease the action immediately.¹⁸⁷

Despite the inconsistency with Article 53, however, most international actors tolerated NATO's use of force in Kosovo. During the Security Council deliberations, a number of states expressed regret that military action was used and evinced their discomfort that NATO acted outside the parameters of the U.N. Charter.¹⁸⁸ Yet

184. The legality of the NATO action has been debated at great length in the legal scholarship. For purposes of this Article, it is sufficient to say that most scholars consider the action to have been inconsistent with the design of the U.N. Charter, even if they also consider it to have been otherwise lawful or legitimate. See, e.g., ABASS, *supra* note 2, at 63; INDEP. INT'L COMM'N ON KOSOVO, KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 163–70 (2000) (concluding that NATO's action was not strictly legal but was legitimate); Jose Alvarez, *Constitutional Interpretation in International Organizations*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 153–55 (J.M. Coicaud & V. Heiskanen eds., 2001) (surveying legal scholarship); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 835–36 (1999); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841, 844 (1999); W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860, 860 ("While some in our profession will strain to weave strands from various resolutions and *ex cathedra* statements of UN officials into a retrospective tapestry of authority . . . , all appreciate that NATO's action in Kosovo did not accord with the design of the United Nations Charter."); Ress & Bröhmer, *supra* note 10, at 869; Simma, *supra* note 157, at 12.

185. U.N. Charter art. 53, para. 1.

186. See, e.g., S.C. Res. 1244 Annex 2, *supra* note 180, ¶ 4.

187. See U.N. SCOR, 54th Sess., 3989th mtg., *supra* note 182, at 5 (statement of Russia invoking a violation of "Article 53, on the inadmissibility of any enforcement action under regional arrangements or by regional agencies without the authorization of the Security Council"); U.N. SCOR, 54th Sess., 3988th mtg., *supra* note 182, at 12 (statement of China that the NATO action "amounts to a blatant violation of the United Nations Charter," under which only the Security Council "can take appropriate action" in response to a threat to international peace and security); see also Barton Gellman, *U.S., Allies Order Attack on Serbia; Milosevic Rejects Appeal to Retreat; Senate Supports Airstrikes*, WASH. POST, Mar. 24, 1999, at A1 ("China's U.N. representative, Qin Huasun, said yesterday that any military action against Yugoslavia without Security Council authorization would violate the U.N. Charter."). India and the FRY echoed Russia's and China's statements in this regard. See U.N. SCOR, 54th Sess., 3988th mtg., *supra* note 182, at 13–15.

188. See, e.g., U.N. SCOR, 54th Sess., 3989th mtg., *supra* note 182, at 10 (statement of Ukraine); U.N. SCOR, 54th Sess., 3988th mtg., *supra* note 182, at 6 (statement of Slovenia); *id.* at 7 (statement of Bahrain); *id.* at 9 (statement of Malaysia); *id.* at 10–11 (statement of Argentina); *id.* at 18 (statement of Albania).

instead of condemning NATO for that action, they tended to apportion blame to Belgrade.¹⁸⁹ These states avoided the questions of whether and how NATO's action could be reconciled with the Charter system,¹⁹⁰ but a number of them underscored that the Charter system continues to establish the rule of decisionmaking in this area.¹⁹¹ These states thus took steps to endorse publicly the Charter system even as they declined to enforce it against NATO.

In the end, the Security Council voted twelve to three to reject a draft resolution introduced by Russia, Belarus, and India condemning NATO's action.¹⁹² The resolution was not expected to survive a Security Council vote, but the scale of its defeat was politically significant, for it meant that the international community was overwhelmingly unwilling to condemn NATO for taking an enforcement action outside the parameters of the U.N. Charter.¹⁹³ Likewise, the U.N. Secretary-General was unwilling to condemn NATO. In a carefully worded statement, the Secretary-General advised that "the Security Council has primary responsibility for maintaining international peace and security" and therefore "should

189. See *supra* note 188.

190. One state, Slovenia, sought to analyze the legality of the NATO action by reference to the operational system. The Slovenian representative to the United Nations explained:

[T]he draft resolution completely fails to reflect the practice of the Security Council, which has several times, including on recent occasions, chosen to remain silent at a time of military action by a regional organization aimed at the removal of a regional threat to peace and security. It is true that each case is unique. However, the requirement of consistency in the interpretation and application of the principles and norms of the United Nations Charter demands at least some indication as to the specific justification for the approach proposed by the draft resolution in the present case. Such indication is sadly lacking and, as I mentioned before, cannot be replaced by the strong words we see in the draft resolution [condemning the NATO action].

U.N. SCOR, 54th Sess., 3989th mtg., *supra* note 182, at 3. Slovenia thus made explicit that the question of whether to condemn NATO could not be answered by resort to Article 53 alone. Slovenia's invocation of the operational system, however, was not addressed by other states.

191. U.N. SCOR, 54th Sess., 3989th mtg., *supra* note 182, at 8 (statement of Malaysia); *id.* at 10 (statement of Ukraine); U.N. SCOR, 54th Sess., 3988th mtg., *supra* note 182, at 7 (statement of Gambia); *id.* at 9–10 (statement of Malaysia).

192. See U.N. Doc. S/1999/328 (Mar. 26, 1999) (draft resolution introduced by Belarus, India, and Russia). For the Security Council vote, see U.N. SCOR, 54th Sess., 3989th mtg., *supra* note 182, at 6. China, Namibia, and Russia voted to adopt the resolution; Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, the United Kingdom, and the United States voted to reject it. *Id.*

193. See Judith Miller, *Conflict in the Balkans: The United Nations; Russia's Move to End Strikes Loses; Margin Is a Surprise*, N.Y. TIMES, Mar. 27, 1999, at A7.

be involved in any decision to resort to the use of force.”¹⁹⁴ At the same time, however, the Secretary-General pinned responsibility for the failure of diplomacy on Belgrade and conceded that “there are times when the use of force may be legitimate in the pursuit of peace.”¹⁹⁵

IV. THE OPERATIONAL SYSTEM

Part III of this Article reviewed four cases in which a regional arrangement used force not in self-defense without obtaining Security Council authorization. These cases demonstrate two critical points. First, they demonstrate that the international response to a regional action is not based exclusively on whether the action is consistent with the Charter system. With the possible exception of Grenada, the regional action in each of these cases deviated from the Charter system. In Grenada, there was at least a plausible argument, in light of the Governor-General’s request, that the action was not an enforcement action within the scope of Article 53 and thus that no Security Council authorization was required. Yet of the regional actions reviewed, Grenada was the only one that the international community condemned. In each of the other cases, the international community tolerated or condoned the deviation from the Charter system. International practice in this area therefore is informed, not only by the Charter system, but also by some other set of normative principles—principles that comprise the operational system.

Second, the cases demonstrate that, notwithstanding its practice to the contrary, the international community continues to view Article 53 as setting forth the rule of decisionmaking in this area. Thus, major international actors tend to obfuscate their acquiescence or participation in a deviation. In some instances, they try to justify any deviation in terms of the Charter system (as the United States did in Cuba and Grenada). In others, they behave as if the deviation raises no questions under that system (as ECOWAS and the Security Council did in Liberia). And in still others, they publicly endorse the Charter system even as they decline to enforce it with respect to the particular deviation at issue (as the non-aligned states did in Cuba and as several states did in Kosovo). International actors do not, however, attempt to justify deviations from Article 53 by asserting that the requirement for Security Council authorization has been or

194. Press Release, U.N. Secretary-General Kofi Annan, Secretary-General’s Statement on NATO Military Action Against Yugoslavia, U.N. Doc. SG/SM/6938 (Mar. 24, 1999), available at <http://www.globalpolicy.org/security/issues/kosovo2.htm>.

195. *Id.*

should be discarded, even though at this point there is considerable precedent to that effect.

The cases reviewed in Part III thus demonstrate the coexistence of two different legal systems. The Charter system sets forth the rule that, in the *opinio juris* of most states, continues to govern: Regional arrangements may not take enforcement actions without authorization from the Security Council. Under the operational system, however, international actors may tolerate or even condone deviations from that rule in order to satisfy broader legal and policy interests. In these instances, international actors deem the deviation to be legitimate or appropriate despite the inconsistency with the Charter text. Yet even as they acquiesce or participate in the deviation, international actors take steps to maintain the integrity of the Charter system and to suppress awareness of the operational system. This Part of the Article examines the operational system. It identifies the general parameters of that system, considers its costs on the Charter system, and concludes that, so long as the Security Council remains ineffective in satisfying certain critical interests, the operational system will—and should—continue to coexist with the Charter system.

Because the operational system functions discreetly, its parameters must be inferred from international practice. That practice depends heavily on the circumstances of a case, but it nevertheless is possible to identify, in broad and general terms, the factors that inform the international response. These factors include: (1) the importance of the substantive interests at stake; (2) the circumstances in which the regional arrangement forgoes Security Council authorization; and (3) the characteristics of the acting regional arrangement.

1. *Substantive Interests at Stake.* The international community is more likely to tolerate a deviation if it perceives the enforcement action to satisfy important substantive interests.¹⁹⁶ What substantive interests will be deemed sufficiently important to warrant the (unauthorized) use of force? This depends largely on

196. It is worth underscoring that the focus of this inquiry is on the interests that the international community *perceives* to be at stake and not necessarily on the interests that are, in fact, at stake based on some empirical or objective analysis. In Liberia, for example, the enforcement action almost certainly prolonged the humanitarian crisis and substantially increased the human casualties. See Renda, *supra* note 141, at 67. Yet the international community perceived the action as contributing to peace and security in the region, and it responded by tolerating the deviation from Article 53. S.C. Res. 788, *supra* note 147 (deeming the situation in Liberia to be a threat to international peace and security); see also *supra* notes 143–51 and accompanying text. Similarly, in Grenada, the use of force likely increased, rather than decreased, the self-determination of the persons living on the island, see generally Reisman, *supra* note 123, but it was not perceived in that way, and the international community responded negatively.

context. The international community is notoriously fickle in protecting international norms; major actors sometimes but not always believe action is appropriate to cease a humanitarian crisis, to prevent an incident of nuclear proliferation, or to eliminate terrorist havens. The international response in any particular case thus turns on the context in which these norms are implicated and the extent to which they conflict with other interests.

As a general matter, however, the international community is more likely to acquiesce in an unauthorized enforcement action where the interests being satisfied relate (in some way) to the maintenance of international peace and security. The use of force to maintain international peace and security is an established component of the international legal process and is provided for in the U.N. Charter.¹⁹⁷ Of course, the Charter also requires that such actions be authorized by the Security Council, but the failure to obtain Security Council authorization does not eliminate the weight of the substantive interest.

Of the cases reviewed in Part III, the international community acquiesced in the regional action only where it perceived the action to respond to a serious threat to international peace and security. In the Cuba case, the deployment of Soviet missiles was widely understood to threaten American states, to destabilize the region, and to increase the possibility of a nuclear confrontation.¹⁹⁸ In Liberia and Kosovo, the Security Council itself determined that the humanitarian crisis threatened international peace and security (although, in Liberia, it did not make that determination until over a year after the enforcement action was initiated).¹⁹⁹ By contrast, the coup in Grenada was hardly noticed outside the region and was certainly not considered by the broader international community to constitute a threat to peace and security.²⁰⁰ Indeed, the international community perceived the enforcement action in Grenada as detracting from, rather than contributing to, world public order.

2. Circumstances of Procedural Deviation. Regional arrangements presumably forgo the authorization requirement of Article 53 because they expect not to obtain authorization. Yet the circumstances in which such authorization is forgone will vary widely and will influence the international response. It matters, for example, whether and in what way the Security Council is seized of the matter when the regional arrangement acts. It also matters whether the regional arrangement takes steps to involve the Security Council or attempts to circumvent the Council altogether. In the

197. U.N. Charter, arts. 39–42.

198. See *supra* note 71 and accompanying text.

199. See *supra* notes 143–47 (Liberia), 169–71 (Kosovo) and accompanying text.

200. See *supra* note 101.

Cuba case, for instance, a number of countries cited the U.S. request for an urgent meeting of the Security Council as evidence that the United States was working within the Charter framework insofar as was possible.²⁰¹ Finally, it matters why Security Council authorization would not be forthcoming. International actors will analyze the situation differently if they view a permanent member as being intransigent based on motives unrelated to the issue at hand than if they believe there are legitimate reasons for the Council not to authorize the use of force.

The circumstances of any particular deviation may be relatively simple or quite complex. In Liberia, for example, there was very little gamesmanship.²⁰² ECOWAS informed the Security Council of its intervention,²⁰³ the Council did not respond, and that was the end of the matter—until the Council commended ECOWAS over a year later.²⁰⁴ By contrast, in Kosovo, the circumstances of the procedural deviation were extremely complicated, with some factors weighing against acquiescence and other factors weighing in favor. On the one hand, the Security Council was seized of the matter and consciously did not authorize the use of force.²⁰⁵ This was not a case like Liberia, where the Security Council was simply disengaged.²⁰⁶ Nor was it a case like Cuba, where the Security Council could not be expected to act, given that the underlying conflict was between the two P-5 superpowers.²⁰⁷ In Kosovo, the Security Council *had* acted. It had adopted a number of resolutions expressing concern about the situation and deeming it a threat to peace and security; it simply declined to authorize the use of force.²⁰⁸ On the other hand, the lack of Security Council authorization seemed directly attributable to Russia's and China's parochial interests, rather than to the severity of the threat.²⁰⁹ Moreover, NATO appeared to operate as much as

201. See, e.g., U.N. SCOR, 17th Sess., 1023d mtg., *supra* note 71, ¶ 38 (statement of the U.K.); U.N. SCOR, 17th Sess., 1024th mtg., *supra* note 71, ¶ 11 (statement of France); *id.* ¶ 24 (statement of China).

202. See *supra* notes 143–47 and accompanying text.

203. Letter from the Permanent Representative of Nigeria, *supra* note 125.

204. S.C. Res. 788, *supra* note 147.

205. Ress & Bröhmer, *supra* note 10, at 867.

206. See *supra* notes 141–47 and accompanying text.

207. See U.N. SCOR, 17th Sess., 1025th mtg., *supra* note 55.

208. See *supra* notes 169–73 and accompanying text.

209. See, e.g., Justin Brown, *NATO Sets Precedent in Deciding to Violate a Border*, CHRISTIAN SCI. MONITOR, Mar. 25, 1999, at 8, available at 1999 WLNR 1455821 (suggesting that Russia and China opposed the use of force in Kosovo because “[b]oth countries have their own secessionist provinces: Russia has Chechnya, China has Tibet and, in its view, Taiwan”); David Callahan, *Making the Case for the Kosovo Bombing*, NEWSDAY, Mar. 28, 1999, at B05, available at 1999 WLNR 614999 (“Russian opposition to airstrikes on Serb forces has much to do with the strength of Slav nationalism within Russian politics.”); Roy Gutman, *How NATO Eclipsed the U.N. The Western Alliance Used Humanitarian Law to Take Military Action*, PITT. POST-GAZETTE, Mar. 28, 1999, at A7, available at 1999 WLNR 3166476 (describing Russia

possible within the Charter system. It deviated from Article 53 only once it realized that Security Council authorization would not be forthcoming, and then only insofar as was necessary to meet its immediate ends.²¹⁰ Both after NATO threatened to use force in October 1998 and after it actually used force in March 1999, it quickly brought the matter back into the Charter fold.²¹¹ NATO's efforts to work within the Charter system likely influenced the international response.

3. *Characteristics of the Regional Arrangement.* The international community's response will also vary based on characteristics specific to the acting regional arrangement. The international community will consider, for instance, whether that arrangement has any connection to the target of the action and whether it is subject to any controls. First, the international community is more likely to tolerate a deviation from Article 53 where the regional arrangement has a unique connection (usually based on geography) to the subject of the action. Regional arrangements are understood to have a strong interest in addressing threats that originate within their own regions, and they often have the tools necessary to respond quickly and effectively. It therefore is acknowledged that regional arrangements may be better suited than the universal organs of the United Nations to address local threats to peace and security.²¹²

At the same time, however, the U.N. Charter purposefully subordinates regional arrangements to the Security Council in matters relating to international peace and security.²¹³ Under the Charter system, the Security Council is supposed to exercise control over non-defensive uses of force by regional arrangements. Thus, where regional arrangements take enforcement actions without Security Council control (in the form of authorization), the international community will seek other checks on regional action. The level of development of the regional arrangement therefore becomes relevant. A highly developed arrangement, with a pre-existing substantive and procedural framework, is more likely to be subject to controls than an undeveloped group of states acting together as an issue-specific coalition of the willing. The pre-existing framework of a developed arrangement contributes to rational decisionmaking and lends the enforcement action some legitimacy.²¹⁴

and China as "longtime friends of Yugoslavia, dead set against any use of force by NATO").

210. See Simma, *supra* note 157, at 7.

211. See *supra* notes 174, 181–82 and accompanying text.

212. See, e.g., BENNETT, *supra* note 38, at 289–94.

213. U.N. Charter art. 53.

214. This may be the case even if the regional arrangement acts outside the scope of its own legal framework. For instance, ECOWAS's intervention in Liberia was

This is particularly the case where the regional arrangement acts against one of its own member states. In that event, the targeted member state may be deemed to have "bought into" the regional regime within which the regional arrangement acts.

Indeed, it is for reasons of legitimacy that states seeking to undertake an enforcement action often do so through regional arrangements, rather than acting on their own. In the case of Cuba, for example, the United States made an independent decision to impose the quarantine, but it looked to the OAS to endorse and participate in that action²¹⁵ because it realized that the international community would more likely tolerate an action taken by a group of states, acting within a pre-established framework, than one taken by an individual, perhaps hypersensitive state in the absence of any controls. Indeed, during Security Council deliberations, a number of states cited the strong views of the non-U.S. OAS states as evidence that the quarantine was not the act of a single, outlaw state.²¹⁶ By contrast, in Grenada, the inclusion of a strong state that was not a member of the acting regional arrangement (the United States) worked to delegitimize the action.²¹⁷ The international reaction focused heavily on the role of the United States, and many actors

deemed legitimate by almost all international actors even though it was inconsistent with its own governing framework. Substantively, ECOWAS treaties are best interpreted as not authorizing the use of military force in cases like Liberia. The ECOWAS charter focuses primarily on economic and trade issues and does not authorize ECOWAS to take enforcement actions to maintain regional peace and security. See Treaty of the Economic Community of West African States art. 2, May 28, 1975, 14 I.L.M. 1200. The Charter was amended in 1978 and again in 1981 to address matters of peace and security, but the most reasonable interpretation of those amendments is that they do not authorize the sort of enforcement action undertaken in Liberia. See Economic Community of West African States, Protocol Relating to Mutual Assistance of Defence arts. 2-4, May 29, 1981, available at http://www.iss.co.za/af/regorg/unity_to_union/pdfs/ecowas/13ProtMutualDe fAss.pdf; Economic Community of West African States, Protocol on Non-Aggression, Apr. 22, 1978, available at http://www.iss.co.za/af/RegOrg/unity_to_union/pdfs/ecowas/14ProtNonAggre.pdf; see also Levitt, *supra* note 129, at 346-47; Ofodile, *supra* note 137, at 411. Moreover, even if the ECOWAS treaties provide a substantive basis for the ECOWAS intervention, the treaties did not authorize the Standing Mediation Committee to make that decision. The Standing Mediation Committee was established to settle disputes among member states and did not have executive decisionmaking authority under the ECOWAS framework. The executive body under the ECOWAS treaties (the Authority of Heads of State and Government) endorsed the decision to intervene in Liberia only in November 1990, once the parties to the conflict agreed to a cease-fire. See ECOWAS Decision Relating to the Approval, *supra* note 142, at 111.

215. See The Soviet Threat to the Americas, *supra* note 44, at 718.

216. See U.N. SCOR, 17th Sess., 1025th mtg., *supra* note 55; U.N. SCOR, 17th Sess., 1024th mtg., *supra* note 71; U.N. SCOR, 17th Sess., 1023d mtg., *supra* note 71.

217. News Conference, *supra* note 90, at 70.

failed even to acknowledge that the OECS was involved.²¹⁸ The United States was not a member of the OECS, was not itself acting within a pre-established framework, and appeared not to be subject to any controls—and the response of the international community was fierce.

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The parameters of the operational system thus may be defined in general terms, but they remain somewhat nebulous. This system is advantageous in that it satisfies demands for action where Security Council authorization is not forthcoming. The Security Council will not always be an accurate gauge on the perception of the broader international community that an enforcement action is appropriate. And where the Security Council fails to accurately reflect the views of the broader community, that community may acquiesce in action by other means, circumventing the procedural impediments of the U.N. Charter in order to satisfy its substantive demands.

Yet the operational system also has significant costs.²¹⁹ Article 53 is an integral part of the Charter's framework for collective security. However, its prescript is weakened every time a regional arrangement deviates from it without suffering any negative consequences. Moreover, because the operational system is not acknowledged, its nebulous parameters must be inferred from the actions taken and statements made in response to particular deviations. There is not a tidy jurisprudence that defines whether a particular deviation will be condoned or condemned. As a result,

218. See U.N. SCOR, 38th Sess., 2491st mtg., *supra* note 98; U.N. SCOR, 38th Sess., 2489th mtg., *supra* note 99; U.N. SCOR, U.N. SCOR, 38th Sess., 2487th mtg., *supra* note 97.

219. Months after the NATO action in Kosovo, U.N. Secretary-General Kofi Annan famously remarked on the costs and benefits of acquiescing in non-defensive military actions without Security Council authorization:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

To those for whom the Kosovo action heralded a new era when States and groups of States can take military action outside the established mechanisms for enforcing international law, one might ask: Is there not a danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents, and in what circumstances?

Press Release, U.N. Secretary-General Kofi Annan, Secretary General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999).

there are considerable risks that different actors will interpret differently the parameters of the operational system or that some actors will fail to recognize that system altogether, and instead will interpret repeated deviations from Article 53 to mean that its prescript is simply no longer law and that regional arrangements may claim the unrestricted right to take enforcement actions without Security Council authorization.

The options for managing these costs are relatively limited. The best option is for the Charter system to become more effective, thereby eliminating the need to resort to the operational system. This has already happened to some extent with the end of the Cold War, as the Security Council more frequently takes action to address grave threats to international peace and security. Nevertheless, the permanent members of the Council continue to take very different approaches with respect to certain substantive norms, and they do not always represent the interests of the broader international community. In these instances, the ineffectiveness of the Charter system may be expected to continue. And so long as the Charter system remains ineffective in satisfying interests that, in the view of the international community, warrant the use of force, the operational system will coexist with the Charter system.

The options, then, are either to openly acknowledge the operational system and to elucidate its parameters or to maintain the status quo. The first option would entail formalizing as lawful the actions that are now tolerated deviations. This might be appealing if the parameters of the operational system could be defined with specificity. In that event, one could identify the "lawful exceptions" to Article 53 without inviting abuse by resort to vague or loose standards. Further, because the deviations would be considered lawful exceptions rather than tolerated deviations, they could occur without undermining the authority of the Charter system more generally. Unfortunately, however, the operational system may not be defined with specificity. As discussed above, it remains nebulous and heavily fact-dependent. It therefore would be difficult to formalize the system without inviting abuse.

There are, in any event, certain advantages to the status quo. Because major international actors do not acknowledge the existence of the operational system, and because they assert that the Charter system allows no exceptions, the stakes for a regional arrangement interested in pursuing an unauthorized enforcement action remain relatively high. This provides a check on regional enforcement actions taken without Security Council authorization. Moreover, although each tolerated deviation undermines the prescript of Article 53, the Charter system remains fairly resilient. The number of regional enforcement actions has not mushroomed, for example, since Kosovo. Especially in light of the potential for abuse under the

alternative option, the status quo continues to be the best arrangement for managing regional enforcement actions.

V. CONCLUSION

The Security Council increasingly looks to regional arrangements to address matters relating to international peace and security. Yet regional arrangements also have a history of acting without Security Council authorization. This Article has demonstrated that, in the area of regional enforcement actions, two different legal systems govern. The Charter system requires that any regional enforcement action be authorized by the Security Council. That system is endorsed by international actors and, in their *opinio juris*, sets forth the general rule for decisionmaking. Under the operational system, however, international actors may tolerate deviations from the Charter system in order to satisfy broader legal and policy interests. Whether the international community will condone or condemn an unauthorized regional action thus depends, not only on the Charter system, but also on the nebulous operational system.

The operational system allows the international community to achieve its immediate substantive interests even when the Charter mechanism fails. This may be critical, but it is not without its costs. The prescript of Article 53 and the more general Charter framework for collective security are undermined each time the international community acquiesces in a regional enforcement action that has not been authorized by the Security Council. Nevertheless, the status quo—in which the operational system functions discreetly to permit deviations from Article 53—remains the best available option for managing the international community's varied interests. An appreciation for the role and parameters of the operational system will therefore continue to be essential to understanding the application of law in this area.
