

4-1-1984

The United States Action in Grenada: An Exercise in Realpolitik

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Recommended Citation

John M. Karas and Jerald M. Goodman, *The United States Action in Grenada: An Exercise in Realpolitik*, 16 U. Miami Inter-Am. L. Rev. 53 (1984)

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I. INTRODUCTION

Dawn in the Caribbean. Peaceful waters bathe white, picturesque beaches framed by rugged mountains of lush tropical vegetation. The farms, villages and jungles of Grenada sleep. In the towns, the winding alleys are empty. The inhabitants of the small wooden houses which clutch the hillsides are silent. As the last vestiges of nightfall wane, however, the tranquility is violently shattered. At dawn on Tuesday, October 25, 1983, approximately 2,000 troops from the United States, Jamaica, Barbados, Dominica, St. Lucia, St. Vincent, and Antigua launch an assault upon the island paradise of Grenada.¹

1. The initial assault was a two-prong attack, composed of 500 U.S. Marines landing at

Prompted by concern for the safety of approximately one thousand U.S. citizens, the U.S. government closely monitored the situation in Grenada following the bloody putsch in which Prime Minister Maurice Bishop was assassinated.² Mr. Bishop, who seized power in a 1979 coup d'etat, was deposed and placed under house arrest by security forces led by General Hudson Austin. Several days later, on October 19th, Bishop was freed by an unarmed band of supporters, but, was recaptured almost immediately and then murdered. General Austin imposed a curfew, closed the island's only commercial airport, and severed most communications with the outside world.³ Neighboring Caribbean island states also watched the situation with increasing alarm.

On October 21st, the members of the little-known Organization of Eastern Caribbean States (OECS), convened in Barbados.⁴ The OECS states, relying upon article 8 of the OECS treaty,⁵ which provides for collective measures to protect the common security of its members, decided to solicit support for an intervention in Grenada. Both Barbados and Jamaica responded positively to the OECS request.⁶ On October 24th, the United States joined the group and agreed to lend the necessary military assistance.

Thus, the scenario was complete for a global superpower, in conjunction with six other states, to invade one of the world's smallest independent nations.⁷ Naturally, the appearance of such

Pearls Field on the northern end of the island, and 1,000 marines in the south at Point Salines. Later, the American forces were joined by an additional 400 U.S. troops and 300 military personnel from the Caribbean states. N.Y. Times, Oct. 26, 1983, at A1, col. 6.

2. Bernard Gwertman, *Fear of 'Another Iran' Haunted White House*, N.Y. Times, Oct. 26, 1983, at A1, cols. 2-4. The seriousness of the threat to U.S. citizens on Grenada, however, has been questioned. See John T. McQuiston, *School's Chancellor Says Invasion was Not Necessary to Save Lives*, N.Y. Times, Oct. 26, 1983, at A20, cols. 5-6. Nevertheless, both Britain and Canada, two countries with significant numbers of citizens on Grenada, arranged for the air evacuation of their nationals prior to the October 25th invasion. Their evacuation plans were scuttled, however, by the governments of the invading states. John Burgess, *Canada, Britain Arranged Flights From Grenada for Their Citizens*, Wash. Post, Oct. 27, 1983, at A8, cols. 1-5.

3. Wall St. J., Oct. 21, 1983, § 1 at 1, col. 3; Wall St. J., Oct. 25, 1983, § 1 at 1, col. 3.

4. Pursuant to article 2 of the Treaty Establishing the Organization of Eastern Caribbean States [hereinafter cited as OECS Treaty], Antigua, Dominica, Grenada, Montserrat, St. Kitts/Nevis, Saint Lucia and Saint Vincent and the Grenadines are the Member States of OECS.

5. Article 8(4) of the OECS treaty provides for "collective defense and the preservation of peace and security."

6. The Economist, *supra* n. 3.

7. Grenada, with a population of approximately 110,000, and a land area of only 133 square miles, is, as aptly noted by President Reagan, about twice the size of the District of

disproportionate combatants resulted in a flurry of condemnations of Washington's course of action.⁸ Despite the American government's position that the operation was both necessary to protect its nationals and justified as a "collective regional action"⁹ to fill a "vacuum of responsible governmental authority,"¹⁰ world public opinion questioned Washington's resort to military intervention.

This comment examines the legal theories and arguments which are applicable in both the defense and condemnation of the Grenada invasion. Indeed, the legality of military intervention has long been debated by classical scholars of international law. The Grenada incident presents an opportunity to analyze the vitality of the theories of customary international law in a contemporary setting. Moreover, the situation stimulates inquiry into the application of the Charters of the United Nations (UN) and the Organization of American States (OAS) in the volatile political tinderboxes of the eighties. The Grenada invasion may offer some suggestions regarding the future vitality and usefulness of those documents, and the present role of those organizations vis-à-vis regional and sub-regional blocks of states. Grenada 1983 may invite new interpretations of these organizational charters which are more consistent with superpower aims and political realities. The aftermath of the Grenada invasion presents an illustration of the initial actions, reactions and interworkings of the international organizations confronted with a crisis.

Columbia. *Transcript of Address by President on Lebanon and Grenada*, N.Y. Times, Oct. 25, 1983, at A9, cols. 1-6.

8. The United States action was criticized not only by Nicaragua, Cuba, and the Soviet Union, but also by American allies such as Canada, Great Britain, France, West Germany, Italy, and most Latin American States. See, N.Y. Times, Oct. 26, 1983, at A17, cols. 1-2; N.Y. Times, Oct. 26, 1983 at A19, col. 1; N.Y. Times, Oct. 27, 1983 at A20, cols. 4-6; N.Y. Times, October 27, 1983, at A21, cols. 1-4; Wash. Post, Oct. 27, 1983 at A8, col. 4; Wash. Post, Oct. 27, 1983 at A8, cols. 1-5; Wash. Post, October 27, 1983 at A9, cols. 1-4. In addition, the United States was condemned by fifteen of the members of the Organization of American States (OAS) at an emergency meeting of the organization on October 26th. Wash. Post, Oct. 27, 1983, at A9, cols. 1-3. Indeed, the world-wide anti-American sentiment was reflected by the lopsided vote in the United Nations' General Assembly, in which a resolution deploring the Grenada invasion was adopted by a vote of 108 to 9 with 27 abstentions.

9. Statement of Jeanne J. Kirkpatrick, (United States of America), S/PV.2491, 28 Oct. 1983, 28 at 37.

10. *Id.* at 38.

II. BACKGROUND

In 1979, the New Jewel Movement¹¹ came to power after the first revolution in the English-speaking Caribbean under the leadership of Prime Minister Maurice Bishop.¹² Bishop overthrew the government of Prime Minister Eric Gairy, which had been in control since Grenada's independence from Great Britain in 1974, by seizing the government radio station and proclaiming the authority of a revolutionary government in a virtually bloodless coup.¹³ In attaining popular approval, Bishop promised a corruption-free society based on a constitutional government.¹⁴ The New Jewel Movement never achieved its aims, however, as popular elections were never held, the press was stifled and any effective political opposition was prohibited.¹⁵

Once in power, Bishop readily accepted Cuban aid,¹⁶ and, during his rule, both Cuba and the Soviet Union established a strong presence in Grenada.¹⁷ Pursuant to a 1979 treaty, Cuba agreed to provide between \$40 and \$60 million in funds, labor and materials to assist in the construction of a large new airport with a 9,000 foot-long runway.¹⁸ With Cuban and Soviet assistance, Bishop rebuilt the one-kilowatt Radio Grenada into a 75-kilowatt station that had the capacity to broadcast throughout the Caribbean.¹⁹ The government also shifted news sources from the British Broadcasting Corporation to the Soviet TASS and Cuba's Prensa Latina and renamed the station "Radio Free Grenada."²⁰ Grenada developed its military capacity considerably pursuant to military agreements with Cuba, the Soviet Union and North Korea.²¹ In con-

11. The word "Jewel" is an acronym for the terms "Joint Endeavor for Welfare, Education and Liberation." N.Y. Times, Oct. 21, 1983, at A8, col. 2.

12. N.Y. Times, Oct. 20, 1983, at A3, col. 1.

13. N.Y. Times, Oct. 21, 1983, at A8, col. 2.

14. *Id.* at A8, col. 1.

15. *Id.* In fact, Bishop suspended the 1973 Grenadian Constitution in 1979 by unilaterally legislating through the promulgation of a series of "People's Laws". See American Bar Association, Section of International Law and Practice, Report of the Committee on Grenada, January 25, 1984. (Unpublished Report) [hereinafter cited as A.B.A. Report].

16. N.Y. Times, Oct. 21, 1983 at A8, col. 2.

17. N.Y. Times, Oct. 20, 1983, at A3, col. 1.

18. A.B.A. Report, *supra* note 15 at 3.

19. *Id.* at 2.

20. *Id.*

21. *Id.* at 3. In fact, by the fall of 1983, Grenada had a regular army of 600 men and a militia estimated to include between 1,500 and 3,000 men. Cuba and the Soviet Union had provided Grenada with military equipment, sophisticated arms and military and intelligence training. Further, plans discovered during the invasion disclosed an intention to increase

trast, Bishop had remained distant to the United States government, refusing to establish diplomatic relations and claiming that the United States had tried to destabilize his government.²² In the spring of 1983, however, Bishop changed his policy and travelled to Washington where he spoke with several members of the Reagan administration in an attempt to justify his program for Grenada.²³ On June 4, 1983, Bishop announced the establishment of a five-member commission to draft a new constitution.²⁴

During the summer of 1983, dissension surfaced and a split within Grenada's Central Committee seemed imminent.²⁵ At the committee meetings from September 14 through 16, a proposal to shift power from Bishop to Deputy Prime Minister Bernard Coard was approved.²⁶ The proposal to depose Bishop was reportedly ratified by the rest of the ruling party on September 25th.²⁷

On Wednesday, October 12, 1983, the disputes over Bishop's willingness to share his power with other members of the Central Committee continued.²⁸ Several Committee members, led by Deputy Prime Minister Coard, seized control and placed Bishop under house arrest at his official residence.²⁹ Several other cabinet ministers and political leaders who were sympathetic to Bishop's views and policies were also detained when the balance of power shifted.³⁰ On Friday, October 15, 1983, Deputy Prime Minister Coard resigned, reportedly in an attempt to dispel rumors that he was involved in a plot to kill Bishop.³¹ Bishop had apparently been given twenty-four hours to resign from his position as Prime Minister on Wednesday, October 13th, but, failed to do so.³²

On Sunday, October 16, 1983, Major Liam Cornwall, a military

Grenada's armed forces to between 7,000 and 10,000 men in the near future.

22. N.Y. Times, Oct. 21, 1983, at A8, col. 2.

23. *Id.*

24. N.Y. Times, Oct. 17, 1983, at A10, col. 2.

25. A.B.A. Report, *supra* note 15 at 3-4. The Minutes of the sessions of the Central Committee in both July and August exhibited that dissension. In fact, at the committee meeting on August 29th, Bishop was openly denounced for contributing to the political split and for his failure to uniformly and staunchly support the Marxist-Leninist position. *Id.*

26. *Id.* Deputy Prime Minister Coard had long criticized Bishop for failing to socialize Grenada fast enough and for encouraging the development of private enterprise. N.Y. Times, Oct. 18, 1983, at A3, col. 4.

27. A.B.A. Report, *supra* note at 4.

28. N.Y. Times, Oct. 15, 1983, at A5, col. 5.

29. N.Y. Times, Oct. 18, 1983, at A3, col. 4.

30. N.Y. Times, Oct. 20, 1983, at A3, col. 2.

31. N.Y. Times, Oct. 17, 1983, at A10, col. 2.

32. *Id.*

leader and the Grenadian Ambassador to Cuba, read a statement on Radio Free Grenada stating that the army had taken control and that Bishop had been deposed.³³ On Monday, October 17, 1983, the commander of the military, General Hudson Austin, stated that Prime Minister Bishop was "at home and quite safe" but would be turned out of office unless he shared his power with Deputy Prime Minister Coard, in a broadcast on the official Grenadian radio station.³⁴ The Grenadian army, numbering approximately three thousand soldiers had been mobilized by a broadcast ordering all members of the security forces to report to their bases.³⁵

On Wednesday, October 19, 1983, a crowd of approximately four thousand pro-Bishop demonstrators protested in the streets of the capital, St. George's, demanding Bishop's release.³⁶ When no response was forthcoming, they swarmed toward Bishop's official residence where they freed him by force.³⁷ Bishop and his supporters then proceeded to the army headquarters at Fort Rupert where Bishop convinced the soldiers to put down their weapons.³⁸ Within moments, an armed personnel carrier, driven by Deputy Prime Minister Coard's hard-line supporters pulled up, pointed its high-powered machine gun at the crowd and then fired randomly into the masses.³⁹ Once the crowd was under the military's control, Bishop and several of his cabinet members and sympathetic union leaders were seized, removed from the public's view, and executed.⁴⁰

Within hours, General Hudson Austin declared himself to be the head of Grenada's new Revolutionary Military Council.⁴¹ Austin then imposed a twenty-four hour, shoot-on-sight curfew.⁴² The Council also closed the airport, decreed the imposition of strict censorship of all publications and banned all foreign journalists from entering Grenada.⁴³ Several Caribbean nations, including Ja-

33. *Id.* at A1, col. 3.

34. N.Y. Times, Oct. 18, 1983, at A3, col. 4.

35. N.Y. Times, Oct. 17, 1983, at A10, col. 2.

36. N.Y. Times, Oct. 20, 1983, at A3, col. 1.

37. *Id.* at A3, col. 2.

38. N.Y. Times, Oct. 21, 1983, at A8, col. 5.

39. Time, Nov. 14, 1983, at 21, col. 3.

40. Wash. Post, Oct. 21, 1983, at A25, col. 2.

41. *Id.* at A1, col. 1.

42. *Id.* at A25, col. 1. The curfew was not absolute in that it allowed workers in "essential services" to move around the island if they obtained passes to do so. *Id.*

43. N.Y. Times, Oct. 24, 1983, at A13, col. 2.

maica and Barbados, publicly denounced the events in Grenada and refused to recognize the Council's authority.⁴⁴

On Friday, October 21, 1983, the seven-nation Organization of Eastern Caribbean States met in Barbados to discuss the events in Grenada.⁴⁵ The representatives of the member states unanimously agreed that the situation in Grenada warranted OECS action; however, only four members voted in favor of military action, pursuant to article 8 of the OECS treaty, and two members abstained.⁴⁶ Grenada, a founding member of the organization, was not represented at the discussions in Barbados.⁴⁷ Allegedly with the safety of approximately one thousand U.S. citizens on Grenada in mind, the United States government ordered a ten-ship, 1,900-man task force, originally headed for Lebanon, to proceed towards Grenada to be available for a potential evacuation of United States citizens.⁴⁸

On Saturday, October 22, 1983, two United States diplomats were permitted onto Grenada to investigate any potential dangers to United States citizens.⁴⁹ The government radio station broadcast statements that the island was calm, but, repeatedly warned that a "military invasion of our country is imminent."⁵⁰ General Austin told the Chancellor of the Medical School that the curfew would be lifted at six A.M., Monday, October 24th, and that the airport would be opened and "everyone would be free to come and go."⁵¹ Early Saturday, the Organization of Eastern Caribbean States formally requested the United States and other friendly nations to participate in a regional security force which was being created under article 8 of their charter to invade Grenada and remove the potential threat to the peace and security of the region.⁵² The force was allegedly created upon the invitation of Grenada's Governor General, Sir Paul Scoon, "to enter Grenada and restore order."⁵³

On Sunday, October 23, 1983, the Revolutionary Military

44. Wash. Post, Oct. 21, 1983, at A25, col. 2.

45. N.Y. Times, Oct. 24, 1983, at A13, col. 2.

46. A.B.A. Report, *supra* note 15, at 5.

47. *Id.*

48. N.Y. Times, Oct. 22, 1983, at A1, col. 3.

49. N.Y. Times, Oct. 23, 1983, at A1, col. 3.

50. *Id.*

51. *Id.* at A12, col. 1.

52. N.Y. Times, Oct. 28, 1983, at A16, col. 6.

53. A.B.A. Report, *supra* note 15 at 5.

Council placed the armed forces on alert and called upon the militia reserves in anticipation of an imminent invasion by the foreign forces stationed off the Grenadian coast.⁵⁴ The Council agreed to allow several charter flights from Barbados to land on Grenada the next day to evacuate British and Canadian citizens.⁵⁵ The charter line cancelled the flights, however, when it was notified by the Caribbean leaders who were meeting in Barbados that they had decided to suspend all air and sea links with Grenada.⁵⁶

At approximately two P.M. on Monday, October 24, 1983, the United States Embassy in Barbados received a diplomatic note from General Austin promising that all United States citizens in Grenada would be safe.⁵⁷ The telex explicitly stated that "the lives, well-being and property of every American . . . [is] fully protected and guaranteed by our government." The message continued by affirming that "any American . . . who desires to leave Grenada for whatever reason can freely do so . . . through our airport and commercial aircraft."⁵⁸ Although the airport was still closed at that point, the message promised that Grenada would be responsive to any flights, commercial or charter, and that it would "facilitate them in any way."⁵⁹

The telex went on to state that "the Revolutionary Military Council . . . has no desire or aspiration to rule the country."⁶⁰ It also noted that measures were being taken to establish a "fully constituted civilian government within 10 to 14 days."⁶¹ In fact, under article 57 of the Grenada constitution, authority on the island was vested in the Governor General, Sir Paul Scoon.⁶²

On Monday night, the United States formally agreed to join the multi-national force in invading Grenada.⁶³ At approximately five A.M. on Tuesday, October 25, 1983, the multi-national force began its assault on the island.⁶⁴

54. N.Y. Times, Oct. 28, 1983, at A16, col. 4.

55. Wash. Post, Oct. 24, 1983, at A4, col. 4.

56. See *supra* note 2.

57. Wash. Post, Oct. 27, 1983, at A8, col. 2.

58. U.N. SCOR (2487 7th Mtg) at 43 (1983).

59. *Id.*

60. *Id.*

61. *Id.* at pp. 44-45.

62. *Id.*

63. Wash. Post, Oct. 27, 1983, at A9, col. 3.

64. N.Y. Times, Oct. 28, 1983, at A16, col. 6.

III. THE INITIAL POSITION OF THE UNITED STATES

During his speech of Thursday, October 27, 1983,⁶⁵ President Reagan stated that the United States had participated in the invasion of Grenada at the "urgent request" of the Organization of Eastern Caribbean States.⁶⁶ The stated purpose of the invasion was to "assist in the restoration of law and order and of governmental institutions to the island of Grenada."⁶⁷ The President found that protecting the lives and personal safety of American citizens was of such "overriding importance" as to justify military action.⁶⁸

Secretary of State George P. Shultz held a press conference on October 25th during which he noted that there was "no responsible government" in Grenada, leading figures had been arrested, and there was a shoot-on-sight curfew in effect.⁶⁹ He stated that the basis of the Reagan administration's concern for the safety of United States citizens on Grenada was that there was a dangerous "vacuum of authority" in conjunction with violent conditions.⁷⁰ President Reagan stated that, although there was no present danger to the Americans on the island, many wanted to leave, the airports were closed and he felt that it was necessary to take decisive action rather than to wait for something to happen.⁷¹

The United States' legal position on the validity of the invasion is based on two different and distinct theories. The primary justification advanced by the Reagan administration was that the U.S. forces were participating in an act of collective self-defense under article 8 of the OECS charter.⁷² In a State Department legal memorandum, the U.S. took the position that the invasion was "consistent with" both the UN and OAS charters because each allows for "collective action pursuant to regional security treaties in response to threats to peace and security."⁷³

65. N.Y. Times, Oct. 26, 1983, at A1, col. 5.

66. President Reagan spoke in a nationally televised address on the evening of October 27, 1983. A verbatim transcript of the speech appeared in N.Y. Times, Oct. 28, 1983, at A9, cols. 1-6.

67. *Id.*

68. Wash. Post, Oct. 26, 1983, at A7, col. 1.

69. *Id.*

70. N.Y. Times, Oct. 26, 1983, at A18, col. 3.

71. *Id.*

72. Wash. Post, Oct. 26, 1983, at A7, col. 4.

73. U.N. SCOR, U.N. Doc. 2487 at 96, 10/25/83.

The OECS contended that it was responding to the fact that "conditions in institutions of authority had degenerated [and] that a climate of fear, anxiety and acute danger to personal safety existed on the island."⁷⁴ It felt that the "dangerous vacuum of authority constituted an unprecedented threat to the peace and security of the entire Eastern Caribbean."⁷⁵ In her address to the UN Security Council, Mrs. Kirkpatrick, the U.S. Ambassador, stated that the action was "reasonable and proportionate" to the threat posed by the deterioration of authority in Grenada and the threat it posed to the region.⁷⁶

Mrs. Kirkpatrick also claimed that the invasion was "consistent with the purposes and principles" of both the UN and OAS charters because "it aims only at the restoration of conditions of law and order fundamental to the enjoyment of basic human rights."⁷⁷ The concept of intervention to protect human rights is central to the second U.S. justification: the necessity of protecting U.S. citizens.⁷⁸ While the administration noted that this rationale would justify a "limited evacuation mission" it apparently realized that it could not justify the occupation of the entire island pending the creation of a new government.⁷⁹

IV. SELF-DEFENSE

A. Introduction

The content of a legal norm evolves in a changing society. Treaties and agreements which attempt to create such norms must be amended, officially re-interpreted or revoked to retain their ability to govern in a changing world. The body of international law pertaining to the use of force has remained largely unchanged in the last 35 years and the instruments which created that body of law, although frequently discussed and debated, have substantially survived in their original form. Eventually, when the legal framework, and therefore, the norms it encompasses, becomes outdated, failing even to provide for some of its explicitly-stated central purposes, state practice will reflect a wanton disregard for the limita-

74. N.Y. Times, Oct. 27, 1983, at A22, col. 1.

75. See *supra* note 73 at 96.

76. *Id.*

77. *Id.*

78. *Id.*

79. See *supra* note 74 at col. 2.

tions imposed and nations will act as they choose leaving discussions of "legality" and potential justifications for scholars and theoreticians helplessly gazing at the glowing aftermath.

This may be precisely the fate of the United Nations⁸⁰ in its role as global peacekeeper. Today's world is based on global superpowers dominating their zones of influence by whatever means necessary while maintaining only the facade of international comity and respect for traditional norms of international law. The United States participation in the Grenada invasion exhibits just such erosion of the traditional respect for international obligations and rules of conduct when they clash with foreign policy objectives.

B. *The Customary Law Right of Self-Defense*

Self-defense is an exception to the general prohibition on the use of force. It is, therefore, one criterion to determine the "legality" of a state's actions. A legitimate exercise of the right of self-defense provides a certain amount of justification for a use of force which would otherwise violate international law. Bowett noted that the purpose of the right of self-defense is "to justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states."⁸¹

Grotius stated that the origin of the right was in "the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor."⁸² As the law developed, self-defense was a wide concept which was virtually unrestricted. The natural law right of self-defense allowed "any individual, or a state, to defend his person, property, or honor against a real or imminent attack."⁸³

The basis of the modern concept of the right of self-defense is derived, in large part, not from the writings of philosophers and theorists, but rather from a protest note from U.S. Secretary of State Daniel Webster to the British government in the *Caroline*

80. The same rationale applies to every regional and sub-regional organization, like the OAS and the OECS which performs similar functions in attempting to maintain peace and security in its section of the globe.

81. BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW* 270 (1958).

82. GROTIUS, *DE JURE BELLI AC PACIS* 172 (F. Kelsey trans. 1925).

83. VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, Bk. II, ch. IV (1758) in *THE CLASSICS OF INTERNATIONAL LAW* 130 (G. Fenwick trans. 1916) (J.B. Scott ed.).

incident in 1837.⁸⁴ The note stated that the British government had the obligation to prove "[the] necessity of self-defense, instant, overwhelming, leaving no choice of means, and leaving no moment for deliberation"⁸⁵ to justify their actions in destroying an American ship. Webster's note also required that the act be shown to be proportional to the danger, in expressly expecting the British to show that they "did nothing unreasonable and excessive; since the act justified by the necessity of self-defense, must be limited to that necessity, and kept clearly within it."⁸⁶

Customary international law permitted anticipatory action in response to imminent danger.⁸⁷ The *Caroline* doctrine was interpreted to allow preventative action where self-defense was found to constitute self-preservation.⁸⁸ One commentator, in defining self-preservation, which he considered to be synonymous with the right of self-defense, noted that "a state may defend itself, by preventive [sic] means if in its conscientious judgment necessary, against attack by another State, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended."⁸⁹ According to some scholars, the customary international law right of anticipatory self-defense was allegedly qualified by the dearth of occasions where it was relied upon in the period from 1920 to 1939.⁹⁰

The customary international law right of self-defense was also limited by the requirement that the amount of force used must be proportional to the intensity of the challenge and the immediacy of the danger.⁹¹ Although this limitation is an indispensable component of the traditional justification for self-defense, it was neither

84. The underlying facts in the *Caroline* case were that a U.S. ship, the *Caroline*, was standing by in American waters to carry insurgents who were preparing to attack Canada. During the night of December 29, 1837, British forces crossed the Niagara river and destroyed the ship. Jennings, *The Caroline and the McLeod cases*, AM. J. INT'L L. 32 (1938).

85. H.R. EXEC. DOC. NOS. 302 & 73, 25th Cong., 2d Sess. (1837).

86. *Id.*

87. BOWETT, *supra* note 81 at 31, 58, 256; WALDOCK, *The Regulation of the Use of Force by Individual States in International Law* 81 RECUEIL DES COURS 463 (Hague Academy of Int'l L.) (1952); P. JESSUP, A MODERN LAW OF NATIONS 166 (1948).

88. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257 (1963). The right of self-preservation allows states to resort to force to protect their existence as states. It has been interpreted to be a narrower form of necessity justifying acts of war. *Id.* at 41-43.

89. WESTLAKE, INTERNATIONAL LAW 299 (1904).

90. BROWNIE, *supra* note 88 at 259. Brownie also noted its absence in treaties of mutual assistance during that period. *Id.*

91. *Id.* at 261.

mentioned nor applied with any frequency until the period of the League of Nations.⁹² Professor Waldock thus found that there were three main requirements for a legitimate exercise of self-defense under customary international law

- (1) An actual infringement or threat of infringement of the rights of the defending State;
- (2) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement; and,
- (3) Acts of self-defense strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.⁹³

In applying this test to determine whether the U.S. action in Grenada was within the parameters of the customary law right of self-defense it appears clear that there are some serious questions as to whether a use of force was justified even under this least strenuous barrier. First, was any right of the U.S. actually infringed or even threatened? If not, can the U.S. rely on the threat to the region and therefore to the hemisphere, of which the U.S. is an integral part? The U.S. position is centered around the threat to the region created by the "vacuum of responsible authority" in Grenada coupled with the violent conditions and the dominant position of Grenada's armed forces in the region.⁹⁴ In light of the discovery of warehouses filled with Russian rifles and military supplies and the presence of over six hundred Cuban advisors ready to "defend the fatherland"⁹⁵ in response to the invasion, the position is not totally untenable. Further, the extension of Grenada's military presence to the nearby islands exhibited a certain amount of preparation for attempts to strengthen its position in the Eastern Caribbean.⁹⁶ The imminence of the threat is, however, a question

92. *Id.*

93. Waldock, *supra* note 87 at 463-64. Waldock reached this conclusion after discussing the vitality of the standards set out in the *Caroline* case and noting that those standards set the proper limits of a "plea of self-defense." *Id.*

94. N.Y. Times, *supra* note 21. If one considers the minute forces of each of the Eastern Caribbean states next to those of Grenada, the imbalance is indeed in threatening proportions. See statement of Miss Charles (Dominica) S/PV 2489 at 7, 26 October 1983.

95. N.Y. Times, *supra* note 65. The Cubans present on Grenada at the time of the invasion were prepared to fight to the death to "defend the fatherland" after they received a communication from Fidel Castro on October 25, 1983. *Id.*

96. Wash. Post, *supra* note 57. U.S. forces captured small bands of Grenadians on the nearby islands which are approximately three and five miles off the coast of Grenada. Although they didn't actually amount to anything that could be construed as a potential invasion force, their capture (or discovery) mandates consideration of the possibility.

of fact as the Revolutionary Military Council barely had control of Grenada and was, in all likelihood, in no position to begin attacking other nations.⁹⁷ Further, the only mobilization of the military was to fend off an "imminent invasion" by the U.S. forces standing by offshore for a potential evacuation of U.S. citizens.⁹⁸

It seems likely, however, that if the Council (either alone or with Cuban and/or Soviet input) determined that its absolute grip on the power in Grenada provided a perfect opportunity to expand its influence in the region there would be nothing to really hinder it.⁹⁹ The real question raised under Waldock's test is whether an all-out invasion was proportional to the threat posed by even a hypothetical imminent attack. A positive response is inherently premised upon the belief that Grenada not only had the ability to launch a similar attack on one of its neighbors, but that it had already made the preparations to do so.¹⁰⁰ Even in light of Grenada's burgeoning military might, revolutionary leadership and encouragement from expansionist allies, it seems unlikely that the revolutionary council could have mounted a massive attack on even its closest neighbor. Further, even though Grenada possessed military forces approximately equivalent to those of the invasion force, the bulk of those soldiers were necessary to impose the curfew and maintain control of the population. It is, therefore, difficult to contend that the invasion was in response to a truly *imminent* threat and that it was in fact *proportional* to that threat and thus can be justified as an act of self-defense under customary international law.

Although customary international law included the ability to engage in anticipatory self-defense, it provided no justification for mutual defense unless such action was pursuant to an agreement or some sort of proximate relationship with the threatened party.¹⁰¹ Some scholars assert that each participant in an act of collective defense must have a right to act in such a manner indi-

97. The imposition of the 24-hour, shoot-on-sight curfew clearly shows the extreme measures they had to take to retain their control over the populous, N.Y. Times, *supra* note 43.

98. N.Y. Times, *supra* note 54.

99. Therefore, the second requirement of Waldock's test is easily met in that Grenada was unable at that point in time to "use its own legal powers to stop or prevent the infringement." Waldock, *supra* note 87 at 463-64.

100. An argument can be made, however, that preventative action is permissible under the third prong of the test, but, traditional applications of this theory require the threat to be truly imminent.

101. BOWETT, *supra* note 81 at 202.

vidually.¹⁰² Alternatively they point to state practice, like that of the U.S. pursuant to the Monroe Doctrine, wherein a proximate relationship was inferred for any use of force in the hemisphere under the belief that U.S. "security was so dependent on the security of the American Continent as a whole that any attack upon that continent would jeopardize U.S. interests to such an extent as to afford to the United States the right of self-defense."¹⁰³ Although this theory has been extended to cover a wide variety of actions, it is probably inapplicable to the U.S. action in Grenada as the underlying infringement of rights is tenuous.

C. *Self-Defense Under the U.N. Charter*

1. GENERAL PROHIBITION ON THE USE OF FORCE

The preamble to the U.N. Charter reflects the drafter's central goals — "to save succeeding generations from the scourge of war" and "to insure . . . that armed force shall not be used, save in the common interest."¹⁰⁴ In order to accomplish those objectives, article 2(3) requires all members to "settle their international disputes by peaceful means in such a manner that international peace and security . . . are not endangered."¹⁰⁵ Article 2(4) expressly promulgates the norm prohibiting unilateral uses of force in stating that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations."¹⁰⁶ Although this prohibition appears to be virtually absolute, state practice and scholarly interpretations have weakened its value as a constraint.

Scholars and theorists contemplating the law pertaining to the use of force in the post-UN Charter era are sharply divided into two contrasting schools of thought. The restrictionists, scholars such as Brownlie, Kelsen and Jessup, assert that the UN Charter must be read in a narrow, literal fashion and that force may be

102. *Id.* at 206. Bowett, conversely, also takes the right further, however, in noting that any state can invoke their right of self-defense to defend "the substantive rights for which self-defense is a permissible means of protection." *Id.* This may be interpreted to allow any state to use any means to defend any of these rights anywhere as long as they do so within the parameters of the *Caroline* test.

103. *Id.* at 209.

104. U.N. CHARTER PREAMBLE.

105. U.N. CHARTER, art. 2(3).

106. U.N. CHARTER, art. 2(4).

used only in conformity with charter constraints and mechanisms. The realist position, as espoused by such commentators as Bowett, Waldock and McDougal and Feliciano, is that due to political realities, changes in the methods of using force and the frequent ineffectiveness of the charter mechanism, the provisions prohibiting the use of force must be interpreted flexibly.

The restrictionists assert that any use of force by a member state is unlawful, regardless of the dangers or disputes which provoked it, unless (1) it is in justifiable self-defense against an "armed attack", or (2) it is part of a "collective action" pursuant to a decision of the relevant organ of the United Nations.¹⁰⁷ Professor Brownlie buttressed this view on the drafter's central concern with controlling unilateral uses of force. He noted that:

. . . the general tendency was towards a restrictive interpretation of any permission in relation to the use of force. Delegations were concerned that the Organization should have a near monopoly [on the] use of force and the wide terms of paragraph 4 reflect the emphasis on prohibition rather than permission.¹⁰⁸

Conversely, the realists contend that individual intervention is available to protect rights which are illegally denied or to defend nationals or territory when collective forms of relief are unavailable.¹⁰⁹ Succinctly stated, they assert that "[i]f the collective organization, through a fault in its organizing instrument, leaves a gap where the use of force is necessary but the collective organization is impotent to act, then the legal right to use force must, in such instance, revert back to the members."¹¹⁰

2. THE SELF-DEFENSE EXCEPTION - ARTICLE 51

Article 51 of the UN Charter provides the principal exception to the general prohibition on the use of force. The article explicitly allows member states to retain their "inherent right of individual or collective self-defense."¹¹¹ The terms of the article expressly attempt to limit that right, however, as the article provides that a

107. See R.J. VINCENT, *NONINTERVENTION AND INTERNATIONAL ORDER* 310 (1974).

108. BROWNLIE, *supra* note 88 at 270. He also noted that several of the drafters wanted to require the organization to authorize any uses of force before they would be considered lawful.

109. See J. STONE, *AGGRESSION AND WORLD ORDER* 94-95 (1958).

110. A. THOMAS & A. THOMAS, *NON-INTERVENTION, THE LAW AND ITS IMPORT IN THE AMERICAS* 208 (1956).

111. U.N. CHARTER, art. 51.

use of force in self defense is only permissible where "an armed attack occurs against a Member of the United Nations" and is restricted to the period "until the Security Council has taken measures necessary to maintain international peace and security."¹¹² The provision also requires member states to notify the Security Council immediately upon exercising this right and attempts to maintain the autonomy of organizational action in stating that acts of self defense "shall not in any way affect the authority and responsibility of the Security Council . . . to restore or maintain international peace and security."¹¹³

Because article 51 explicitly recognizes the existence of an "inherent right" of self-defense, realist commentators contend that the phrase itself accepts and incorporates the customary international law right of self-defense into the UN Charter System.¹¹⁴ They point to the negotiating history at San Francisco and the use of broader terms¹¹⁵ which are more flexible in the official texts in other languages. The realists also rely on portions of the *travaux préparatoires* to support their position.¹¹⁶ They point to the fact that the purpose of even explicitly including the provision was to clarify the official position regarding collective agreements for self-defense.¹¹⁷ Further, the realists believe that member states retain all of their customary international law rights except those that they have surrendered in assuming their obligations under the U.N. Charter.¹¹⁸

As noted above, the restrictionists believe that article 51's exception to the prohibition on the use of force should be read in a narrow, literal fashion, permitting actions in self-defense only in

112. *Id.*

113. *Id.*

114. BOWETT, *supra* note 81 at 185; WALDOCK, *supra* note 87 at 498.

115. For example, the French text uses the term "*aggression armée*" which includes, but is not limited to, armed attacks.

116. One of the committee reports in the *travaux* states that the "use of arms in legitimate self-defense remains admitted and unimpaired" under the Charter. Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. 459 (1945). The restrictionists traditionally counter any reliance on the *Travaux* with the general principle that if the text is clear, no reliance can be placed on them. See generally BROWNLIE, *supra* note 88 at 267-68.

117. WALDOCK, *supra* note 87 at 497. The drafters were particularly concerned with maintaining the vitality of the Inter-American system of mutual defense which existed at that point in time under the Act of Chapultepec. *Id.* See also GOODRICH, HAMBRO & SIMONS *CHARTER OF THE UNITED NATIONS*, 348 (1969).

118. BOWETT, *supra* note 81 stated that "[W]e must presume that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter." *Id.* at 184-185.

response to an "armed attack" or within a collective action taken pursuant to decisions by competent organs of the UN.¹¹⁹ Therefore, they believe that the broad customary law right of self-defense does not survive the ratification of the UN Charter.¹²⁰ Further, they contend that reliance on the *travaux préparatoires* must be conditioned by the numerous statements regarding the broad prohibition against the use of force in article 2(4) and its central position in the purposes of the UN Charter.¹²¹ Thus, in light of these contrasting theoretical positions, it is a burden, however minimal it may be, to assert that the customary international law right of self-defense survived the adoption of the UN Charter intact. Indeed, the arguments even seem moot under these particular circumstances as the invasion was probably unjustifiable, even under customary international law.

3. COLLECTIVE SELF-DEFENSE UNDER THE U.N. CHARTER

Article 51 also mentions "collective self-defense"¹²² explicitly, thus providing for the existence of regional organizations or mutual agreements created with collective self defense as their express or central purpose.¹²³ The realists assert that the right was purposefully removed from Chapter VIII of the UN Charter to remove the limitations placed on any potential actions by regional organizations by article 52.¹²⁴ They believe that the right extends to all collective defense organizations, regional and contractual, and that it even includes the ability to assist any nation, regardless of a membership in the UN, in a legitimate exercise of its right of self-defense.¹²⁵ In contrast, the restrictionists believe that member states can only assist other member states, regardless of their obligations under other regional arrangements, because their obligation to refrain from using force under article 2(4) is superior to obligations outside the UN Charter.¹²⁶ The restrictionists do, how-

119. H. KELSEN, *LAW OF THE UNITED NATIONS* 791-800 (1950); Brownlie, *supra* note 88 at 271-72.

120. BROWNLIE, *supra* note 88 at 265.

121. *Id.* at 268 note 6. Brownlie believes that the "narrow and precise terms [of article 51] are explicable against the background of the general prohibition" in article 2(4). *Id.* at 271-72.

122. U.N. CHARTER, art. 51.

123. Waldock, *supra* note 87 at 497.

124. *Id.* at 503-04.

125. *Id.* at 504.

126. KELSEN *supra* note 119 at 916-17. Kelsen supports the proposition by noting that

ever, support the proposition that member states can participate in regional organizations or collective defense agreements insofar as its obligations do not conflict with either its responsibilities under the Charter or the authority of the Security Council.¹²⁷ Therefore, although the OECS members that requested U.S. assistance in defending themselves are members of the UN and are participating in an arguably legitimate regional organization, their failure to act in a way that was consistent with UN mechanisms¹²⁸ is a fatal flaw in attempting to justify the invasion as an act of "collective self-defense".

4. ANTICIPATORY SELF-DEFENSE UNDER THE U.N. CHARTER

The realists contend that the right of anticipatory self-defense is not limited by the phrase "if an armed attack occurs" in article 51 because such an interpretation would reduce the scope of the customary international law right of self-defense.¹²⁹ Bowett suggests that an armed attack is only one event which can trigger the right of self-defense.¹³⁰ Others maintain that such a limited phrasing was not intended by the drafters.¹³¹ Some commentators note that, in an age of nuclear capabilities, giving the aggressor the automatic prerogative to strike the first blow allows those who breach their duties under the U.N. Charter to obliterate those who comply with them.¹³² Waldock supports that proposition by arguing that if the action of the U.N. is obstructed, delayed or just plain inadequate, and the threat is imminent, then it is a "travesty of the purposes of the charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow."¹³³

The restrictionists read the language literally in finding the phrase "*if an armed attack occurs*" to mean "*after an armed attack occurs*."¹³⁴ Further, they assert that an "armed attack" means

article 103 of the U.N. Charter provides that charter obligations are superior to all other obligations. *Id.*

127. *Id.*

128. See *infra*, section IV C.5 at pp. 22-27.

129. Waldock, *supra* note 87 498. As noted above, Waldock points to the more flexible phrasing in the French text and the fact that Article 51 is positioned in Chap. VIII, etc.

130. BOWETT, *supra* note 81 at 191-192.

131. McDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 235-39 (1961).

132. Waldock, *supra* note 87 at 498.

133. *Id.*

134. KELSEN, *supra* note 119 at pp. 269, 797, Henkin, *supra* at 232, BROWNLIE, *supra* note 88 at 265 and JESSUP, *supra* note 87, at 166. Professor Myles McDougal phrased their

literally that and is therefore not subject to more flexible interpretations which encompass imminent threats of attack and other types of aggression based on subversion, political propaganda and/or the incitement and training of insurgents.¹³⁵ Both groups, however, agree that even if the customary law right of anticipatory self-defense is recognized, it can only be exercised in response to a genuine and absolutely imminent threat.¹³⁶ One commentator reduced the requirement to tangible terms in noting that:

the danger of obliteration of the threatened state must be real, the threatening state must be in a position to obliterate the threatened state, the threatening state must have the means to obliterate the threatened state, and there must be sufficient evidence to support the belief of the intended victim that the threatening state made the decision to attack.¹³⁷

In delineating such stringent standards for justifying an anticipatory use of force, Professor Rohlik contended that "in the vast majority of cases when anticipatory self-defense was invoked, the self proclaimed victim not only had sufficient time for deliberations, but any threat of armed attack which could lead to its obliteration was far less than credible."¹³⁸ He cites the Israeli initiation of hostilities in the 1967 "Six Day War" as the only example of an act of anticipatory self defense which can be justified under the U.N. Charter because "there was a threat of imminent armed attack and a reasonable presumed intention of the threatening state to destroy the intended victim, the threatening state was assumed to have means to carry out its intention, and there were not suffi-

position in noting that "the proponents of a [restrictive] interpretation substitute for the words 'if an armed attack occurs' the very different words 'if, and only if, an armed attack occurs,'" McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600 (1963).

135. Brownlie, as a major proponent of the restrictionist position views the phrase "armed attack" to actually require a trespass into the geographical territory of another state. Brownlie, *supra* note 88 at 255-6. This is consistent with the view that self-defense must be in response to delictual conduct *see* Bowett, *supra* note 81 at 185. While the realists agree that imminent threats or delictual conduct is a necessary prerequisite to unilateral action, their definitions of those concepts are broad enough to include a variety of acts of aggression short of actually using military force. *See* BOWETT, *supra* note 81 at Chap. IX and McDUGAL & FELICIANO, *supra* note 131 at 232-41.

136. Both groups point to the *Caroline* definition of self-defense which requires an "instant and overwhelming" necessity "leaving no choice of means and no moment for deliberation."

137. Rohlik, *Remarks on Self-Defense and Intervention: A Reaction to Pending Law and Civil War in the Modern World* 6 GA. I. INT'L. & COMP. L. 395, 419 (1977).

138. *Id.* at 420.

ciently effected international efforts to avert the war."¹³⁹ Finally, many theorists believe that an "anticipated attack" is too subjective and manipulable as a standard to provide an exception from the prohibition on the use of force.¹⁴⁰

As noted above, although it is a question of fact, the imminence, and even the existence of a genuine threat is improbable if not unlikely. Further, the fact that Grenada probably doesn't have much of a capacity, if any, for nuclear warfare restricts any realistic reliance on potential threats of obliteration as a justification for striking first, albeit allegedly in self-defense. Indeed, it has not even been alleged that Grenada had either the means to "obliterate" its neighbors or that it had definitely determined to attack them with conventional, non-nuclear, weapons. Therefore, even if the realist's broad and flexible interpretation of article 51 is accepted, the invasion would not be justified as an act of anticipatory self-defense under the U.N. Charter.

5. STRUCTURAL AND ORGANIZATIONAL LIMITS ON THE USE OF FORCE UNDER THE U.N. CHARTER

a. *The Security Council*

Pursuant to article 24 of the U.N. Charter, the Security Council has "primary responsibility for the maintenance of international peace and security."¹⁴¹ Article 34 confers jurisdiction upon the U.N. Security Council to "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute. . . ."¹⁴² Although the power to investigate is explicitly granted, the Security Council usually relies on various committees and commissions for "elucidation" of facts in issue.¹⁴³ Article 36 provides the Security Council with the power to "recommend ap-

139. Rohlik points to the history of prior antagonistic Egyptian acts including the blockade of the Gulf of Aquaba and the closing of the Suez Canal and then notes the immediacy of the danger due to the withdrawal of the U.N. Emergency forces, the movement of massive amounts of Egyptian forces and equipment towards the Israeli border, the current anti-Israeli hysteria in Egypt at that time and the inability to rely on protection from the U.N. due to the probable Soviet veto of any potential Security Council action and U Thant's position as illustrated by his insistence on withdrawing the emergency forces. *Id.* at 421.

140. Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 545 (1971). See also 2 L. Oppenheim's International Law 156, n. 2 (7th ed. 1952).

141. U.N. CHARTER, art. 24

142. U.N. CHARTER, art. 34.

143. GOODRICH, HAMBRO & SIMONS, *supra* note 117 at 267.

appropriate procedures or methods of adjustment."¹⁴⁴ Article 37 requires member states to submit disputes which might endanger the maintenance of international peace and security, and which they have failed to settle among themselves by the peaceful means listed in article 33,¹⁴⁵ to settlement by the Security Council.

Article 39 authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression."¹⁴⁶ Therefore, whenever any situation develops which might be considered deleterious to the maintenance of international peace and security, the Security Council has the power to determine whether such a situation in fact exists. The Security Council takes the position that member states, or regional organizations composed of member states, can not determine that there is a threat to the peace without deferring to the Security Council's exclusive authority to make such a determination.

Article 41 empowers the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions" and thus maintain international peace and security.¹⁴⁷ Article 42 allows the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."¹⁴⁸ Therefore, as the Security Council allegedly has both the authority and the ability to deal with any potential challenges to international peace and security, member states are expected to rely on the Security Council to deal with any problems, circumstances or situations which might require the threat or use of force.

The Grenada invasion manifests a blatant disregard of many of these charter obligations. No situation or dispute was referred to the Security Council for investigation or settlement, action was taken prior to any Security Council determination that there was even a threat to the maintenance of international peace and security and the action was taken by a group other than the Security Council. Critics contend that the Charter mechanisms are inadequate, inefficient and impractical due to the veto power of the per-

144. U.N. CHARTER, art. 36.

145. Article 33 lists the procedures recommended for the pacific settlement of disputes and mentions "negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. CHARTER, art. 33.

146. U.N. CHARTER, art. 39.

147. U.N. CHARTER, art. 41.

148. U.N. CHARTER, art. 42.

manent members of the Security Council who are more than likely to have a stake in any dispute apt to require U.N. action. Even if such contentions are accepted, does this justify the failure to maintain even a facade of attempted compliance with Charter obligations?

An argument may be made that the ineffectiveness of the Security Council is due to a "fundamental change in circumstances" (i.e. the permanent members' shift from allegiance to opponents) and therefore, under article 62 of the Vienna Convention, treaty obligations can be ignored.¹⁴⁹ The Vienna Convention provides only for the use of this provision in the termination or suspension of a treaty, however, not for a unilateral avoidance or reinterpretation of its terms.¹⁵⁰ Further, even if the treaty mechanisms are *de facto* obsolete and have been completely ignored and avoided in the state practice of the signatories, the legal obligation to rely on those mechanisms continues until the treaty has been formally abandoned by mutual consent.¹⁵¹ Finally, even though state practice subsequent to the Charter's signing exhibits a certain amount of disregard for the prohibition on unilateral uses of force, it is not enough to show either a *de facto* amendment of the charter or the development of a new legal norm in its place. As the American Bar Association Committee on Grenada noted, "such state practice as might be offered in evidence of a new legal norm cannot be said to possess anything like the uniformity, frequency and acknowledgment that is motivated by *opinio juris communis*."¹⁵²

b. Regional Organizations

Chapter VII, which regulates regional arrangements, was included at the insistence of a majority of Latin American Nations.

149. Professor Franck notes that the great power unanimity required for Security Council action has been almost non-existent as only one collective enforcement action (in North Korea) has occurred in the Charter's history. Franck, *Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States*, AM. J. INT'L L. 809, 810 (1970). Further, the ability to take such action was probably only due to the U.S.S.R.'s failure to attend the meeting when the resolution to act was passed. *Id.*

150. Vienna Convention, art. 62. This provision limited the doctrine of *rebus sic stantibus* which allowed a change in circumstance to alter obligations under an agreement and thus provided states with an excuse for ignoring or avoiding such obligations. 1966 II YB INT'L L. COMM'N. at 40.

151. Vienna Convention, art. 62. See generally, the joint dissenting opinion of judges Onyeama, Billard, Arechaga and Waldock in the 1974 *Nuclear Tests* (Australia/France) case I.C.J. REP. 253 (1974).

152. A.B.A. REPORT, *supra* note 15 at 24.

During the Conference on Problems of War and Peace in Mexico City, which culminated in the signing of the Act of Chapultepec on March 3, 1945, representatives of those states

expressed their misgivings about the universalist bias of the Dumbarton Oaks Proposals, affirmed the value of the Inter-American system, proclaimed the intent to refurbish and strengthen that system, and insisted that the constitution of the new world organization should leave the way open for the functioning of a politically active and largely autonomous Inter-American agency.¹⁵³

Therefore, since the UN Charter is based on an implicit compromise between universal and regional international systems, and the predominant interests and attitudes of each organization tend to differ, the system which is either applied or circumvented easier will be relied upon by its members.

The Charter system is based on two potentially conflicting beliefs. The system is premised upon the coexistence of the two systems on the one hand, and the primacy of the global organization, and the obligations inherent in membership, on the other. Article 52 recognizes that member states have the right to establish "regional arrangements or agencies for dealing with . . . matters relating to the maintenance of international peace and security."¹⁵⁴ The provision sets out two explicit limitations on such regional organizations in that the matters they deal with must be "appropriate for regional action" and their activities must be "consistent with the Purposes and Principles of the United Nations."¹⁵⁵

Disputes between parties to regional arrangements are generally considered to be suitable for regional action as long as they can be settled by peaceful means. However, situations which require preventative or enforcement action, or which involve states which are not parties to such arrangements, are generally considered to be beyond the scope of regional action.¹⁵⁶ The requirement that regional organizations must be "consistent with the purposes and principles of the U.N." simply reflects the principle espoused in article 103 that UN. Charter obligations prevail over obligations

153. Claude, Jr., *The O.A.S., the U.N. and the United States*, International Conciliation, No., 547 (March, 1964) p. 5.

154. U.N. CHARTER, art. 52.

155. *Id.*

156. See KELSEN, *supra* note 119 at pp. 918-20 and BOWETT, *supra* note 81 at pp. 222-24.

under other international agreements.¹⁵⁷ The clause also illustrates the drafters' belief that the UN, as a global organization for peace and security, is the dominant institution and that regional organizations, as subordinate entities, must function within the same framework and subject to the same purposes and principles.

Paragraphs 2 and 3 of article 52 create an obligation to "make every effort to achieve pacific settlement of local disputes through . . . regional agencies before referring them to the Security Council."¹⁵⁸ This provision is based on the belief that regional agencies, because they are closer to the specific situation or dispute, are in a better position to evaluate the facts and take decisive action faster and more effectively. Members of regional organizations can bring their disputes before the Security Council if prompt or peaceful solutions do not seem to be forthcoming. Further, the ability of the Security Council to investigate (under article 34) or to hear any dispute presented by any state, regardless of membership in the United Nations, (under article 35) has been retained by the Security Council under article 52 paragraph 4.¹⁵⁹

Article 53 establishes the Security Council's ability to "where appropriate, utilize such regional arrangements . . . for enforcement action under its authority."¹⁶⁰ The text continues in prohibiting enforcement actions by regional agencies except where they are either (1) authorized by the Security Council; (2) against an "enemy state";¹⁶¹ or (3) aim[ed] at preventing such a state from renewing its aggressive policies. The immediate issue which arises under article 53 is to determine what constitutes an "enforcement action." Kelsen, a restrictionist, found that "enforcement action" means "action decided on or approved by the Security Council for the restoration of peace."¹⁶² He therefore concluded that:

[t]he use of force in the exercise of the right of self-defense under [a]rticle 51 takes place prior to an 'enforcement action' in the specific sense of the term, that is to say, an action involving

157. Article 103 of the U.N. Charter provides:

[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

158. U.N. CHARTER, art. 52 para. 2 and art. 52 para. 3.

159. U.N. CHARTER, art. 52 para. 4.

160. U.N. CHARTER, art. 53 para. 1.

161. This term is defined in art. 53 para. 2 to mean "any state which during the second World War has been an enemy of any signatory of this Charter."

162. KELSEN, *supra* note 119 at 921.

the use of armed or non-armed force taken by the Security Council.¹⁶³

In considering the collective economic measures taken by OAS members against the Dominican Republic in 1960, the Security Council found that the measures could have been taken by those nations individually and that the term "enforcement action" of itself suggests a use of force which would require Security Council authorization.¹⁶⁴ Further, when Cuba requested the Security Council to determine whether the OAS Punta Del Este resolutions removing Cuba from the OAS constituted an "enforcement action", the Security Council declined to do so, noting that it had previously determined that economic measures did not constitute "enforcement action" and that exclusion from a regional organization also failed to rise to such a level of severity.¹⁶⁵ The Security Council also found that the establishment of an Inter-American force by the OAS in the Dominican Republic in 1965 did not constitute an "enforcement action" because it was involved as part of a conciliatory mission, had no intention to support any claim against the state and was attempting to achieve a peaceful settlement, under article 52, not to take "enforcement action", under article 53.¹⁶⁶ Further, article 54 requires that the Security Council be kept informed of activities "undertaken or in contemplation" by regional agencies to maintain international peace and security.¹⁶⁷

In light of the failure to even notify the Security Council of the proposed invasion, it is impossible to contend that the action was in any way "authorized" by the UN. Further, the failure to attempt to resolve the situation peacefully prior to any use of force is a glaring violation of the Charter. Finally, any contention that the act was an "enforcement action" by a regional organization is moot in light of the Security Council's immediate response in attempting to condemn the action.¹⁶⁸

163. *Id.*

164. U.N. SCOR (894th and 895th Mtgs), U.N. Doc S/P.V. (1960).

165. See discussion in U.N. SCOR (992-998th Mtgs) U.N. Doc. S/P.V. (1962).

166. Statement of representative of Malaysia. U.N. SCOR (1222nd. Mtg), U.N. Doc S/P.V. (1965).

167. U.N. CHARTER, art. 54.

168. At the emergency meeting of the U.N. Security Council on October 28th, the group voted 11 to 1 to condemn the action as a "flagrant violation of international law and of the independence, sovereignty and territorial integrity of [Grenada]." See N.Y. Times, Oct. 29, 1983, at 4.

D. Self-Defense Under The Charter of the Organization of American States and the Rio Treaty

The Organization of American States (OAS) was created to promote Inter-American unity and autonomy and to consolidate the hemisphere's power. It was developed within the framework of regional arrangements as provided for in Chapter VII of the UN Charter and thus was organized with many of the same underlying purposes and principles in mind. Chapter II of the OAS Charter, which sets out the principles "reaffirmed" by American states, reiterates many of those promulgated by the UN Charter, including "respect for the personality, sovereignty and independence of states" (article 3(b)), condemnation of wars and acts of aggression (article 3(e)), and the requirement of settling controversies by peaceful means (article 3(g)).¹⁶⁹

1. THE DOCTRINE OF NON-INTERVENTION: STRINGENT PROHIBITION
ON THE USE OF FORCE

Articles 18 and 20 constitute the broadest formulation of the doctrine of non-intervention.¹⁷⁰ Their mandates are the result of a Latin American obsession with proclaiming an absolute doctrine of non-intervention and binding every nation in the hemisphere, including the United States, to adhere.¹⁷¹ The principle was first adopted in the Convention of Rights and Duties of States which was drafted at the Seventh International Conference of American States at Montevideo, Uruguay in 1933.¹⁷² The doctrine was expanded by subsequent conferences and conventions until it acquired the breadth of its current codification.¹⁷³

169. O.A.S. Charter, art. 3 para. (b), (e), and (g).

170. Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147, 1156. Non-intervention is the doctrine prohibiting intervention in any way, shape, form or manner. See generally, THOMAS & THOMAS, *NONINTERVENTION*, *supra* note 110.

171. THOMAS AND THOMAS, *THE ORGANIZATION OF AMERICAN STATES* 158 (1963). The authors found that it "became a cardinal aim of Latin American Diplomacy to formulate a code of public international law in the form of a multilateral treaty containing a renunciation of the right of intervention and binding all American States. *Id.*

172. Article 8 of the convention reads: "No State has the right to intervene in the internal or external affairs of another." F.V. GARCIA AMADOR, *THE INTER-AMERICAN SYSTEM* 82 (1933). Acceptance of this provision was the first in an Inter-American instrument, however, it was not unconditional. The United States submitted a lengthy reservation retaining its rights "as generally recognized and accepted" in international law. *Id.* at 85.

173. In 1936, at the Inter-American Conference for the Maintenance of Peace in Bue-

Article 18 states that:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.¹⁷⁴

Article 18 is broad, precise and comprehensive. The application of the principle to both "state[s] or group[s] of states" prohibits both unilateral and collective acts (of intervention).¹⁷⁵ The prohibition on intervention encompasses practically every type of act imaginable; direct or indirect, in the internal or external affairs of states, and by "any other form of interference or attempted threat."¹⁷⁶ This provision extended the doctrine to include acts against a county's political, economic or cultural elements.¹⁷⁷ Further, it bans this wide variety of acts regardless of rationale or justification by forbidding intervention "for any reason whatever."¹⁷⁸

Article 20 explicitly creates a blanket prohibition on military occupation by providing that "the territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly, or indirectly, on any grounds whatever."¹⁷⁹ By forbidding military occupations or any other direct or indirect uses of force "even temporarily," the provision appears to require territorial inviolability. This extends the concept of "territorial integrity" applied in article 2(4) of the UN Charter to its extreme limits. The inclusion of the clause "on any grounds whatever" again exhibits a blindness to ra-

nos Aires, the United States accepted the doctrine of non-intervention. THOMAS & THOMAS *THE O.A.S. supra* note 171 at 159. The Eighth International Conference of American States, held at Lima, Peru in 1938, adopted the Declaration of the Principle of the Solidarity of America which provided for actions against any threats to the "peace, security, or territorial integrity of any American Republic." GARCIA AMADOR *supra* note 172 at 266 (vol. II). In 1947, the Inter-American Treaty of Reciprocal Assistance was signed in Rio de Janeiro. The treaty provides the basis for the present scope of the doctrine of Non-Intervention in articles 18 and 20.

174. O.A.S. CHARTER, art. 18.

175. *Id.*

176. *Id.*

177. This Charter was the first to extend the definition of intervention to these extremes. By encompassing political, social and economic protections, the framers made it clear that complete independence from interference was the new norm in the Americas. THOMAS & THOMAS, *THE O.A.S. supra* note 171 at 159.

178. O.A.S. CHARTER, art. 18.

179. O.A.S. CHARTER, art. 20.

tionale or justification in expressing an absolute prohibition. In placing articles 18 and 20 within the chapter on the "rights and duties of states," the drafters clearly intended for these provisions to form an integral part of the charter.¹⁸⁰

Although these provisions appear to create a broad prohibition on the use of force or any other type of intervention, OAS practice has been less strigent.¹⁸¹ In 1954, a rebel invasion and subsequent overthrow of the Guatemalan government gained the tacit approval of the OAS member states.¹⁸² The unilateral invasion of the Dominican Republic by the U.S. in 1965, has been cited as a violation of the OAS Charter.¹⁸³ The Dominican intervention, however, was "later converted into an OAS action."¹⁸⁴ The OAS became embroiled in the crisis by approving the establishment of an Inter-American force to join the U.S. forces in the Dominican Republic.¹⁸⁵ Hence, this pattern of behavior may indicate that flexibility in the interpretation of the OAS Charter, although difficult, may nonetheless be achieved through U.S. influence in the organization. The invasion of Grenada, however, illustrates the loss of U.S. influ-

180. GARCIA AMADOR *supra* note 172 at 81.

181. *See generally*, F.X. DE LIMA, *INTERVENTION IN INTERNATIONAL LAW* (with a reference to the OAS) (1971).

182. The newly elected Guatemalan government instituted a land reform policy which was perceived as discriminatory to U.S. property interests in Guatemala. De Lima notes that "the USA managed to have an Anti-Communist resolution adopted, directed mainly at Guatemala [at the 10th Inter-American Conference in Caracas 1954]." De Lima argues that the U.S. supplied arms to the rebel force which invaded Guatemala and toppled the existing regime. The Guatemalan action, however, gained the support of OAS member states despite De Lima's allegations that the act violated the OAS Charter.

The attitude of the majority of the Latin American States on the Guatemalan issue is baffling [sic], as they supported the violation of the most cherished principle of non-intervention. At times attempts have been made to excuse Latin American behavior on the grounds, 1) that they could not hold back a determined USA, 2) that this was [the] only way of obtaining the much needed economic aid from the USA. Whatever motivated them to support the USA, it cannot be denied that they were creating a precedent which could possibly be utilized against one of them in the future.

DE LIMA, *supra* note 102 at 124-25.

183. De Lima points out that the unilateral invasion of the Dominican Republic violated not only articles 18 and 20, but also the duty to consult other OAS members under article 6 of the Rio Treaty. *See* DE LIMA, *supra* note 181 at 42. *See also* Nanda, *The United States' Action in the 1965 Dominican Republic Crisis: Impact on World Order-Part 1*, 43 DENVER L.J. 439, 467 (1966). For a detailed analysis of the Dominican Crisis, *see generally*, McLaren, *The Dominican Crisis: An Inter-American Dilemma*, 4 CAN. Y.B. INT'L L. 178 (1968).

184. DE LIMA, *supra* note 181 at 43.

185. Tenth Meeting of Consultation, Res. of May 6, 1965, OEA/Ser.F/IL.10 Doc. 39, Rev. 2 (1965).

ence over the OAS, as the action was overwhelmingly condemned initially¹⁸⁶ and acquiescence in accepting the action was neither swift nor unanimous.¹⁸⁷

The OAS Charter's prohibitions on intervention and unilateral uses of force must be analyzed in conjunction with the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty) which structured the Inter-American system of collective defense.¹⁸⁸ The treaty's stated central purpose was "to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attack against any American state, and . . . to deal with threats of aggression against any of them."¹⁸⁹ The Rio Treaty justifies collective action both "in the exercise of the inherent right of individual or collective self-defense recognized by Article 51"¹⁹⁰ of the UN Charter and also

[I]f the inviolability or the integrity of the territory or the sovereignty or political independence of any American state should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America.¹⁹¹

Collective action may only be taken, however, pursuant to a decision by the Organ of Consultation,¹⁹² or, if immediate action is necessary to combat an armed attack, upon the threatened state's request, while the Organ of Consultation is deliberating.¹⁹³

Although the Organ of Consultation's primary objective is to settle regional disputes by peaceful means, they have the authority to rely on the "use of armed force."¹⁹⁴ The Rio Treaty only autho-

186. See Wash. Post, Oct. 27, 1983, *supra* note 8.

187. The OAS never actually condoned the invasion officially but when the weapons and military plans were discovered on Grenada their disapproval of the action ameliorated and some members even stated their approval of it. N.Y. Times, Nov. 21, 1983 at A6, col. 4.

188. The Rio Treaty, which went into force on December 3, 1948, set out the precise rules and regulations regarding the use of force in the Americas. It delineated the circumstances justifying both unilateral and collective action, the duties and procedures of the Organ of Consultation, and the interrelationship with the U.N. Security Council.

189. Inter-American Treaty of Reciprocal Assistance, Preamble.

190. *Id.*, art. 3.

191. *Id.*, art. 6.

192. *Id.* The Organ of Consultation is composed of the Ministers of Foreign Affairs of the Signatories. *Id.*, art. 11. The Organ of Consultation only acts upon a vote of two-thirds of the signatories. *Id.*, art. 17.

193. *Id.*, art. 3, para. 2.

194. *Id.*, art. 8.

rizes the use of force in two situations: (1) in individual or collective self defense under article 51 of the UN Charter; and, (2) pursuant to a decision by the Organ of Consultation. Since the Grenada invasion was neither justified under article 51 of the UN Charter nor granted the prerequisite approval by the Organ of Consultation,¹⁹⁵ it violated both the OAS Charter and the Rio Treaty.

2. THE UNITED STATES CONTENDED JUSTIFICATION IN THE O.A.S.

The U.S. government contends, however, that the invasion was justified under articles 22 and 28 of the OAS Charter as an act of collective self-defense pursuant to one of the "special treaties on the subject" and therefore it fell outside the prohibition created by articles 18 and 20.¹⁹⁶ Article 22 provides that "measures taken for the maintenance of peace and security in accordance with existing treaties" are not violative of the prohibitions contained in articles 18 and 20.¹⁹⁷ Article 28 notes that, in response to acts of aggression which do not formally constitute an armed attack, "the American states, in furtherance of the principles on continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject."¹⁹⁸ The contention is, therefore, that action pursuant to a "special" or "existing" treaty, like the Organization of Eastern Caribbean States Treaty, is removed from both OAS jurisdiction and OAS regulation.

This argument is tenuous at best in light of the fact that the negotiating history refutes any suggestion that the drafters intended to permit parties to the charter to participate in other collective security agreements within the hemisphere.¹⁹⁹ In fact, any ambiguity due to using terms like "existing" or "special" treaties was only due to an attempt to incorporate the Rio Treaty while simultaneously avoiding the necessity of amending the OAS Char-

195. In fact, at the extraordinary session of the O.A.S. on October 26, 1983, several Latin American states strongly condemned the invasion while others regretted that there was a failure to settle the matter peacefully. See generally Transcript of Extraordinary Session of Permanent Council of the Organization of American States, October 26, 1983, OEA/Ser.G., Dec. CP/ACTA 543/83.

196. *Id.* at 28-29.

197. O.A.S. CHARTER, art. 22.

198. *Id.*, art. 28.

199. See *Actas y Documentos, Novena Conferencia Internacional Americana*, Bogota, Colombia, Marzo 30 - Mayo 2 de 1948, Vol. IV, pp. 73-78 and 234-46.

ter to reflect subsequent amendments to the Rio Treaty.²⁰⁰ In considering that the central purpose of the OAS Charter, especially when read in conjunction with the Rio Treaty, is to create an absolutely autonomous institution to represent, protect and regulate the region, it is patently ridiculous to suggest that any action in the hemisphere can be justified under another regional arrangement. Therefore, as U.S. reliance on articles 22 and 28 is not supported by the drafting history and as the invasion both violated the prohibitions delineated in articles 18 and 20 and ignored the procedural mechanisms involving the Organ of Consultation, the invasion clearly violates the U.S. obligations under the OAS Charter and the Rio Treaty.

E. *Self-Defense Under the Organization of Eastern Caribbean States Treaty*

When the Organization of Eastern Caribbean States (OECS) was created in 1979, one of its "major purposes" was to defend the "sovereignty, territorial integrity and independence" of its member states.²⁰¹ To this end, article 8 set out the "Composition and Functions of the Defense and Security Committee."²⁰² Article 8(4) provides for "collective defense and the preservation of peace and security against external aggression."²⁰³ Defensive actions must, however, fit within "the exercise of the inherent right of individual or collective self defense recognized by article 51" of the UN charter.²⁰⁴ Further, article 8(5) mandates that the decisions and directives of the Defense and Security Committee must be unanimous.²⁰⁵

As an act of collective defense, the Grenada invasion failed to comply with the conditions set out in article 8. The action was not taken pursuant to a unanimous decision of all seven members of the OECS as only four members voted to intervene, two abstained

200. *Id.*, at pp. 39-40. In fact, the original draft versions of Articles 22 and 28 specifically mentioned the Rio Treaty. *Id.*, at Vol. II, pp. 218-19.

201. O.E.C.S. CHARTER, art. 3(b).

202. O.E.C.S. CHARTER, art. 8.

203. O.E.C.S. CHARTER, art. 8(4). However, these rights specifically include "measures to combat the activities of mercenaries, operating with or without the support of internal or national elements." *Id.* This phrasing seemingly presupposes the right to combat subversive activities within a state either unilaterally or collectively.

204. O.E.C.S. CHARTER, art. 8(4).

205. O.E.C.S. CHARTER, art. 8(5).

and one (Grenada) was not represented.²⁰⁶ Further, article 8 only allows members to take collective security measures in response to *external aggression* or "to combat the activities of mercenaries."²⁰⁷ Therefore, unless those terms can be stretched to cover the civil strife and political instability in Grenada at the time of the invasion, even if those conditions can be attributed to external forces, collective defense would not be justified under the treaty. Finally, pursuant to article 4 of the OECS Treaty, the state concerned must initiate the request for collective security.²⁰⁸ Although the U.S. and her allies in the invasion claimed that their actions were in response to a confidential appeal from the Governor-General of Grenada, others have contested the validity of that allegation.²⁰⁹ Further, there is a factual question as to whether the revolutionary council failed to achieve *de facto* control of the island so that power would officially vest in the Governor-General.²¹⁰

There is also a question as to whether the OECS constitutes a "regional arrangement" under chapter VII of the UN Charter. Although the Charter fails to define the term, article 52(1) seems to establish only three criteria: whether the group is (1) regional; (2) concerned with the maintenance of international peace and security; and, (3) consistent with the principles and purposes of the U.N.²¹¹ Professor Franck noted that the definition could not be more strenuous than "any grouping of states in some defined geographical context with historic, ethnic or socio-political ties, which habitually acts in concert through permanent institutions to foster unity in a wide range of common concerns."²¹²

Therefore, in light of the malleability of those definitions and the youth of the organization, the OECS can probably be considered to be a valid "regional arrangement" under the UN Charter.

206. N.Y. Times, Oct. 26, 1983, at A19.

207. O.E.C.S. CHARTER, art. 8(4).

208. *Id.*, art. 14.

209. Fidel Castro directly controverted the U.S. reliance on such a request in stating that the Governor-General himself had "declared that he approved of the invasion but that he had not previously asked anyone to invade Grenada." See Castro's speech in Havana, November 14, 1983, as published in *Garnma*, November 20, 1983, p. 3.

210. The U.N. Security Council apparently concluded that the power so shifted. See Report of the Secretary-General to the Security Council, at U.N. Doc. 5/16100 (1983).

211. U.N. CHARTER, art. 52(1).

212. Franck, *supra* note 149 at 832. Professor Franck reached this conclusion after noting that the chapter of the Charter was drafted with the young Inter-American system in mind and that it has been flexibly interpreted to recognize economic organizations such as the European Economic Community and COMECON. *Id.*

This determination is crucial "[i]n view of the fact that regional organizations are accorded such extensive powers in derogation of article 2(4), and have garnered much greater powers in practice."²¹³ Conversely, this determination may be limiting because any collective action involving the use of military force must generally be regarded as an "enforcement action" and therefore requires authorization or initiation by the Security Council of the UN. Since article 15(2) of the OECS Treaty expressly subordinates obligations under that instrument to obligations under prior international agreements, any OECS action must be consistent with prior obligations - such as those under the OAS and UN Charter.²¹⁴ Thus, because the invasion clearly violated those obligations for the reasons enumerated above, any reliance on the OECS Treaty as a justification for the invasion is correspondingly limited. Because the Grenada invasion was neither consistent with the requirements for action under articles 4 and 8 of the OECS Treaty nor with those superior obligations under either the OAS or UN Charters, it was not even justified under the OECS Treaty - one of the primary contended justifications.

F. *Realpolitik - Underlying Guidelines Delineating the Actual Limitations on the Use of Force*

In a world where international relations are based on nuclear weapons, détente, national pride and self interest, and thus, ultimately, on superpower dominance of zones of influence, legality often becomes subordinated to considerations motivated by *realpolitik*. Even though acts of 'intervention' and unilateral uses of force are clearly prohibited by the UN and O.A.S. charters, the superpowers inevitably use such measures when they believe that the balance of power is threatened. Because the constraints imposed by the charters are not peripheral regulations, but, instead lie at the core of international efforts to minimize unilateral military intervention, it becomes clear that the determinations as to when, whether and how much force is to be used are based mainly on political, rather than legal, considerations.

213. *Id.*, at 827.

214. Article 15(2) of the O.E.C.S. Treaty provides that: "the rights and obligations arising from agreements concluded before the entry into force of this treaty between Member States and other countries or organizations shall not be affected by the provisions of this treaty."

The superpowers probably manifest such a strong desire to maintain their zones of influence due to their belief in the underlying premise that international peace and stability is inexorably linked to the stability of the present balance of power.²¹⁵ DeLima noted the expansion of this rationale in the era after the Cuban missile crisis had propelled the world to the edge of a nuclear precipice in stating that "since the Cuban affair the two superpowers have taken more than the ordinary precautions and hastened to intervene, even at the cost of [the] international law on the subject of the non-use of force, on the very suspicion of an intervention by an alien power."²¹⁶ In fact, both the U.S. and the U.S.S.R. have gone to extreme lengths to tailor international law to include political justifications for their actions such as the Johnson²¹⁷ and Brezhnev²¹⁸ doctrines. These concepts and the corresponding expansive applications of regional and treaty alliances, such as the OAS, OECS and Warsaw Pact, illustrate the dominance of political necessity in a world where legal mechanisms are both allegedly exclusive and almost absolutely inoperative.

As long as twenty years ago, this legal impasse was recognized when one scholar stated

[t]he charter of the United Nations is a treaty, binding as such

215. De Lima, *supra* note 181 at 51.

216. *Id.*

217. The so called "Johnson Doctrine" is really just a corollary to the Monroe Doctrine which President Johnson promulgated in an announcement on May 3, 1965 in an attempt to justify the U.S. involvement in the civil strife in the Dominican Republic. President Johnson stated that

the Revolutionary movement took a tragic turn, Communist leaders, many of them trained in Cuba, seeing a chance to increase disorder, to gain a foothold, joined the revolution. They took increasing control. And what began as a popular democratic revolution, committed to democracy, and social justice every shortly was moved and was taken and really seized and placed into the hands of a band of communist conspirators . . . [T]he American Nations cannot, and must not, and will not permit the establishment of another communist government in the Western Hemisphere. 17 AMERICAS, 43, 1965.

218. The Brezhnev Doctrine was essentially a series of arguments attempting to justify the Russian military action in Czechoslovakia in 1968. Professor Rohlik reduced the doctrine to three principles

1. [A] dispute within the socialist "family" or "commonwealth" of Eastern Europe must be resolved within that grouping and not by or in the United Nations.
2. [A] member of the family of socialist states must limit its sovereignty to conform to the requirements of the grouping.
3. [T]he family of socialist states may use force, even military force, by way of collective self-defense against any attempt to divert a member of the Socialist Commonwealth from orthodox conformity.

Rohlik, *supra* note 137 at 832.

upon the United States. But what if the treaty has been consistently and at times flagrantly violated by the Soviet Union, and the veto of the Soviet Union has been used to defeat decisions of the security council? How much of collective security is left in the situation of 'co-existence' in which we have lived with the Soviet Union for the past fifteen years? Must the United States continue to respect obligations and follow procedures when the other party to the contract violates them.²¹⁹

As noted, the legal justifications asserted by the U.S. for abandoning its obligations under either the UN or OAS Charters have neither been met nor, for the most part, alleged and, actions in derogation of those obligations have not occurred with the frequency, acknowledgement or uniformity to rise to the level of *opinio juris communis* and thereby create a new norm. State practice, however, proceeds as either pursuant to such a behavior-based norm or in violation of the existing ones. Where the system is ineffective or clashes with political policy decisions, it will be ignored, avoided or circumvented in any expedient manner, regardless of "legality." Although the degree of violation varies from flagrantly ignoring obligations to simply stretching attempted compliance, the motivations are the same and the results are equally blatant.

Therefore, whether one condemns the U.S. actions in the Dominican Republic in 1965 and in Grenada today or denounces the Soviet Union's intrusions into Czechoslovakia in 1968 and into Afghanistan more recently, the underlying motivations are identical and, although the levels of violation may vary, international law is subordinated to political reality. The superpowers will continue to base their action on political exigencies, even if in direct contravention of international law, until the system is more compatible with political realities. Thus, although the U.S. action in Grenada can be condemned on a legal basis, it reflects the relative unimportance of such considerations when the balance of power is even slightly threatened. Nations will act first, based on national interests and foreign policies, and leave the legal arguments and justifications for scholars and outdated institutions in the aftermath.

219. Fenwick, *The Quarantine Against Cuba: Legal or Illegal?*, 57 AM. J. INT'L L. 588, 591 (1963).

V. INTERVENTION FOR HUMANITARIAN PURPOSES

A. Introduction

It has been noted that intervention by States is a time-honored practice which is firmly established in the history of international relations.²²⁰ Intervention, however, has also been characterized as illegal and inconsistent with traditional notions of sovereignty.²²¹ Nevertheless, scholars of international law have long recognized the right of a state to protect its nationals in another state through intervention by force.²²² The status and scope of this right of intervention to protect endangered nationals is presently the topic of debate among modern publicists. Those theorists who advocate a broad scope for this right of intervention are more reflective of the nineteenth century view and are often classified as representing the imperialist position.²²³ Increasingly, modern ju-

220. H.F. Morgenthau, *To Intervene or Not to Intervene*, 45 FOREIGN AFFAIRS 425, 425 (1967). Indeed, Morgenthau states that: "From the time of the ancient Greeks to this day, some states have found it advantageous to intervene in the affairs of other states on behalf of their own interests and against the latter's will." *Id.* See also R. LITTLE, INTERVENTION, EXTERNAL INVOLVEMENT IN CIVIL WARS, 3 (1975).

221. Vattel maintains that intervention cannot be reconciled with the concept of sovereignty.

It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offense.

VATTEL, *supra* note 83, at 131. For a full overview of the ideas of several publicists regarding notions of sovereignty juxtaposed with those of intervention see F.X. DE LIMA, *supra* note 181, at 6-16.

222. Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.

VATTEL, *supra* note 83, Bk. II, ch. VI, § 71 at 137. See also E. STOWELL, INTERVENTION IN INTERNATIONAL LAW, 2-3 (1921); 1 C. HYDE, INTERNATIONAL LAW § 202, at 647 (2d rev.ed. 1947); 1 L. OPPENHEIM, INTERNATIONAL LAW, § 135 at 309 (8th ed. H. Lauterpacht 1955); A. THOMAS & A. THOMAS, *supra* note 110, at 305-06. This right of intervention has been articulated perhaps most forcefully by Bowett. "The right of the State to intervene by the use or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writing of jurists and in the practice of states." D.W. BOWETT, *supra* note 81, at 97.

223. Oppenheim illustrates this view by proposing such a right of intervention even for the protection of a national's honor. "The right of protection over citizens abroad, which a State holds, may cause an intervention by right to which the other party is legally bound to

rists have maintained that this right of intervention is limited in scope and application.²²⁴ Although the French Revolution has been cited as the root of the limitation upon the right to intervene,²²⁵ the adoption of the United Nations Charter in 1945 has fueled the argument of those advocating restriction of this right.²²⁶

In the context of the Grenada invasion, several theories have been advanced to either condone or condemn the U.S. intervention. Numerous theorists and several governments have criticized the invasion of Grenada as an unjustified intervention.²²⁷ The United States, at least initially, maintained that the action was taken to protect the safety of U.S. nationals on Grenada during a period of anarchy on the island.²²⁸ The initial arguments put forth by the supporters of these conflicting viewpoints illustrate the tension between the basic documents of both the UN and the OAS and the concept of *realpolitik* in today's world of superpower rivalry.

B. *The Legal Framework*

1. THE U.N. CHARTER

Although the doctrine of forceful intervention to protect threatened nationals is a right that has been recognized in international law,²²⁹ modern theorists argue that the adoption of article 2(4) of UN Charter precludes such forceful measures of self-help.²³⁰ Article 2(4) prohibits the threat or use of force with an exception reserved by article 51 which permits the inherent right of individual or collective self-defense. These articles have fomented considerable debate regarding their interpretation. Conflicting schools of thought have evolved concerning the legality of forcible

submit. And it matters not whether protection of the life, security, honour, or property of a citizen abroad is concerned." OPPENHEIM, *supra* note 222, § 135 at 309.

224. Several modern theorists have been categorized as representing the restrictionist theory of intervention. Among those in this category are Brierly, Brownlie, De Lima and Jessup. For a discussion of the restrictive theory and its proponents see Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under the International Law*, 21 VA. J. INT'L L. 485, 487-91 (1981).

225. Morgenthau, *supra* note 220 at 425.

226. Note, *supra* note 224 at 487-88.

227. See *supra* note 8 and accompanying text.

228. Statement of Jeanne J. Kirkpatrick, *supra* note 9, at 37-38. See also *Transcript of Address by President on Lebanon and Grenada*, *supra* note 7 at col. 5.

229. See *supra* note 222.

230. See *supra* note 224 and accompanying text.

intervention to protect nationals under the UN Charter.²³¹

Those publicists who insist upon a rigid interpretation of articles 2(4) and 51 have been classified as supporters of the restrictionist theory. The restrictionists argue that the right of intervention to protect nationals is inconsistent with the UN Charter and modern principles of international law, and is thus, obsolete. Jessup, a leading restrictionist, notes that

[t]he landing of armed forces of one state in another state is a "breach of the peace" or "threat to the peace" even though under traditional international law it is a lawful act. It is a measure of forcible self-help, legalized by international law because there has been no international organization competent to act in an emergency. The organizational defect has now been at least partially remedied through the adoption of the Charter, and a modernized law of nations should insist that the collective measures envisaged by article 1 of the Charter shall supplant the individual measures approved by traditional international law.²³²

Moreover, the restrictionists maintain that this right of forcible intervention is generally employed as an imperialist tool for achieving Western aims.²³³

Consequently, in view of the large number of third-world and developing states which are the most susceptible to such intervention, a lopsided majority of UN States support this restrictive interpretation of article 2(4).²³⁴ There are, however, a number of legal theorists that dispute this literal interpretation of article 2(4) and 51. These publicists, along with several Western governments,²³⁵ submit that the right to intervene to protect nationals on foreign territory remains intact within the framework of the UN

231. For a thorough analysis of the views of these schools and their leading proponents see Note, *supra* note 224 at 487-501.

232. P. JESSUP, *supra* note 87, at 169-70 (1948). Brownlie considers it "very doubtful whether this form of intervention [to protect the lives of nationals on foreign territory] has any basis in the modern law. Only a minority of states have continued to assert its legality in the more recent period." I. BROWNIE, *supra* note 88, at 433.

233. "Restrictionists contend that such a doctrine, . . . merely gave imperialist powers and legal pretext to intervene in states for political, economic, or religious reasons." Note, *supra* note 145 at 488. The term "pretext" has been used frequently by states in describing such interventions. The reaction of the African states to the U.S.-Belgian intervention in the Congo in 1964 illustrates this notion. See Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261, 269 n.44 (1972).

234. See Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 app. B, fn. 79-81 at 217 (R. Lillich ed. 1973).

235. *Id.* at 212-13.

Charter.²³⁶ The scholars that support this liberal interpretation differ over the theories which buttress the pro-intervention position. One commentator has thus divided the pro-interventionists into two groups, the realist theorists and the self-defense theorists.²³⁷

The realists argue that the right to intervene to protect nationals is premised on humanitarian concerns which are in harmony with the underlying goals of the UN.²³⁸ The true core of the realist theory is the notion that the UN's collective security measures are ineffective in crisis situations where the safety of human lives are at stake.²³⁹ The self-defense theory bases its stance upon Vattel's notion of self-defense, that an injury to the citizen is an injury to the state.²⁴⁰ Bowett insists that this traditional concept of self-defense is incorporated in the right of self-defense contained in article 51.

Article 51 is declaratory of an existing right, not constitutive of new rights . . . There is nothing in the *travaux préparatoires* to support the view that only in cases of armed attack could the right of self-defense be exercised. Indeed, such a restriction of the right of self-defense under general international law could only be achieved by a specific prohibition; Article 51 is permissive not prohibitive, and, . . . the only prohibitive article, Article 2(4), leaves the right of self-defense unimpaired.²⁴¹

Therefore, the self-defense theory maintains that where a foreign state is unwilling or unable to protect an alien, the right of intervention by the alien's state of nationality is thus, preserved.

2. THE O.A.S. CHARTER

Articles 18 and 20 of the Charter of the Organization of American States (OAS) contain strong language which prohibits inter-

236. These pro-interventionists include Waldock, Bowett, Morgenthau and Lillich. See C. Waldock, *supra* note 87. D.W. BOWETT, *supra* note 81; Morgenthau *supra* note 220 at 430-36; R. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967) [hereinafter cited as Lillich, *Forcible Self-Help*].

237. See Note, *supra* note 224 at 491-501.

238. *Id.* at 494.

239. Lillich, *supra* note 236 at 335-36. Lillich points out that the UN Security Council is unable "to act with the speed requisite to preserve life." *Id.* quoting P. JESSUP, *supra* note 87 at 170.

240. VATTEL, *supra* note 83.

241. Bowett, *The Use of Force in the Protection of Nationals*, 43 TRANS. GROT. SOC'Y 111, 116-17 (1957).

vention or interference of any form and precludes military occupation of another state for any reason.²⁴² Unlike the various interpretations which suggest flexibility of the provisions of articles 2(4) and 51 of the UN Charter, the wording of articles 18 and 20 of the OAS Charter provide no such malleability. The rigidity of this language is perhaps reflective of the troubled history of the region and the fact that Latin American states were frequently the target of intervention.²⁴³ It has been observed that in the Inter-American system

[n]o state has a right to intervene in another state in favor of the life or liberty of its nationals except through intercession of diplomatic representation in a friendly, conciliatory action without any character of coercion, undertaken only after there has been previous exhaustion of the possible local remedies and a clear denial of justice.²⁴⁴

Nevertheless, despite the literal meaning of articles 18 and 20, intervention to protect nationals on foreign territory has occurred, and paradoxically, has received the consent of the OAS.

C. *The Right to Protect U.S. Nationals*

In the days following the invasion of Grenada, the United States asserted its right to protect U.S. nationals in Grenada imperiled by a lack of governmental authority following the murder of Prime Minister Bishop. Mrs. Kirkpatrick, the U.S. Ambassador to the UN articulated this position in her address to the Security Council on October 27, 1983.

Of course, it goes without saying that the United States does not advocate that in normal circumstances concern for the safety of a State's nationals in a foreign country may justify military measures against that country. But normal circumstances presuppose the existence of a Government which, regardless of its democratic, non-democratic or anti-democratic nature or the system which it pursues, is nevertheless recognized as minimally responsible for not wantonly endangering the lives of its citizens and foreign nationals and the security of neighboring states in the region. Where, however, terrorists murder the leading citi-

242. OAS CHARTER, arts 18 and 20. See *supra* note 232.

243. DE LIMA, *supra* note 181 at 122. See also Nanda, *supra* note 183 at 446-47. See also THOMAS & THOMAS, *supra* note 110 at 327.

244. See *supra* notes 182-85 and accompanying text.

zenry and leadership of their own country, a situation may well arise in which no Government replaces the former order, but anarchy prevails. In those circumstances, the general rule of international law permits military action to protect endangered nationals. [T]his was indeed a unique situation, in which there existed a vacuum of responsible governmental authority.²⁴⁵

The argument that customary international law permits intervention where there is a lapse of governmental authority has been observed by several theorists. It does, however, turn on a question of facts. Was such a vacuum of authority evident in Grenada preceding the invasion?

The lack of effective governmental authority has, indeed, been recognized as a situation where intervention to protect nationals would be justified. Borchard maintained that "[i]n the absence of any central authority over states having power to enforce the principles of international law, the right of diplomatic protection was self-help for its sanctions."²⁴⁶ Although, such a right has been recognized, it is, nonetheless, not without limitations.

Waldock considered this right of intervention in the post-UN Charter era.

[T]he general principle of self-protection remains untouched by the [UN] Charter. But, clearly, only cases of extreme urgency to prevent irreparable injury could justify the introduction of troops into foreign territory.²⁴⁷

Waldock, then analyzes this notion in terms of the Abadan Oil incident.²⁴⁸ Observing that it would be rather difficult to justify the landing of troops to prevent the nationalization of British property by Iran, Waldock distinguishes a hypothetical situation where British lives would be imperiled.

[I]f law and order had completely broken down, and the community of British nationals in Abadan had been faced with almost certain death or serious injury, then loss of life being irreparable, it is considered that the long established right of protection would have justified intervention for the sole purpose

245. Statement of Jeanne J. Kirkpatrick, *supra*, note 9 at 37-38.

246. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 346-47 (1915).

247. Waldock, *supra* note 87 at 503.

248. For an explanation of the Abadan or Anglo-Iranian Oil Company incident, see BROWNLIE, *supra* note 88 at 296-97; W. Bishop, Jr., *The Anglo-Iranian Oil Company Case*, 45 AM. J. INT'L L. 749 (1951).

of securing the safe removal of nationals.²⁴⁹

Nevertheless, Waldock insists that "[e]ven then the permission of the local government ought if possible to have been sought."²⁵⁰

Waldock establishes several criteria, which if satisfied, would justify forcible intervention. "There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting against injury."²⁵¹ Waldock thus indicates by the use of the word "and" in joining these three conditions, that all three of these factors must be present for such a measure to qualify as a justifiable instance of self-protection. Bowett, a proponent of the self-defense theory of intervention,²⁵² has identified three similar conditions as the "normal requirements of self-defense."²⁵³

These three conditions have been applied to analyze previous interventions. Friedmann observes that the Waldock statement was invoked by the British Government to buttress its 1956 invasion of the Suez Canal region in Egypt.²⁵⁴ Friedmann, however, notes that during the Suez crisis "there was no breakdown of organized government in Egypt nor any physical threat to foreign nationals . . ."²⁵⁵ On this basis, Friedman distinguishes the Suez intervention from the U.S. intervention in the Dominican Republic in 1965, which he argues "had much greater legal justification."²⁵⁶

249. Waldock, *supra* note 87 at 509 (emphasis added).

250. *Id.*

251. *Id.* at 467.

252. Note, *supra* note 224 at 498-501.

253. "Intervention for the protection of the intervening states' own nationals traditionally has been and still is today a part of the customary right of self-defense. Its exercise must be subject to the normal requirements of self-defense, that is to say, there must exist a failure in the territorial state to accord the protection for aliens demanded by international law, there must be an actual or imminent danger requiring urgent action, and the action taken must be proportionate and limited to the necessities of extricating the nationals from the danger." Bowett, *The Interrelation of Theories of Intervention and Self-Defense in LAW AND CIVIL WAR IN THE MODERN WORLD* 38, 44 (J. Moore ed. 1974). [hereinafter cited as *Intervention and Self-Defense*].

254. W. Friedmann, *United States Policy and the Crisis of International Law*, 59 AM. J. INT'L L. 857, n.10 at 867 (1965).

An account of the British intervention in the Suez Canal crisis may be found in Q. Wright, *Intervention 1956*, 51 AM. J. INT'L L. 257 (1957); See also BROWLIE, *supra* note 88 at 297.

255. Friedmann, *supra* note 254, n.10 at 867.

256. "[T]he United States had much greater legal justification for its original, limited intervention in protection of its nationals in the Dominican crisis than did Great Britain in the Suez crisis." *Id.*

The U.S. intervention in the Dominican Republic bears striking resemblance to the invasion in Grenada.²⁵⁷ As a justification for the Dominican intervention, the U.S. cited "a complete breakdown of law and order," and that the Dominican authorities "could no longer provide any assurance for the safety of American lives."²⁵⁸ Nevertheless, the Dominican intervention fails to satisfy the third condition of either the Waldock or Bowett theory of justified intervention, because U.S. forces remained on the island well after U.S. nationals were evacuated.²⁵⁹ Since the bulk of the U.S. force remained intact for at least two months after the departure of the last endangered national, this same defect plagues the legal justification of the Grenada action as well.

The realist theorists assert that intervention to protect the lives of endangered nationals are legal under the UN Charter. This theory is premised on the fact that the intervening state

seeks neither a territorial change nor a challenge to the political independence of the State involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).²⁶⁰

Perhaps the realist notion of a legal intervention is more accurately described as a rescue mission.²⁶¹ Such missions are normally composed of a small strike force which aims only to secure the evacuation of the endangered individuals. Thus, illustrations of interventions which are consistent with the realist theory are the *Mayaguez* incident in Cambodia,²⁶² the Israeli raid in Entebbe,²⁶³

257. See *supra* notes 182-85 and accompanying text.

258. Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T. STATE BULL. 60, 61 (1965). Compare Statement by Jeanne J. Kirkpatrick, *supra* note 9 at 37-38.

259. See Nanda, *supra* note 183 at 440.

Lillich questioned the legality of the Dominican intervention in view of the lengthy deployment of U.S. troops on the island following the departure of U.S. nationals. *The I.C.J. Decisions and Other Public International Law Issues*, in *THE IRAN CRISIS AND INTERNATIONAL LAW* (R. Steele ed. 1981) (remarks of R. Lillich) at 31 [hereinafter cited as *The Iran Crisis*]. See also Bowett, *Intervention and Self-Defense*, *supra* note 253, at 45 n.19.

260. Riesman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 167, 177 (R. Lillich ed. 1973).

261. See generally Comment, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation*, U. TOL. L. REV. 209, 219-23 (1976).

262. See generally Finch, *Pueblo and Mayaguez: A Legal Analysis*, 9 CASE W. RES. J. INT'L L. 79 (1977); Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774 (1976).

and the aborted attempt to rescue U.S. hostages in Iran.²⁶⁴ Commentators have suggested that the recent International Court of Justice opinion in *U.S. Staff in Tehran* may be read as condoning the rescue-mission-type operation.²⁶⁵ Lillich argues that the majority's silence regarding the legality of the rescue mission is significant and suggests at best, tacit approval of such tactics or at least, reluctance to condemn such action.²⁶⁶ Nevertheless, Lillich lists several criteria which must be satisfied to justify an act of intervention to protect endangered nationals.

First, there obviously has to be a very serious and immediate threat or violation to someone's human rights. Second, there has to be a very widespread violation of human rights. Third, the degree of coercive measures that are employed has to be reasonable and proportionate. . . . And, lastly, the State that's using forcible self-help has to be relatively disinterested.²⁶⁷

Bowett interprets the I.C.J. decision in the *Corfu Channel Case*,²⁶⁸ between Great Britain and Albania, as a rejection of the realist theory.²⁶⁹ In the *Corfu Channel Case*, Britain alleged that neither Albania's territorial integrity nor its political independence had been disturbed by a temporary minesweep operation which

263. See generally, Note, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RES. J. INT'L L. 117, 133 (1977); Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel's Rescue Action* 12 J. INT'L LAW & ECON. 57 (1979).

264. See generally, Note, *supra* note 224.

265. See *The Iran Crisis*, *supra* note 259, at 25-32. (remarks of R. Lillich).

266. *Id.* at 29. Lillich concludes by noting that: [t]he fact that the Court did not condemn it, [intervention by a state to protect its nationals], and that this open question that has been debated so much these last ten or fifteen years still remains open, suggests to me that the case of the proponents of the doctrine has been strengthened by the Court's incidental treatment of it.

Id. at 32. Compare the dissenting opinion of Judge Morozov which harshly condemned the U.S. attempt to rescue the hostages as an illegal act under international law. 1980 I.C.J. 51 (Morozov, J., dissenting).

267. *Id.* at 31. To illustrate this last point, Lillich states that the U.S. rescue mission to Iran "would have run afoul of this criteria," had the mission intended to affect any purpose other than rescuing the hostages. *Id.*

268. *Corfu Channel Case* (U.K. v. Albania), 1949 I.C.J. 4.

The *Corfu Channel* decision considered the question of Britain's unilateral use of force. Britain claimed that damage was caused to British vessels and, consequently, loss of life to British nationals navigating through the Corfu Strait by a minefield of anchored automatic mines laid by Albania. Britain responded by organizing "Operation Retail" in which minesweepers were sent into Albanian territorial waters. The apparent rationale for this operation was to gather evidence of the minefield" in order to submit it to an international tribunal . . ." 1949 I.C.J. at 34.

269. Bowett, *Intervention and Self-Defense*, *supra* note 253 at 45.

sought merely to gather evidence to prove Britain's claim.²⁷⁰ The court, however, found that the incursion into Albanian waters, regardless of its temporary nature, was nevertheless a violation of Albanian sovereignty.²⁷¹ Bowett maintains that the court's rejection of this temporary incursion renders the theoretical foundation of the realist notion of intervention unsound because it justifies the use of force solely on humanitarian, rather than self-defense grounds.²⁷² "[F]orceful intervention based simply on humanitarian grounds and unrelated to a threat to one's own nationals is illegal under the United Nations Charter."²⁷³

The self-defense theory of intervention, advanced by Bowett, justifies intervention under article 51 of the charter, based on the notion that an injury to a national is an injury to the state. Consequently, such an injury is a breach of the territorial state's duty "to accord protection for aliens demanded by international law."²⁷⁴ Therefore, it is argued that the breach of this legal duty justifies a temporary violation of territorial sovereignty of the breaching state.²⁷⁵

An analysis, under either the realist theory or the self-defense theory, proves fatal to the initial U.S. justification in both the Dominican Republic²⁷⁶ intervention and that in Grenada as well.²⁷⁷ In Grenada, the U.S. maintained that intervention was necessary to ensure the safety of U.S. nationals on an island plunged into anarchy.²⁷⁸ Both the realist theory as articulated by both Waldock and

270. 1949 I.C.J. at 34.

271. 1949 I.C.J. at 35.

272. Bowett, *Intervention and Self-Defense*, *supra* note 253 at 44.

273. *Id.* at 45.

274. *Id.* at 44.

275. *Id.*

276. Meeker, *supra* note 258 at 64. Bowett criticizes the invasion of the Dominican Republic because "though this was a case of protection of nationals, the U.S. later did shift the ground for its jurisdiction for the presence of its forces to one of maintaining peace and security in the area at the request of the authorities of Santo Domingo." Bowett, *Intervention and Self-Defense* *supra* note 253, at 45 n.19.

277. Statement by Jeanne J. Kirkpatrick, *supra* note 9 at 38.

278. *Id.* At a press conference conducted on the day of the Grenada invasion, President Reagan explained the reasons for invading Grenada.

We have taken this decisive action for three reasons.

First, and of overriding importance, to protect innocent lives, including up to 1,000 Americans, whose personal safety is, of course, my paramount concern. Second, to forestall further chaos.

And third, to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada, where a brutal group of leftists violently seized power, killing the prime minister, three cabinet mem-

Lillich,²⁷⁹ and the self-defense theory put forth by Bowett²⁸⁰ are contingent upon the existence of an imminent threat of injury to the nationals of the intervening state. Although the U.S. has consistently maintained that such a threat existed, the validity of this premise has been questioned.²⁸¹ It is, however, quite likely that the true extent of the actual danger existing prior to the invasion may never be known.

The justification of the United States intervention in Grenada, contains a serious flaw which renders it inconsistent with either the realist or self-defense theory. Waldock,²⁸² Lillich²⁸³ and Bowett²⁸⁴ have stated that a legal intervention must be proportionate to the magnitude of the crisis and must be limited to the exigencies of evacuating threatened nationals. Admittedly, the U.S. maintained that the purpose of the intervention was not only to protect the safety of U.S. nationals, but also to remedy the alleged vacuum of effective authority in Grenada.²⁸⁵ Bowett argues that non-compliance with the three conditions for a justified intervention will

bers, two labor leaders and other civilians including children.

Let there be no misunderstanding, this collective action has been forced on us by events that have no precedent in the eastern Caribbean and no place in any civilized society.

American lives are at stake.

We've been following the situation as closely as possible.

Between 800 and 1,000 Americans, including many medical students and senior citizens, make up the largest single group of foreign residents in Grenada. Wash. Post, Oct. 26, 1983, at 7 cols. 1-5. See also *Transcripts of Shultz News Conference on Invasion of Grenada*, N.Y. Times, Oct. 26, 1983, at A13, cols. 1-6.

279. Waldock, *supra* note 87 and accompanying text. See also Lillich *supra* note 236 and accompanying text.

280. Bowett, *Intervention and Self-Defense*, *supra* note 253.

281. McQuiston, *supra* note 2. Compare statements of other U.N. Ambassadors with that of Jeanne J. Kirkpatrick, *supra* note 9. (Guyana) "My delegation understands that all foreigners on the island were safe and that at no time was their welfare in question." U.N. SCOR (2487th mtg.) at 36-37, U.N. Doc. S/PV.2487. (Grenada) (Grenadian authorities assured the U.S. government that U.S. nationals were fully protected and free to leave). U.N. SCOR (2487th mtg.) at 42-44, U.N. Doc. S/PV.2487. (Cuba) "[T]he United States consul to Saint George's stated that the United States citizens there, including the medical students, were perfectly well . . . anyone who wanted to leave the country would be able to do so without any problem as soon as international flights were resumed. U.N. SCOR (2487th mtg.) at 57, U.N. Doc. S/PV.2487. (France) "The justifications put forward relating to the internal situation of Grenada, do not seem to us to be admissible." U.N. SCOR (2487th mtg.) at 75, U.N. Doc. S/PV.2489.

282. Waldock, *supra* note 236 and accompanying text.

283. Lillich *supra* note 236 and accompanying text.

284. Bowett, *Intervention and Self-Defense*, *supra* note 253.

285. See generally, Statement of Jeanne J. Kirkpatrick *supra* note 9; Wash. Post, *supra* note 278; *Transcript of Shultz News Conference*, *supra* note 278.

enlarge the right to protection into a more general right of humanitarian intervention [which] would . . . introduce a dangerous exception to these prohibitions. Such intervention will, in the nature of things, be confined to intervention in small states who cannot oppose the intervening forces of a large power. It will be susceptible to use for ulterior motives, as in the past: that is to say, it will be used as a cover for interference in the domestic, internal affairs of the state, notably to influence the outcome of an internal struggle. It may also encourage counter-intervention by states, with the consequent risk of an escalation of conflict.²⁸⁶

The U.S. invasion of the Dominican Republic in 1965, is cited by Bowett as an incident which may cause the formulation of a "dangerous exception" to the prohibitions on intervention.²⁸⁷

Lillich attempts to close this "dangerous exception" by including a fourth condition, to wit, that the intervening State be relatively disinterested.²⁸⁸ This condition of relative disinterest requires the intervening State to be motivated by "humanitarian, not political or economic [goals]."²⁸⁹ The U.S. rescue mission to Iran provides an illustration of an act of self-help motivated by humanitarian goals. That mission aimed only to rescue the hostages,²⁹⁰ not to affect a change of government in Iran, or to seal a lacuna in effective leadership.

The invasion of Grenada is thus distinguishable from the realist's notion of a justified intervention. The Grenada operation, like its predecessor in the Dominican Republic, sought to cure the vacuum of effective authority in Grenada.²⁹¹ Indeed, U.S. forces remained on the island long after U.S. nationals were evacuated.²⁹² This fact demonstrates that the legal justification of the U.S. intervention in Grenada could not be premised on the right to protect endangered nationals.

286. Bowett, *Intervention and Self-Defense*, *supra* note 253 at 45.

287. *Id.* at note 19. Professor Lillich also criticizes the Dominican intervention on this basis. In discussing the criteria of a justified intervention, Lillich comments that the continued occupation by U.S. troops following evacuation of U.S. nationals was improper. *The Iran Crisis*, *supra* note 259.

288. Lillich *supra* note 236 and accompanying text.

289. Note, *supra* note 224 at 512.

290. *Id.*

291. See generally, Statement of Jeanne J. Kirkpatrick, *supra* note 9; Wash. Post, *supra* note 278; Transcript of Shultz News Conference, *supra* note 278.

292. N.Y. Times, Dec. 15, 1983 at A9 cols. 1-6.

D. *The Doctrine of Humanitarian Intervention*

A State's right of territorial sovereignty has been characterized as an imperfect right. The salient imperfection, which qualifies the right of sovereignty is the notion that States will maintain minimum standards of human decency. If, however, those standards are not maintained, scholars of international law have long recognized the right of humanitarian intervention.²⁹³ Humanitarian intervention is defined as an intervention by one State in the internal affairs of another State to ensure that the human rights of the inhabitants are not flagrantly violated.²⁹⁴ Such a right is said to exist:

[W]here a State under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on the grounds of humanity. When these 'human' rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled.²⁹⁵

The doctrine was first employed in the nineteenth century to justify several such interventions.²⁹⁶ Although the doctrine has not been frequently invoked, one commentator has noted that "the doctrine appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate."²⁹⁷

During the twentieth century, however, the doctrine began to wane in popularity. Indeed, "[t]he concept of humanitarian intervention has the distinct flavor of the nineteenth century which was relatively a century of tolerance and progress."²⁹⁸ The nineteenth

293. For a history of the right of humanitarian intervention see A. THOMAS & A. THOMAS, *supra* note 110 at 372-74 (1956); E. STOWELL, *supra* note 222, at 51-54.

294. E. STOWELL, *supra* note 222 at 51-54. See also Note, *supra* note 233 at 264-65.

295. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 14 (1915).

296. See A. THOMAS & A. THOMAS, *supra* note 110 at 373. The Thomases list the diverse incidents of humanitarian intervention in the nineteenth century. See also Lillich, *Intervention to Protect Human Rights*, 15 *MCGILL L.J.* 205, 209 (1969).

297. Lillich, *supra* note 296 at 210. At least one publicist, Hall, maintained that no right of humanitarian intervention was established by customary international law. See W.E. HALL, *A TREATISE ON INTERNATIONAL LAW* 302-05 (1969).

298. A. THOMAS & A. THOMAS, *supra* note 110 at 373.

century, however, was also an era of imperialism, and the state intervening for humanitarian purposes was always one of the great imperial or pseudo-imperial powers.²⁹⁹ Evidence of the fall from grace of the doctrine may be seen in the lack of intervention in the face of atrocities committed by Hitler's Germany, Franco's Spain or Stalin's Russia.³⁰⁰ Several theorists submit that the doctrine was invalidated by the signing of the Charter of the United Nations, particularly, by the prohibition on the use of force established by article 2(4).³⁰¹ Furthermore, in the inter-American setting, articles 18 and 20 of the OAS Charter seem to "completely prohibit [humanitarian] intervention."³⁰² Nevertheless there are publicists who interpret article 2(4) in a manner which preserves the right of humanitarian intervention.³⁰³

If, however, one assumes that the doctrine of humanitarian intervention remains a valid alternative, could the doctrine be used

299. Great Britain, France, the United States and Russia.

300. A. THOMAS & A. THOMAS, *supra* note 110 at 373. "For nationals of [a State], the common assumption is that international law offers no protection, other than the obsolete doctrines of humanitarian intervention." M. McDUGAL & F. FELICIANO, *supra* note 131, at 90.

301. "Intervention by the use or threat of force is, apart from self-defense, probably . . . illegal under the Charter." D. BOWETT, *SELF-DEFENSE*, *supra* note 81 at 14. Brownlie notes that "[i]t is considered very doubtful whether this form of intervention has any basis in the modern law. Only a minority of States have continued to assert its legality in the more recent period." I. BROWNLIE, *supra* note 88, at 433; P. JESSUP, *supra* note 88, at 169-70.

The Thomases note that "[t]he general international law right of an individual nation or group of nations to intervene for humanitarian purposes remains unchanged, except that this intervention may no longer be taken by means involving the use of force." A. THOMAS & A. THOMAS, *supra* note 110 at 384.

302. A. THOMAS & A. THOMAS, *supra* note 110 at 385-90. The Thomases note that: Although the Charter of the United Nations does not change the general international law right of individual intervention for humanitarian purposes, except that such intervention may no longer be intervention by use of or threat of force, it would seem that the Charter of Bogota does, as far as the American States are concerned, completely prohibit such intervention.

Id. at 390.

303. See Lillich, *Forcible Self-Help* *supra* note 236, at 325; I. L. OPPENHEIM, *supra* note 222 at 279-80; Professors Reisman and McDougal noted that:

[t]he advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights, and appraising its own work.

REISMAN & McDUGAL, *supra* note 260, at 171.

For a complete overview of the debates regarding the legality of humanitarian intervention, see Note, *supra* note 233 at 266-74.

by the United States to justify its position in the Grenada invasion? Although the United States, in defending its actions in Grenada, never expressly invoked the doctrine of humanitarian intervention, nonetheless, the doctrine is the natural progression of the stated legal position of the U.S.³⁰⁴ Indeed, action aimed at curing a "vacuum of effective authority,"³⁰⁵ arguably protects the inhabitants of the invaded State from the effects of anarchy and presumably from a lack of governmental protection as well. Such intervention could persist until the lacuna of governmental authority was cured. Conceivably, this crisis could be alleviated by a temporary or permanent imposition of the intervening State's sovereignty to the invaded territory.³⁰⁶

In the context of the Grenada invasion, it could be argued that the United States intervention was motivated by a humanitarian concern for the Grenadian populace. The troublesome fact of the United States' continued presence on the island, which presented an impediment to a legal justification based on the right to protect endangered nationals, could thus be overcome by the need to ensure the existence of an effective governmental unit that could protect Grenadians. Nevertheless, one crucial factor appears to be lacking in this humanitarian interventionist analysis.

The right to resort to humanitarian intervention is conditioned on the existence in the target State of violations of "the universally recognized principles of decency and humanity."³⁰⁷ The doctrine addresses "flagrant and persistent violations of the recognized principles of humanity,"³⁰⁸ not an "occasional abuse and instance of inhumane action."³⁰⁹ Lauterpact noted that "international recognition manifested itself in the precarious doctrine of humanitarian intervention in cases in which a State maltreats its subjects in a manner which shocks the conscience of mankind."³¹⁰

Prior to the invasion of Grenada, one could point to perhaps one instance of a flagrant violation of human rights.³¹¹ Indeed, it is

304. Statement of Jeanne Kirkpatrick, *supra* note 9.

305. *Id.*

306. See E. BORCHARD, *supra* note 246 at 14.

307. STOWELL, *supra* note 222 at 51-52.

308. *Id.* at 52 n.8.

309. *Id.* at 52 n.8. "We must admit that international law does not afford any machinery for correcting such occasional abuses." *Id.*

310. H. LAUTERPACT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 32 (1950).

311. On Oct. 19, 1983, the evening when Grenadian Prime Minister Maurice Bishop was murdered, Grenadian forces fired randomly into a crowd of Bishop supporters. See

rather difficult to argue that one such instance would shock the conscience of a world accustomed to the excesses of the junta in Argentina or the Khomeini regime in Iran. It should be noted that the United States did not previously allege a persistent disregard for human rights by the Grenadian government. Moreover, it cannot be said that the actions of the Grenadian regime vis-à-vis its own citizens were such to outrage or shock the conscience of the world. Therefore, the United States would be hard pressed to prove the existence of facts which could justify an intervention based on humanitarian concerns for the Grenadian public. Perhaps the failure of the United States to rely on this theory of intervention reveals that it may be uncomfortable arguing such a position. Consequently, if the United States intervention could not be legally justifiable as an instance of humanitarian intervention to protect Grenadian citizens, nor as an action to protect endangered U.S. nationals, what legal theory could validate the incident?

Both the United States and the members of the OECS alleged that the invasion aimed "to put an end to the situation of acute threat to peace and security to the entire eastern Caribbean region."³¹² Does the existence of a perceived threat to the security of neighboring states justify an act of intervention? A small minority of legal theorists argue that an intervention aimed at removing such a threat is, indeed, legal under international law. The doctrine of international nuisance, although not widely accepted, would justify the U.S. intervention in Grenada. This doctrine is "built upon the analogy of the common law right to remove a nuisance."³¹³ Stowell notes that Professor John Basset Moore adhered to the view that the U.S. intervention in Cuba in the late nineteenth century "rested upon the ground that there existed in Cuba conditions so injurious that they could no longer be indured. Its action was analogous to what is known in private law as the abatement of a nuisance."³¹⁴ Such interventions were justified by the French publicist, Alphonse Rivier, who recognized a right to intervene if the security of the intervening State was imperiled by political or social conditions or the governance of a neighboring

supra note 8 and accompanying text.

312. Statement of Jeanne J. Kirkpatrick 25 October, 1983 S/PV 2478, 92, 97. See also Statement of Mr. Moseley (Barbados) 28 October, 1983 S/PV.2491 63, 72.

313. STOWELL, *supra* note 222 at 62 n.14; see also J.B. MOORE, *THE PRINCIPLES OF AMERICAN DIPLOMACY* 208 (1918).

314. J.B. MOORE, *supra* note 313 quoted in E. STOWELL *supra* note 222 at 62 n.14.

State.³¹⁵

Nevertheless, Rivier suggests that this type of intervention is valid only where there is a direct and imminent threat to the security of the intervening State.³¹⁶ Moreover, Rivier notes that the institution of hostile doctrines or theories of government, which are perhaps contrary to the intervening State would not justify resort to intervention.³¹⁷ Rivier, however, legitimizes separate treatment for a situation where a neighboring State is plunged into anarchy, arguing that in such a case, the intervening State is entitled to a more expansive right of intervention.³¹⁸ In effect, Rivier submits that the existence of anarchy may entitle an intervening State to extend its sovereignty into the territory.³¹⁹

The United States and the member States of the OECS have vehemently argued that a situation of anarchy existed on Grenada which threatened the peace and security of the entire region. Whether such a situation existed is, indeed, a question of fact that may never be resolved. Assuming the existence of such a vacuum of authority on Grenada, it is quite possible that Rivier's outdated, little known or accepted theories, could be used as the legal justification for the intervention of October, 1983. Rivier's ideas, however, emanate from an era in which imperialism was firmly entrenched, and thus, ring of obsolescence. A rather tenuous argument could be made to suggest that such notions remain valid, despite the prohibition on the use of force in article 2(4) of the UN Charter or the prohibition on intervention provided for in articles 18 and 20 of the OAS Charter. One could argue that the need to act quickly in situations of impending danger from a neighboring State plunged into anarchy would preserve the doctrine of interna-

315. "Puis en vertu du droit de conservation, lorsque les droits et la sécurité de l'État intervenant sont lésés ou mis en péril par la condition politique ou sociale ou par la conduite de l'État qui donne lieu à l'intervention." A. RIVIER, *PRINCIPLES DU DROIT DES GENS* 393 (1896).

316. "Elle [l'intervention] est justifié lorsque les droits et la sécurité de l'État intervenant sont lésés ou mis en péril. Il faut donc une lésion, opérée ou imminente."

317. "Le Seul fait de proclamer des doctrines hostiles ou subversives, ou de se donner une constitution contraire aux institutions des autres États, ne suffit pas pour justifier l'intervention, tant qu'il n'y a pas propagande effective et vraiment dangereuse, c'est-à-dire d'un danger immédiat, direct et prochain." *Id.*

318. "Il est superflu de mentionner l'anarchie parce qu'elle supprime la notion et les droits de l'État, et qu'en conséquence, en cas d'anarchie, l'intervention d'autres États non seulement serait autorisée par le droit de conservation, mais durait même un caractère différent, le caractère d'une quasi-occupation, comme d'un territoire sans maître." *Id.* at 398.

319. *Id.*

tional nuisance within the framework of modern, international organizations. Nevertheless, this argument is significantly weakened by the fact that Rivier's theory was not widely accepted before the signing of the UN or OAS Charters, thus how could it gain new found prominence in today's world? Acceptance of Rivier's ideas would, in effect, suggest a return to a pre-UN notion of international law at least in those regions neighboring today's superpower States.

E. *Realpolitik and the Age of the Superpower*

Although clever interpretations of the UN and OAS Charters may be employed, it appears that the United States action in Grenada was employed without regard for the procedures envisioned by those documents. Accordingly, one may venture to note that the U.S. action in Grenada resembled not only the invasion of the Dominican Republic in 1965, but perhaps the Soviet actions in Afghanistan in 1979, and Czechoslovakia in 1968 as well. Although the Soviet responses certainly constitute more serious infractions, this pattern of superpower action illustrates the ineffectiveness of the United Nations to control the acts of those powerful States in their perceived spheres of influence. This pattern also suggests that two standards of conduct have evolved, one which governs superpower behavior in the international arena, and one to govern less powerful States.

It should be noted that such inequity is not a new phenomenon. Rivier recognized that his theory of intervention based on the international nuisance would be employed only by powerful States against weaker members of the international community of States.³²⁰ Yet Rivier wrote in the pre-United Nations era, before such notions as the equality of States and respect for territorial sovereignty bound the community of nations. Indeed, it would seem that each superpower acts more as a *realpolitiker* than a member of the United Nations. The actions of both superpowers, as aptly demonstrated most recently by the United States in Grenada, suggest adherence to policies based on the realities of national interest and power, in effect, policies based on *realpolitik*

320. "[o]n ne concernait guère un État faible intervenant dans les affaires intérieures d'un État fort" *Id.* at 401.

and not the lofty principles of equality of States as manifested in the United Nations Charter.

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** The authors would like to thank the following students who acted as research assistants for this comment: Ervin Gonzalez, Mark Klingensmith, Beth Liebman, Allen Popper and Gary Rosenblum.