SPECIAL REPORT

International Law and The United States Action in Grenada: A Report

COMMITTEE ON GRENADA—
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Editor's Note:

This is a special report submitted to the Council of the ABA Section of International Law and Practice by the Section's Committee on Grenada. It was accepted by the Council as a report of the Committee on February 10, 1984. The report does not necessarily represent the position of the Council or members of the ABA Section of International Law and Practice.

The Legal Adviser of the United States Department of State responded to an earlier draft of the report, which was substantively similar to the one published here. His comments are published, with his permission, following the report.

Introduction

At its meeting in Washington on December 3, 1983, the Council of the Section of International Law and Practice authorized the creation of an Ad Hoc Committee on Grenada and directed it to prepare a report on legal aspects of the intervention[1] in Grenada on October 25, 1983 by United

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[1]The word "intervention" is used here and elsewhere in this Introduction to describe the military action taken by the combined United States-Caribbean force, not as a legal conclusion denoting unlawful interference in Grenada's internal affairs. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 64 (1952); H. WALDOCK, BRIERLY'S THE LAW OF NATIONS 402 (6th ed. 1963); H. LAUTERPACHT, 1 OPPENHEIM'S INTERNATIONAL LAW 305 (7th ed. 1955); and Irizarry, *The Doctrine of Recognition and Intervention in Latin America*, 28 TUL. L. REV. 313, 326 (1954).

States military units aided by security forces from certain eastern Caribbean states. This is the Committee's report.

Given time constraints, the Committee has chosen to limit the focus of this report to international law aspects of the initial military intervention itself. We have not considered the very significant international law implications of the military buildup and political repression on Grenada prior to the intervention or of the conduct of United States military and civilian authorities on the island subsequently. Nor have we considered constitutional and statutory law as they pertain to the action taken by the United States. Although we do not take up these questions here, we in no sense minimize their importance.

The Committee has been conscious of the difficulty of separating the purely legal dimensions of the intervention in Grenada from the policy questions it raises. It has not been easy to maintain this distinction; law and policy are not mutually exclusive. Perhaps just as important, the intervention is controversial, here and abroad. By all published accounts, most Grenadians are grateful for its success, and so are most of their Caribbean neighbors and the American public. On the other hand, any military intervention in this hemisphere by the United States raises fresh doubts in Latin America and elsewhere about the sincerity of this country's commitment to international legal obligations governing the use of force. Even—perhaps especially—within the small circle of lawyers who are professionally concerned with these international obligations, a controversy rages over whether the action taken by the United States was lawful. The Committee has sought to objectively analyze the legal questions involved, free of any suggestion of political partisanship. However, we recognize that in view of the controversial nature of these issues, our conclusions may not please everyone.

It has not escaped the Committee's notice that in some influential circles the international law aspects of the military intervention in Grenada are viewed as inconsequential, irrelevant as a policy consideration, or worse. The nation's largest circulation daily newspaper, the *Wall Street Journal*, told its more than two million readers in an editorial that "the only way we will be able to make sense of the Grenada invasion is if all the international lawyers agree to shut up." That is what we should not and will not do. The ability of the United States to exert its influence in world affairs in furtherance of the humane and democratic values we most deeply believe in will be determined in the long run by the perceived legitimacy of our imposing national power, as well as by that power itself. Whatever immediate gains flow from its use—psychological, political, strategic, even humanitarian—are apt to be Pyrrhic if they come at too high a cost in terms of a loss in credibility or legitimacy, especially the credibility of our commitment to the rule of law.

That the United States has the military and political power to circumvent

its international legal obligations without fear of international sanction is somewhat beside the point. So is the fact that as lawyers, arguing after the event, we might be able to construct a strained if marginally plausible case for the legality of the action taken by the United States in intervening in Grenada. If in order to do so it is necessary to so arrange the variables and so exaggerate the letter and spirit of the applicable legal norms that even we are uncomfortable with the resulting argument, it is unlikely to convince anyone else. Moreover, where, as in this case, the question presented is not only whether the United States has complied with generally applicable rules of law but also whether it has fulfilled important treaty commitments, a report that treats these rules and commitments as infinitely manipulable would serve no useful purpose.

Issues like the ones here presented, even when addressed in legal terms, are ultimately decided by a global audience comprised of lawyers and nonlawyers alike. Many in this audience are skeptical about the reality of law as a constraint upon the use of force in international relations. International law in this context represents merely one among a number of competing ways of looking at international relations, each with its own set of perspectives and standards for appraising the compatibility of national behavior with the expectations of the informed, responsible members of the world community. Among other things, it tends to emphasize long-term interests more than some other perspectives and standards do. Undoubtedly, this contributes to its overall authority. But from time to time it means that an international lawyer's view of events resists popular opinion. When it does, and this may be one such instance, it is tempting to temper one's legal opinion with one's policy preferences. If we were to do this, though, we would be neglecting our responsibilities as members of the Section to work towards enhancing the capacity of law to communicate a compelling authority in world affairs. And we would be ignoring the Council's directions in establishing the Committee.

Some international lawyers in this country and elsewhere have publicly denounced the United States action in Grenada as an unqualified violation of the United Nations Charter, the Rio Treaty, the Charter of the Organization of American States and other relevant legal norms or sources of norms. The United Nations Security Council, by a vote of 11 to 1, with only the United States voting against (and three countries, including Great Britain, abstaining), voted for a resolution condemning the military action in Grenada as "a flagrant violation of international law and of the independence, sovereignty and territorial integrity" of Grenada. The discussion of the intervention in the OAS produced a number of similar expressions from representatives of Latin American countries. Our own analysis suggests a more restrained conclusion, but not a wholly different one.

What is clear is that there has been a steady erosion of the legal norms governing the use of force in international relations that did not begin with

the United States intervention in Grenada, and that this erosion has left national leaders feeling less constrained by these norms than they once were. This, we think, is a dangerous trend. History has shown that the successful use of the military instrument has a tendency to become habit-forming, with the right to use armed force inferred by the victor from the fact of the victory.

In some measure, existing legal norms governing the use of armed force reflect past needs and experiences more than current ones. To the extent, for example, that reasonable efforts to counter insidious forms of aggression, protect human rights, restore civil order or achieve other legitimate ends do not square with the law or our present treaty commitments, perhaps the law needs amendment and our treaty commitments need updating.

I. Developments Preceding the October 25th Action[2]

On October 25, 1983, United States military forces, accompanied by security units from six Caribbean countries (the Caribbean Peace-Keeping Force), landed on the island of Grenada, located about a hundred miles north of the coast of Venezuela. Altogether, some 8,000 United States troops were deployed in the operation, along with 300 members of the Caribbean Peace-Keeping Force. By October 28th, the major military objectives of the operation had been achieved.

Casualties to the United States armed forces are said to have totalled 18 killed and 116 wounded. At least 45 Grenadians were killed, among them 21 civilians killed in the accidental bombing of a mental hospital; 358 were wounded. Of the roughly 800 Cuban personnel on the island, at least 34 died and 59 were wounded in fighting with the American forces. Nearly 600 of the approximately 1,000 American civilians on Grenada at the time of the invasion were safely evacuated. By December 15th, all United States combat troops had been withdrawn from Grenada, leaving several hundred American support personnel and security units, and 300 members of the Caribbean Peace-Keeping Force, on the island.

The joint United States-Caribbean action followed a request to the United States by the Organization of Eastern Caribbean States (OECS) and—although the precise facts and legal weight of the matter remain controversial—the Governor-General of Grenada for assistance in ending the political turmoil triggered by the assassination of Grenadian Prime Minister Maurice Bishop on October 19th. The roots of the Grenadian upheaval, however, extend back at least to 1973, to the formation of the New Jewel Movement (NJM) through the merger of two Grenadian political organizations: the Movement for Assemblies of the People, founded

[2]*See generally* GRENADA: A PRELIMINARY REPORT, issued by the Departments of State and Defense, Dec. 16, 1983; Massing, *Grenada Before and After*, THE ATLANTIC, Feb. 1984, at 76 ff.

by Maurice Bishop, and the Joint Endeavor for Welfare, Education and Liberation (whose acronym is "JEWEL").

After Grenada achieved independence from Great Britain on February 7, 1974, the NJM became the principal political opposition to the corrupt and brutal regime of Sir Eric Gairy. In the 1976 elections, the NJM, in coalition with other opposition parties, received 48 percent of the vote and became the official parliamentary opposition to Mr. Gairy's administration. On March 13, 1979, while Mr. Gairy was out of the country, the NJM mounted a successful and generally popular coup d'etat. Mr. Bishop replaced Mr. Gairy as Prime Minister of what then became known as the new People's Revolutionary Government. He soon suspended the 1973 Grenadian Constitution and began to promulgate a series of "People's Laws."

Before the coup, Mr. Bishop and the New Jewel Movement had espoused a blend of Marxist philosophy and West Indian nationalism, for instance supporting decentralized village government and grass-roots agricultural development while condemning the cultural impact of tourism. Upon coming to power, Mr. Bishop and the NJM adopted more clearly pronounced Marxist-Leninist policies and organizational techniques. The United States government was deeply suspicious of Mr. Bishop and the NJM from the outset. Perhaps partly in consequence of what it viewed as United States hostility, but in any event by design, Bishop and the NJM began to strengthen Grenada's ties with the Soviet Union and other eastern bloc nations, especially Cuba. The one-kilowatt station Radio Grenada was rebuilt with Soviet and Cuban assistance into a 75-kilowatt station capable of broadcasting throughout the Caribbean. Renamed Radio Free Grenada, the NJM-controlled station replaced the British Broadcasting Corporation as the island's news source, with items prepared by the Soviet TASS and Cuban Prensa Latina news services. The new station reflected Soviet policy on international issues and the NJM blocked the dissemination of competing views by closing down all independent news media.

Pursuant to a 1979 treaty with Grenada, the Cuban government contributed between $40 and $60 million worth of work and material for the construction of a new airport at Port Salines, on the southern tip of Grenada. Construction of the airport's 9,000 foot runway received some western financial and technical support, but the project was financially and physically dominated by the Cuban government and Cuban personnel. At the time of the United States-Caribbean military action, over 600 Cubans were at work on the final stages of the runway's construction, which was scheduled for completion in March 1984.

During Prime Minister Bishop's four and one-half years in office, Grenada moved successively closer to the Soviet-bloc nations, entering into a variety of economic, diplomatic, and military assistance agreements with these countries, particularly Cuba, the Soviet Union and East Germany. During this time, Grenada built up its military power to a level dispropor-

tionate to that of its Caribbean neighbors, most of whom had no permanent armed forces. By the fall of 1983, the New Jewel Movement had built a regular army of almost 600 men, supplemented by a militia estimated by various sources at between 1,000 and 3,000 men. Military agreements with the Soviet Union, Cuba and North Korea formed the basis of plans, apparently obtained in the course of the United States-Caribbean intervention, that are said to have envisioned a Grenadian army of between 7,000 and 10,000 men. Cuba had furnished Grenada with some military equipment after the NJM came to power in 1979. The Soviet Union subsequently provided sophisticated arms as well as military and intelligence training to the Grenadian People's Revolutionary Army (PRA). Large caches of weapons were discovered by the invasion forces.

It is not clear at what point dissension surfaced within the leadership of the New Jewel Movement, although it appears to have at least coincided with a meeting Prime Minister Bishop had with William Clark, National Security Adviser to President Reagan, and Kenneth W. Dam, Deputy Secretary of State, in Washington in June 1983. Minutes of the First Plenary Session of the New Jewel Movement Central Committee from July 13–19, uncovered by the invasion forces, indicate growing concern over a split within the party. During the Central Committee meeting of August 29th, Prime Minister Bishop was denounced for straying from the Marxist-Leninist line and contributing to rebellion within the party. Criticism of Mr. Bishop increased during the meeting of September 14–16, at which time a proposal that he share power with Deputy Prime Minister Bernard Coard was approved. The decision was reportedly ratified by the membership of the NJM Central Committee on September 25th.

From September 27th to October 8th, Bishop traveled to the Soviet Union, Cuba and other Soviet-bloc nations. Upon his return to Grenada on October 8th, he apparently attempted, but failed, to regain his authority within the New Jewel Movement. At the October 12th meeting of the NJM Central Committee, he was again denounced by the Coard faction and at some time within the next 48 hours he was placed under house arrest by PRA commander General Hudson Austin, a member of the NJM Central Committee and Minister of Communications, Works and Labor.[3]

The status of government authority on Grenada at this point becomes unclear. Several Central Committee members stated that Mr. Coard[4] was in

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[3]In an address before the Associated Press Managing Editors' Conference in Louisville, Kentucky, November 4, 1983 [hereinafter "AP Louisville speech"], Deputy Secretary Dam said that Mr. Bishop had been put under house arrest the night of October 14th. 83 DEP'T ST. BULL. 80 (1983). Other reports indicate that Mr. Bishop was arrested the night of the 12th or 13th.

[4]Bernard Coard, who also served as Minister of Finance, Trade, Industry and Planning in the Bishop administration, is said to have controlled a powerful, semi-secret group within the NJM known as the Organization for Educational Advancement and Research. Regarded as a more

control of the Party. He was also reported to be under the protection of General Austin's People's Revolutionary Army, however, and was not seen in Grenada until he was captured by American troops. Meanwhile, Central Committee members loyal to Mr. Bishop sought but failed to secure Mr. Bishop's release.[5]

On Monday, October 17th, news of Mr. Bishop's arrest was made public by General Austin. The next day, five government ministers loyal to Mr. Bishop resigned their posts, and then on Wednesday the 19th led several thousand people in freeing Mr. Bishop from house arrest. The crowd continued to the PRA garrison at Fort Rupert where Mr. Bishop apparently took temporary control. PRA troops then attacked the garrison and fired into the crowd, dispersing the Bishop loyalists. Mr. Bishop, several loyal ex-cabinet ministers and union leaders were captured and, apparently, summarily executed. At least 18 confirmed deaths were attributed to the violence and many more were reported.

After Mr. Bishop's execution, the PRA announced the dissolution of the existing government and the formation of a 16-member Revolutionary Military Council (RMC) headed by General Austin. A round-the-clock, shoot-on-sight curfew was imposed and scheduled to remain in effect until 6:00 p.m. October 24th. The Pearls Airport was closed and all scheduled flights were cancelled. In the process, two United States diplomats flying to Grenada from Barbados were turned back.

On Thursday the 20th, President Reagan directed United States warships and troops bound for Lebanon to head instead towards Grenada, in the event United States nationals had to be evacuated.[6] Then on Friday the 21st, representatives of the six island states with which Grenada has been associated since 1981 in the OECS[7] met at Bridgetown, Barbados, adopted a plan of action to restore order in Grenada, and invited the other Caribbean states with which they are associated in the larger association known as the Caribbean Community (CARICOM)[8] to join with them in carrying out the

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hard-line Marxist than Mr. Bishop, Coard reportedly resigned as Deputy Prime Minister on October 12, 1983, to quell rumors that he was plotting to assassinate Mr. Bishop and take control of the NJM. *See* Faerron, *Dramatis Personae and Chronology*, 12 CARIBBEAN REV. 10, 12 (1983); Sanchez, *What Was Uncovered in Grenada*, 12 CARIBBEAN REV. 20, 21; and *The Situation in Grenada*, Hearing before the Senate Comm. on Foreign Relations, 98th Cong., 1st Sess. 4 (1983) (remarks of Deputy Secretary of State Kenneth W. Dam).

[5]*See Interviewing George Louison*, 12 CARIBBEAN REV. 17 (1983).

[6]News conference, Secretary of State George Shultz, Oct. 25, 1983, 83 DEP'T ST. BULL. 69 (1983) (hereinafter "Shultz October 25 news conference").

[7]The OECS was established by treaty June 19, 1981. Text *reprinted in* 20 I.L.M. 1166 (1981). In addition to Antigua and Barbuda, Dominica, St. Lucia, and St. Vincent and the Grenadines, which participated in the military operation against Grenada, the members of the OECS are Montserrat and St. Kitts-Nevis, which did not, as well as Grenada itself.

[8]CARICOM was established by treaty July 4, 1973. Text at 12 I.L.M. 1033 (1973). In addition to the seven OECS states, the members of CARICOM as of October 25, 1983 were Barbados, Belize, Guyana, Jamaica, and Trinidad and Tobago. Belize, Guyana, and Trinidad and Tobago did not participate in the military action taken on the 25th.

plan. They also formally invited the United States; indeed, the plan was contingent upon United States military assistance.

Barbados and Jamaica, whose prime ministers were in Barbados at the time of the OECS meeting on Friday, agreed to participate in the operation and joined in asking the United States to lend the assistance the OECS had requested. The rest of the CARICOM states, whose representatives had gone to Port-of-Spain, Trinidad, for a meeting on the Grenada situation (see below), met on Saturday the 22nd in a meeting that lasted until the early hours of Sunday morning and ended inconclusively. When the CARICOM meeting resumed later Sunday, the subject of the proposed military intervention was not taken up; instead, the discussion turned to the imposition of economic and political sanctions against Grenada.[9] Ultimately, the only non-OECS CARICOM states that participated in the October 25th military operation were Barbados and Jamaica.

On Saturday, President Reagan sent a personal emissary, Ambassador Frank McNeil, to the Caribbean to determine first-hand the views of the OECS states, Barbados and Jamaica. At about this time, the United States proposed several alternative means for evacuating Americans who wished to leave: e.g., by cruise ship, chartered aircraft, military aircraft. These proposals were rejected by the RMC, which meanwhile announced that Pearls Airport would be reopened to normal traffic by Monday the 24th.

At some point over the weekend the RMC became aware that the United States and certain Caribbean states were preparing to launch a full-scale military attack on Grenada. On Monday the 24th, the RMC sent a telex to the United States embassy in Barbados urging the United States and its Caribbean allies not to invade Grenada. The telex stated in pertinent part:

> It is our information that at a meeting of some [Caribbean Community] governments in Port-of-Spain, Trinidad, on Sunday 23rd October, 1983, some of the participating governments decided on establishing a military force to invade Grenada. In their decision they called for direct participation of extra-regional forces in invading Grenada.
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> We are concerned because in many reports the name of the government of the United States of America has been mentioned as participating in such a military force to invade our country. We also have concrete information that for the past 18 hours two warships have been patrolling between 12 and 15 kilometers off the shores of Grenada, well within our territorial waters.
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> We should view any invasion of our country, whether based on the decision of those [Caribbean Community] governments or by that of any other government, as a rude violation of Grenada's sovereignty and of international law.

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[9]The CARICOM states voted 11 to 1 to impose economic sanctions against Grenada and to refer an agreed proposal to restructure CARICOM to the regions' attorney-generals for advice on how to effectuate it. The proposal was to include human rights and democratic government qualifications and to remove the strict unanimity rule applicable to certain CARICOM decision-making. Guyana reportedly dissented from these actions and said it would not participate in the restructured CARICOM.

> Furthermore, any such invasion can only lead to the loss of lives of thousands of men, women and children, therefore we strongly condemn such a decision.
>
> The present situation in Grenada (that is, as of October 24, 1983) is of an entirely internal and domestic nature. And presently peace, calm and good order prevail in our country. For these reasons, we do not understand the basis or the reasons for the reported violent reaction of some Caribbean and other governments.
>
> We view any threat or the use of force by any country or group of countries as a gross and unwarranted interference in the domestic affairs of our sovereign and independent country.
>
> Grenada has not and is not threatening the use of force against any country, and we do not have any such aspirations. . . . We are not seeking military confrontation with any country or group of countries, but, on the contrary, we are prepared to hold discussions with those countries in order to ensure good relations and mutual understanding and with a view to maintaining and strengthening the historic ties with all these countries.

The telex also provided assurances about the safety of foreign nationals on Grenada:

> We are also concerned about the reports that the government of the United States of America is considering sending battleships to evacuate citizens of your country presently residing peacefully in Grenada. We reiterate that the lives, well-being and property of every American and other foreign citizen residing in Grenada are fully protected and guaranteed by our government. However, any American or foreign citizen in our country who desires to leave Grenada for whatever reason can do so using the normal procedures through our airport or commercial aircrafts. As far as we are concerned, these aircrafts can be of regular flights or chartered flights, and we will facilitate them in every way we can.[10]

In fact, however, Pearls Airport was not officially reopened on October 24th as promised, and no regular commercial flights were available, although it was reported that four chartered flights, some carrying Americans, did leave Grenada on October 24th.[11]

As noted, the RMC telex contained assurances that "presently peace, calm and good order prevail in our country." It also said that "the Revolutionary Council of Grenada has no desire or aspiration to rule the country"

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[10]The text of the telex was read to the Permanent Council of the OAS at its October 26th meeting by Ian Jacobs, Grenada's representative. Transcript of Extraordinary Session of the Permanent Council of the Organization of American States, Oct. 26, 1983. OEA/Ser. G, Doc. CP/ACTA 543/83, 4-5 [hereinafter "OAS Transcript"].

[11]The Canadian government, with the permission of authorities on Grenada, had chartered a Leeward Islands Air Transport (LIAT) plane to evacuate Canadian nationals from Grenada on Monday, October 24th. At the last minute, LIAT abruptly cancelled the flight. LIAT is owned by several Caribbean countries. The reason for its cancellation of the evacuation flight is not known. There has been speculation in the press that the U.S. Government pressured LIAT to cancel the flight in order to bolster the U.S. contention that the RMC was unreliable and that U.S. nationals on Grenada were in danger of being held hostage. *See, e.g.*, Barrow, *The Danger of Rescue Operations*, 12 CARIBBEAN REV. 3, 4 (1983). The incident and the charges that the U.S. caused it received wide publicity in Canada.

but rather is "beginning the process of establishing a fully constituted civilian government within 10 to 14 days."[12]

Despite this plea for nonintervention[13] and a communique sent by the government of Cuba to the State Department on October 22nd requesting negotiations with a view to avoiding a resort to force, United States military forces, followed by the Carribean Peace-Keeping Force, launched the invasion of Grenada the following morning, Tuesday the 25th. American forces met stiff resistance from armed Cuban personnel stationed on Grenada, especially the airport construction workers around Port Salines, and from elements of the Grenadian army and militia. Within a few days, however, most resistance had been overcome and virtually all opposition to the intervention had subsided.

II. The Action Taken by the Caribbean States and the United States

A. The Action Taken by the OECS, Barbados and Jamaica

Following the invasion on the 25th, the OECS Secretariat issued a statement explaining the circumstances that caused the OECS states to act and identifying the provisions of the OECS' constituent treaty under which their action was taken. The statement cited the deterioration of conditions on Grenada following the murder of Mr. Bishop and his fellow-ministers; the imposition of the shoot-on-sight curfew; and the indications that, unlike Mr. Bishop, the RMC was unpopular with the Grenadian people. It also mentioned the extensive military build-up in Grenada in the past few years,

[12]In this respect, the telex said:

> We further take this opportunity to inform your government that the Revolutionary Military Council of Grenada has no desire or aspiration to rule the country. We are presently beginning the process of establishing a fully constituted civilian government within 10 to 14 days. Such a government would be broad-based expressing the interests of all social classes and strata in our country. We have already held discussions with our local chamber of commerce and industry, commercial bank managers and hoteliers, as part of the process of constituting such a government. Our civilian government would pursue a policy of mixed economy with state, cooperative, and private sectors and would encourage foreign and local investments within the framework of the national interest of our country . . .

These assurances were later cited by U.S. government officials as evidence of a vacuum of authority in Grenada. In testimony before the Senate Foreign Relations Committee on October 27th, Deputy Secretary Dam said:

> [I]t was never clear that [General] Austin or any other coherent group was in fact in charge. The RMC members indicated only that a new government would be announced in 10 days or 2 weeks.

The Situation in Grenada, supra note 4, at 4, and again at 6, 17, 28, 30 and 34–35.

[13]The State Department has given us to understand that it regarded the assurances contained in the RMC telex as unreliable in light of the fact that the individual who sent it, Major Leon Cornwall, was the one who had already rejected the proposals put forward by the U.S. for peaceful evacuation of U.S. nationals. Major Cornwall was Grenada's ambassador to Cuba and a close political ally of Mr. Coard.

which it said had created a disproportionality between Grenada's military strength and that of the rest of the OECS states. "The military might in the hands of the present group [i.e., the RMC]," the statement said, "has posed a serious threat to the security of the OECS countries and other neighboring states."[14]

The OECS countries were also concerned about possible military uses of the 9,000 foot runway at the Port Salines Airport and by the presence of so

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[14]The complete text of the OECS statement reads as follows:

The member governments of the Organization of Eastern Caribbean States . . . met at Bridgetown, Barbados, on Friday 21st October 1983 to consider and evaluate the situation in Grenada arising out of the overthrow of the Prime Minister Maurice Bishop and the subsequent killing of the Prime Minister together with some of his Cabinet colleagues and a number of other citizens.

The member states were deeply concerned that this situation would continue to worsen, that there would be further loss of life, personal injury and a general deterioration of public order as the military group in control attempted to secure its position.

Member governments considered that the subsequent imposition of a draconian 96 hour curfew by the military group in control was intended to allow them to further suppress the population of Grenada which had shown by numerous demonstrations their hostility to this group.

Member governments have also been greatly concerned that the extensive military build-up in Grenada over the last few years had created a situation of disproportionate military strength between Grenada and other OECS countries. This military might in the hands of the present group has posed a serious threat to the security of the OECS countries and other neighboring states.

Member governments considered it of the utmost urgency that immediate steps should be taken to remove this threat.

Under the provisions of Article 8 of the Treaty establishing the OECS concerning defence and security in the sub-region, member governments of the Organization decided to take appropriate action.

Bearing in mind the relative lack of military resources in the possession of the other OECS countries, the member governments have sought assistance for this purpose from friendly countries within the region and subsequently from outside.

Three governments have responded to the OECS member governments' requests to form a pre-emptive defensive strike in order to remove this dangerous threat to peace and security to their sub-region and to establish a situation of normalcy in Grenada. These governments are Barbados, Jamaica and the United States of America. Barbados and Jamaica are members of CARICOM and Barbados is linked to some of the OECS member governments in a sub-regional security agreement.

It is the intention of the member governments of the OECS that once the threat has been removed, they will invite the Governor-General of Grenada to assume executive authority of the country under the provisions of the Grenada Constitution of 1973 and to appoint a broad-based interim government to administer the country pending the holding of general elections.

It has been agreed that while these arrangements are being put in place, the presence of former Prime Minister Eric Gairy and other undesirable political elements would complicate the situation and that they would therefore not be welcome in Grenada.

It is further intended that arrangements should be made to establish effective police and peace keeping forces in order to restore and maintain law and order in the country.

After normalcy has been restored, non-Caribbean forces will be invited to withdraw from Grenada.

Member governments of the OECS wish to solicit the diplomatic support of all friendly countries for this initiative.

83 DEP'T ST. BULL. 67, 68 (1983).

many Cuban personnel on Grenada. At the time of the invasion, nearly 800 Cubans were on the island, including 53 military and security advisers and over six hundred armed, combat-trained construction workers at Port Salines. Premier Fidel Castro of Cuba has maintained that concern over the Cubans was groundless, claiming that over half of the construction workers were over the age of 40, that they were engaged in strictly civilian activity, and that their weapons had been provided by the Bishop regime for self-defense in the event of foreign invasion. Be that as it may, armed, combat-trained construction workers are an ominous innovation in the Eastern Caribbean.

The OECS perspective was summarized by St. Lucia's representative at the meeting of the OAS Permanent Council on October 26th:

> [I]n the past four years Grenada had built up her armed forces, with the assistance of both regional and nonregional totalitarian states, to a level unmatched by any other country in the Eastern Caribbean. History has shown, and our own intelligence reports have confirmed, that the microcosmic territory of Grenada was rapidly becoming too small to contain both its revolutionary zeal and the mounting tons of military hardware.[15]

The precise sequence of events which led to the OECS action is still not entirely clear. The fullest explanation offered so far is that which was provided by Prime Minister Tom Adams of Barbados in a radio address to his countrymen on Wednesday, October 26th, the day after the invasion. Mr. Adams reported that as early as Saturday, October 15th, while Mr. Bishop was still being held in custody by the RMC, "an American official" approached an official of the Barbados Ministry of Defense about the prospect of rescuing Mr. Bishop. The American indicated that the United States government was prepared to supply transport for such a mission.[16]

Talks concerning the rescue plan continued for several days, according to Mr. Adams, involved several Caribbean and non-Caribbean countries, and culminated in a decision by the Barbados cabinet on Wednesday the 19th to proceed, in collaboration with eastern Caribbean states and "larger non-Caribbean countries with the resources necessary to carry out such an

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[15]OAS Transcript, *supra* note 10, at 22.

[16]Of this offer Mr. Adams said:

> This raised a number of questions: Would the regime perhaps allow Bishop to leave and go into exile? If not, would Bishop wish to be rescued? There were many other political prisoners in Grenada, put there by Bishop's government. It would clearly not have been right to attempt to save Bishop but ignore the detainees, some of whom had spent more than four years behind bars. This was a point put especially strongly by Prime Minister Cato of St. Vincent and the Grenadines when I approached him about the matter as one of the heads of government of the member countries of our regional security pact. I spoke also to other pact members and to officials of two friendly non-Caribbean countries, and took the advice of Colonel, now Brigadier Lewis, the regional security coordinator. Talks about a possible rescue were commenced and continued.

Transcript, address by Prime Minister Adams, Oct. 26, 1983. A copy of this transcript has been made available to the Committee by the State Department.

intricate operation." The Barbados cabinet was still in session, discussing the plan, when Mr. Bishop was rescued by Grenadians loyal to him, a rescue which, as already noted, led to his death.

Mr. Adams said that the next day, Thursday the 20th, he received a telephone call from Prime Minister John Compton of St. Lucia in which Mr. Compton proposed a Caribbean initiative on a multinational basis to restore law and order on Grenada and to lead it to early elections. Mr. Adams said that he, and later in the day his cabinet, agreed to support the proposal on the condition that Caribbean leaders were given an opportunity to discuss the situation and to act jointly. Mr. Compton thereupon called Prime Minister George Chambers of Trinidad and Tobago, the then current chairman of the heads of government of CARICOM, requesting a meeting of CARICOM states in Barbados. Mr. Chambers apparently did call such a meeting, scheduling it for the next day, the 21st; but he named Port-of-Spain, Trinidad, as its venue rather than Bridgetown.

Whatever was going on, the heads of government of Barbados, Jamaica and the six OECS states (i.e., other than Grenada) were in Bridgetown, while the other CARICOM representatives proceeded to Port-of-Spain. As it turned out—and as previously noted—the CARICOM states did not meet, as such, until Saturday the 22nd, that is, until the day after the OECS, joined by Barbados and Jamaica, had decided formally to restore order on Grenada and to ask the United States to provide the military forces needed to secure control on the island.

It is useful at this point to mention the controversy that later surrounded the OECS action. It was caused, at least in part, by the reference in the OECS Secretariat's post-invasion statement to Article 8 of the OECS treaty. Article 8 establishes a Defence and Security Committee, comprised of the ministers of defense of the member states (or other ministers or plenipotentiaries designated by the respective heads of government). The Defence and Security Committee's authority is circumscribed, being limited by Article 8 to responses to "external aggression." This suggested to some observers that the OECS had acted *ultra vires* its constitutent treaty, since the aspects of the Grenada situation that the OECS statement cited as giving rise to its concern seemed to be entirely internal to Grenada.

Moreover, Article 8 requires unanimity. Grenada itself did not participate in the October 21st meeting; and press accounts indicated that, while there had been unanimity among the other six OECS states on the need to take some joint action, only four of the six had voted for the plan actually carried out on the 25th. The others were said to have abstained.[17]

It is possible that the press accounts misinterpreted Montserrat's and St. Kitts-Nevis' nonparticipation in the multinational force as lack of support

[17]*See, e.g.*, N.Y. Times, Oct. 26, 1983, at A19.

for it, whereas the explanation may lie merely in their lack of security forces sufficient to make personnel available. Prime Minister Adams stated in his radio address on the 26th that the OECS had acted unanimously. So did American officials, although their formal statements in this regard were somewhat ambiguous.[18] We have been advised by the State Department, without reservation, that the OECS states acted unanimously.

In the first days following the October 25th operation, OECS and United States officials repeatedly cited Article 8, and only this provision, as legal justification for the OECS action under its treaty.[19] Later, American officials, at least, retreated from Article 8, citing provisions of the OECS treaty that bestow plenary power upon the heads of government, acting in the capacity of "the Authority," i.e., acting under Article 6 of the treaty which creates this body and describes it as "the supreme policy-making institution" of the organization.[20] Together with related provisions, it accords greater discretion than does Article 8 standing alone.

How much more is open to question. It is still not obvious that the OECS treaty contemplates the use of armed force against a member state, especially an invasion having the objective of resolving an internal struggle for control of its authority structure. Nor is it obvious that the treaty contemplates an invitation to a militarily dominant non-OECS power to lead such an invasion.

It is clear that, at least ordinarily, the individuals who act as the Defence and Security Committee under Article 8 are not those who act as the Authority under Article 6. Prime Minister Adams reported that there had actually been two meetings of the OECS Friday night, the 21st. The first meeting, early in the evening, had been attended by the ministers of de-

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[18]In his testimony before the Senate Foreign Relations Committee on October 27th, Deputy Secretary Dam said that President Reagan's emissary, Ambassador McNeil, had met in Bridgetown with OECS and regional leaders, and that Ambassador McNeil had found them "unanimous in their conviction that the deteriorating conditions on Grenada were a threat to the entire region that required immediate and forceful action. They strongly reiterated their appeal for U.S. assistance." THE SITUATION IN GRENADA, *supra* note 4, at 5. This is not quite the same as saying that he found them unanimously agreed to the specific plan of military action that had been taken up at the October 21st meeting(s) of the OECS. The same ambiguity appears in President Reagan's own statement, on October 25th, that the OECS states, Barbados and Jamaica "joined unanimously in asking the U.S. to participate." 83 DEP'T ST. BULL. 67 (1983). Similarly, in testimony before the House Foreign Affairs Committee on November 2nd, Deputy Secretary Dam said that Ambassador McNeil had met with the prime ministers of Barbados, Jamaica and Dominica and found them to be unanimous. The prime minister of Dominica, Eugenia Charles, was chairing the OECS Authority at the time, but it is not clear from Secretary Dam's remarks to the House Committee whether her support for the plan of military action was given in behalf of her own country or for all the OECS states.

[19]*See* OAS Transcript, *supra* note 10, at 23 (representative of St. Lucia), 25 (Dominica), 29 (U.S.), and 48 (St. Vincent and the Grenadines). *See also* Shultz October 25 news conference, *supra* note 6, at 69; and THE SITUATION IN GRENADA, *supra* note 4, at 5, 29–31, and 34–35.

[20]*See* Dam, AP Louisville speech, *supra* note 3.

fense, acting as the Defence and Security Committee; the second, later that evening, had been attended by the heads of government—and, by invitation, Mr. Adams himself—acting as the Authority.

Either way, Grenada itself was not represented. But while this might be deemed a critical absence for the purposes of Article 8 and the work of the Defence and Security Committee, for which absolute unanimity is required, it is less so under the voting provisions applicable to action taken by the Authority. These provisions require only the affirmative vote of member states present and voting, provided that nonpresent, nonvoting states later ratify the action taken.[21]

In any event, Mr. Adams revealed—and subsequent announcements from all relevant parties later stressed—that the OECS states had acted in response to a confidential request for assistance from Grenada's Governor-General, Sir Paul Scoon. The fact of Mr. Scoon's invitation was delayed until his safety had been assured by United States forces shortly after the invasion began.[22] Even without the initial silence, but more so because of it, news of the invitation from Mr. Scoon was greeted with skepticism.[23] Critics doubted—many still do—whether Mr. Scoon had acted voluntarily;

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[21]Deputy Secretary Dam offered two explanations for the view that the unanimity required by Article 8 was present even though Grenada was not represented at the OECS meeting(s). One is that Grenada implicitly participated, since the OECS was acting in response to a confidential appeal from Grenada's Governor General, Sir Paul Scoon. The other is that the OECS agreement should not be construed in a way which would force the remaining OECS governments to remain inactive in the event a vacuum of authority occurs in one of them. In cases of doubt, he said, the parties to a treaty are the best judges of the meaning of its terms. THE SITUATION IN GRENADA, *supra* note 4, at 30–31.

[22]*See* Dam, AP Louisville speech, *supra* note 3. In the course of the United Nations Security Council debate on the intervention in Grenada, the Permanent Representative of St. Lucia, one of the OECS members whose security forces participated in the intervention, said: "It was the Governor-General who made a formal request to the Organization of Eastern Caribbean States . . . for assistance to remove what he saw as a threat to his people and what at that stage had also become a threat to our subregion."

United Nations Doc. S/P.V. 2491, at 16, as quoted by John Carey, formerly a member of the U.S. delegation to the U.N., in a letter to the New York Times published Nov. 23, 1983, at A22.

[23]Perhaps typical is the following comment of Errol Barrow, an attorney who was prime minister of Barbados from 1966 to 1976 and is now leader of the opposition there:

> Even if one is tempted to believe the belated excuse that Sir Paul Scoon invited the intervention—a story that not even the most uncritical follower of the events is tempted to entertain—it must not be forgotten that Sir Paul, like the famous Vicar of Bray, had been appointed by dictator Sir Eric Gairy and maintained his office under an alleged left-wing Marxist regime which seized power only five days after his accession to the largely ceremonial post. He remained in residence, although not in power, for more than four years unheralded, unsung and unknown to the world. It should not have been difficult for Sir Paul to adjust himself to a third authoritarian regime which had not, up to that stage, either declared nor displayed any intention to remove or replace him.

Barrow, *The Danger of Rescue Operations*, 12 CARIBBEAN REV. 3, 4, (1983). Governor General Scoon was appointed by the Queen, upon the recommendation, presumably, of the then prime minister of Grenada, Mr. Gairy.

whether he extended his invitation before or after the OECS acted, indeed, after the invasion had begun and he had been rescued; and whether the plan to invade Grenada was really contingent upon Mr. Scoon's invitation or was designed to go forward, invitation or not.[24]

Mr. Adams revealed in his radio address that "well before the military operations commenced" Mr. Scoon's views were sought "on the issuing of an invitation to friendly countries to enter Grenada and restore order." Mr. Adams did not say precisely when, how or through whom the suggestion that Mr. Scoon issue an invitation was conveyed, referring only to "the kind offices of a friendly, albeit nonparticipating government (not the USA)."

Mr. Scoon has been equally circumspect, alluding to "a lot of diplomatic movement between my house and several other people," without indicating when or through whom the suggestion was made, who these "other people" were or what, if any, pressure was brought to bear to encourage him to issue his invitation. His public statements on these points have been ambiguous. In at least two interviews, he has said that he asked for outside help on Sunday night, the 23rd—i.e., two nights after the OECS decision, several hours after President Reagan decided, provisionally, to proceed with the military assistance requested by the OECS (see below), but before the actual invasion. The relevant part of the transcript of the first of these interviews, with the BBC-TV program "Panorama" on October 31st, reads as follows:

> Q: What was the moment you decided that an invasion was necessary?
> A: I think I decided so on Sunday the 23rd, late Sunday evening.
> Q: But the British say that on that day you told them you still didn't want one, that was early in the day wasn't it?
> A: I did see somebody earlier in the day and during that time I did see somebody and they said you know invasion was the last thing they wanted and I said it in my speech. But if it came to that I would give every support, and later on, as things deteriorated, I thought, because people were scared you know. I had several calls from responsible people in Grenada that something should be done. Mr. Governor-General we are depending on you (that) something be done: People in Grenada cannot do it, you must get help from outside. What I did ask for was not an invasion but help from outside.[25]

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[24]*See generally* GRENADA WAR POWERS: FULL COMPLIANCE REPORTING AND IMPLEMENTATION, Markup before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. (1983); and THE SITUATION IN GRENADA, *supra* note 4. The United States Ambassador to France, Evan G. Galbraith, was reported to have told a French television audience that preparations for the October 25th operation had begun two weeks earlier. If so, that would place the planning in advance of Mr. Bishop's murder. Asked about Ambassador Galbraith's statement, Deputy Secretary Dam told the Senate Foreign Relations Committee that Mr. Galbraith was "dead wrong." *Id.*, at 11, 45. *See also* F. Castro, speech in Havana November 14, 1983, as translated and published in Gramma (the English language organ of the Cuban Communist Party), on Nov. 20, 1983, p. 3.

[25]Hereinafter, "Panorama interview." The transcript of this interview has been made available to the Committee by the State Department.

Another interview, which appeared in a Caribbean newspaper on December 4th, confirms this account. In relevant part it reads as follows:

Q: Sir Paul, at what point did you form the view that you would have to seek assistance from outside?
A: On Sunday 23rd in the evening.
Q: What led you to decide that?
A: Because of the deteriorating situation . . . what I thought to be (the) deteriorating situation of the Military Council.
Q: Up to that point what had been your relationship with the Military Council?
A: My relationship was always very good. They came to me soon after they assumed power and told me what their plans were. They kept me in the picture as to what they were doing. As to whether or not I approved of the things they wanted to do is a different matter. I do not wish to comment on that.
Q: So that it was after the Prime Minister was killed that you then took this position?
A: Oh, from the time that the Prime Minister was killed people were ringing me, writing me, and sending messages saying, Mr. Governor-General, you have to do something. We are depending on you. You are the only man left now. What are you doing about it? People were so shocked and people obviously did not relish the thought of having military people in control and from that time they were saying to me, 'please do something about it.' So the period between the 19th and the intervention by the Caribbean and U.S. forces was a difficult period for me. Very, very difficult period for me.
Q: Whom did you contact to seek the assistance?
A: There was a lot of diplomatic movement between my house and several other people. That I do not wish to comment on but eventually we had to make a formal request to the OECS.
Q: Were you aware at the time you contacted the OECS that this would probably mean that they would invite the Americans in?
A: Oh yes. I was aware of that.
Q: And you had no reservation about this?
A: No. Not really. I felt all along the OECS forces or even the whole Caribbean area, with all the forces put together, couldn't quell any sort of rebellion here because I knew, although I didn't know the exact amount, and was horrified that we had so much arms and ammunition in this country. I knew that we were well stocked with arms and ammunition. . . .[26]

Mr. Scoon's interviews do not fully resolve doubts about how voluntary his invitation was or whether, in fact, he asked for a full-scale invasion or merely security forces to assure the performance of civil administration and police functions. Moreover, the interviews do not settle the legal question of whether he had authority under Grenadian law to invite foreign troops to invade his country.

Commentators critical of the ensuing invasion have argued that the authority of the Governor General of Grenada is essentially ceremonial,

[26]Mr. Scoon's interview appeared in The Sunday Gleaner (Kingston, Jamaica), Dec. 4, 1983, under the caption, *Sir Paul Scoon, Governor-General of Grenada, in an interview with the* Sunday Express *of Trinidad and Tobago.*

similar in this respect to that of Governor-Generals in other Commonwealth countries. This subject had attracted attention in the legal community several years earlier in connection with a widely publicized constitutional debate in Australia, another Commonwealth country, after Australia's Governor-General had called new elections in circumstances in which his authority to do so was less than certain. As it turns out, however, the legal position of Governor-Generals varies among Commonwealth countries. Under Article 57 of the 1973 Grenada Constitution, the executive authority of Grenada is vested in the Queen of Grenada, Queen Elizabeth II, who happens as well to be the Queen of England and of other Commonwealth constitutional monarchies. It may be exercised in her behalf by the Governor-General, either directly or through an officer subordinate to him.[27] For whatever reason, when the regime of Maurice Bishop suspended—or purported to suspend—the Grenadian Constitution in 1979, it left the Governor-General's position more or less intact, with the exception that he was to "perform such functions as the People's Revolutionary Government may from time to time advise."[28]

Given the deterioration of law and order in Grenada following Bishop's assassination, the OECS, the United States, Barbados, Jamaica and later even the United Nations accepted Mr. Scoon's authority to act in Grenada's

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[27]*See The Situation in Grenada*, Report of the United Nations Secretary-General, Nov. 6, 1983, U.N. Doc. A/38/568.

In his December 4th interview, *supra* note 26, Mr. Scoon was asked whether he saw any problem in the fact that he did not contact "Her Majesty's Government" (i.e., in Great Britain). "Being the Queen's representative in Grenada," the questioner said, "do you regard your action in going to the OECS and the possibilities that arose from that to be in any way in conflict with your appointment?" He replied:

> They don't conflict at all. Her Majesty has many governments. You see, lots of people don't understand the constitutional position of Grenada. The Queen is the head of Grenada and the British Government can't dictate to the Government of Grenada what to do, nor can the British Government give any orders to the Governor-General of Grenada. The Queen is the Queen of Grenada, or Australia, as the case may be. I think people missed that point all the time . . .

[28]Declaration of Grenada Revolution dated March 28, 1979, People's Law No. 3 ("The Head of State shall remain her Majesty the Queen and her representative in this country shall continue to be the Governor-General who shall perform such functions as the People's Revolutionary Government may from time to time advise."). *See also* People's Laws Nos. 16 and 18, dated April 2, 1979.

Mr. Scoon was asked how he throught the interim government would perform in relation to his own office. He replied:

> They would act in the way that Ministers who have acted under the electoral system (have acted). And they would advise me just as a Cabinet would advise. Except that perhaps during the interim period I would be more involved. Under the electoral system the Government advises the Governor-General and he virtually has to do what the Government says. But I think in my case it will be necessary sometimes to do more things in my own deliberate judgment . . . I am very conscious of the fact that I am the Queen's representative and so my job is more or less just a ceremonial one.

Id.

behalf. To an extent, this represents political recognition of Mr. Scoon's authority, at least by authorities outside Grenada and after his *de facto* control of Grenada had been assured by the interposition of foreign military force. The apparent popularity of Mr. Scoon's action among Grenadians may be said to represent an informal confirmation of his authority by the Grenadians themselves; it, too, reflects the control which the predominantly American military force has been able to establish in Grenada in Mr. Scoon's behalf.

There is reason to argue that under applicable rules of recognition, General Austin's Revolutionary Military Council was entitled to recognition as the *de facto*, if not the *de jure*, government of Grenada. Those who feel it should have been recognized point to the fact that the new RMC was in sufficient control of the island to impose a 96-hour curfew over the weekend preceding the invasion and that it was with members of this group that the United States, Great Britain and Canada negotiated in an effort to assure the safety of their nationals. Mr. Scoon may have inadvertently added support to this view in his October 31st interview when he analogized the RMC's position to that of the NJM, when it seized power in March 1979:

> [W]hen the military took over they quickly came to me and acknowledged my authority as representative of the Queen, in the same way as the People's Revolutionary Government did when they overthrew the elected government.[29]

Nevertheless, by Sunday night, the 23rd, Mr. Scoon had apparently decided that the situation required the formation of a new government, but that he was powerless to initiate or enforce this conclusion in the absence of outside help.[30]

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[29]Scoon, Panorama interview, *supra* note 25. Similarly, in his December 4th interview, *supra* note 26, Mr. Scoon reported that the military leaders had come to him "soon after they assumed power" and told him what their plans were. "They kept me in the picture as to what they were doing," he said in the interview.

[30]In his Panorama interview, *supra* note 25, Mr. Scoon said that he first asked the OECS to ask the United States whether it could help and that he then confirmed this in writing to President Reagan. Deputy Secretary of State Dam said in his AP Louisville speech, *supra* note 3, that the United States was informed on Monday, October 24th, by Prime Minister Adams that Mr. Scoon had used a confidential channel to transmit an appeal to the OECS and other regional states. This appeal, too, was apparently in writing. Transcript of radio address by Mr. Adams, *supra* note 16. British newspapers indicated that the invitation from Mr. Scoon had been signed only after incoming troops had broken a cordon of armored cars outside Government House, in Grenada, and rescued Mr. Scoon, presumably some time Monday, October 25th. In its October 28th edition, *The Guardian* reported:

> Commonwealth diplomatic sources last night indicated that this was only signed after the incoming troops had broken the cordon of armoured cars outside Government House and rescued Sir Paul Scoon. The Governor-General had reckoned that if he had signed it earlier, with the intention of getting it smuggled out, and it had been intercepted, then he would have signed his own death warrant . . .
>
> Official scources at Whitehall last night acknowledged that the deputy head of the British High Commission in Barbados, Mr. David Montgomery, had seen Sir Paul on Sunday morning October 23rd during a 36-hour visit to the island, but that he had not played the role

The United States government has indicated that it regarded the situation on the island as one of anarchy[31] and that it concurred in Prime Minister Adams' judgment that "the Governor-General of Grenada was the only constitutional authority remaining in the country, and the only one who in addition to any treaty rights which might and did exist could issue a formal invitation to foreign countries to enter Grenada to restore order. . . ." "Accordingly," Mr. Adams said, "the participating countries have no . . . difficulty in deciding that he should be invested with formal authority as soon as his person should be secured—and this was made a number one priority at operations level."[32]

We are not in a position to judge whether Mr. Scoon acted in accordance with his authority under Grenadian constitutional law; whether Grenada's British style constitutional monarchy survived the NJM's 1979 coup d'etat;[33] whether, if not, the post of Governor-General was even more ceremonial under the People's Laws than it had been under the 1973 Constitution; whether Mr. Scoon was entitled under the People's Laws to ignore the counsel of the NJM or, if this be the case, its successor, the RMC; or any other aspect of the question of the compatibility of Mr. Scoon's action with internal Grenadian law. Moreover, we note that thus far the leaders of the RMC have not been heard from. They have been in custody since they were captured by American troops in the course of October's fighting. We presume that when they have an opportunity to explain their position, the question of the lawfulness of Mr. Scoon's action under Grenadian law will

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of messenger. However, two American diplomats traveled in the same plane with Mr. Montgomery, and have since been uncommunicative about their movements except to say that the joint mission was to determine that US and British nationals were not in danger.

Senator Charles Percy, chairman of the Senate Foreign Relations Committee, indicated during Mr. Dam's testimony on October 27th that Mr. Scoon had been flown out of Grenada following his rescue by United States troops. THE SITUATION IN GRENADA, *supra* note 4, at 3.

[31]At his news conference on October 25th, Secretary of State Shultz said:

> For all intents and purposes, there is no semblance of a genuine government present. There is a vacuum of governmental responsibility—the only genuine evidence of governmental authority being a shoot-on-sight curfew. So in the light of that and in the light of the affinity that the other states feel together, they felt they had to protect their peace and their security by taking this action and that doing so would help reconstitute legitimate government in Grenada.

And he added this:

> As far as the establishment of authority on the island is concerned, we believe that the Governor-General is the logical person, given the fact that there is a vacuum of government there, and we expect that it will occur that way.

83 DEP'T ST. BULL. 70, 71, (1983). *See also* note 12, *supra*.

[32]*Supra* note 16. In its October 28th edition, *The Guardian* said that British ministers and constitutional lawyers had concluded that the Governor-General has authority to act when law and order is breaking down.

[33]Mr. Bishop, as prime minister, regularly attended the meetings of Commonwealth heads of state presided over by Queen Elizabeth II. Maingot, *Options for Grenada*, 12 CARIBBEAN REV. 24, 28, (1983).

be reexamined. For the moment, at least, we are inclined to leave this question aside.

Whatever may be said of Mr. Scoon's authority to ask the OECS and other states to restore order, and whether and when he did so, the OECS' action is suspect by virtue of the reference in the OECS Secretariat's statement to the organization's request to friendly governments "to form a pre-emptive defensive strike" to rid the region of the threat to peace and security posed by the situation in Grenada. The words themselves reinforce the impression that the OECS thought it was acting under Article 8 of its treaty, since Article 8 justifies the action it contemplates by referring to Article 51 of the United Nations Charter, which deals with individual and collective self-defense. As discussed more fully below (see "Individual and Collective Self-Defense Under Article 51"), Article 51 permits an otherwise unlawful use of force by a state or group of states "in the event an armed attack occurs." These words appear to preclude anticipatory or pre-emptive military strikes. While this interpretation has been challenged in some quarters, the United States has declined to do so—and continues even now to do so. This fact, too, may help explain the retreat from Article 8 reflected in later statements by American officials after initial dependence on it.

At least two other aspects of the action taken by the OECS states have drawn attention from international lawyers and should be noted at this point. One is a technical issue that we find difficult to credit. It is that the OECS Treaty cannot be invoked in justification for an otherwise unauthorized use of armed force because the treaty was never formally registered with the United Nations Secretariat. Article 102(2) of the United Nations Charter requires such registration as a condition precedent to a treaty's being invoked by one of the parties to it before any organ of the United Nations. Article 102 is designed to deprive secret pacts of standing in the United Nations. The OECS Treaty, though obscure, was not secret. An application for its registration had been sent to the United Nations Secretariat, had been returned by the Secretariat for technical shortcomings in the application, and would and will in due course be registered as intended. The suggestion that under these circumstances the OECS Treaty would be denied standing within the United Nations does not appear to conform to United Nations practice or equity.

The other, to which little attention has been paid thus far, is that the four OECS states that actually contributed security forces to the October 25th operation are associated with Barbados in a sub-regional security arrangement known informally as the Barbados Defence Force. Prime Minister Adams referred to this arrangement, whose terms are still confidential, in his October 26th radio address; so did the OECS Secretariat in its post-invasion statement. It seems reasonable to infer that the arrangement played an important role. All but one (i.e., Jamaica) of the participating

Caribbean states are parties to it. Unlike the OECS agreement, the confidential agreement establishing the Barbados Defence Force is said to contemplate intervention in the event one of the constituent governments is overthrown by a coup d'etat. It may be significant, assuming it is true, that the OECS meeting(s) on October 21st in Barbados is reported to represent the first time the OECS had held a meeting outside the territory of one of its member states.[34]

If the Barbados Defence Force was a critical element in the operation, its constituent instrument is relevant, too. But the terms of this instrument remain secret; the instrument itself is unregistered. At very least, these considerations make it more difficult for the interested states to rely upon it in legal justification for their action. This may help explain the emphasis placed upon the OECS Treaty and the initial confusion concerning the provisions of this treaty under which the OECS was acting.

For the reasons adduced below, we are persuaded that the military action initiated October 25th rests upon an unsteady legal foundation. The factors cited thus far support this conclusion, but in our view they are not of the first order of importance in reaching it.

B. The Action Taken by the United States

United States Ambassador J. William Middendorf II told the OAS Permanent Council at its meeting on October 26th that the purposes of the military intervention in Grenada were "[t]o restore law and order, to help the people of Grenada restore functioning institutions of government, and to facilitate the departures of those who wish to leave . . ."[35]

From a strategic perspective, the government was concerned that Grenada would be used to launch or assist subversive activities in the Caribbean and Central America. The build-up of weapons, the training and organizing of armed forces, the construction of the air field at Port Salines large enough to accommodate Soviet transport aircraft, and the likelihood that Grenada was being used as a ground-based communications network linked with the Soviet satellite system combined to make developments in Grenada a cause for United States concern. The United States government has used evidence obtained in the Grenadian intervention which support these concerns to bolster popular support for the action. For the purposes of this report, however, such evidence and the fears it substantiates do not bear directly on the legal issues presented.[36]

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[34]*See* Manley, Grenada in the Context of History, 12 Caribbean Rev. 7, 45 (1983).

[35]OAS Transcript, *supra* note 10, at 28.

[36]The emphasis placed by the Administration on political developments in Grenada contributed to doubts that the reasons given publicly by the Administration for its involvement in Grenada were sincere. As previously noted, United States hostility to the regime of Prime

The legal rationale put forward by the United States in support of its action rests upon three grounds, summarized here as it is in a letter to the Chairman of this Committee, dated February 10, 1984, from Davis R. Robinson, The Legal Adviser, Department of State:

> The United States, both before and after the collective action, regarded three well established legal principles as providing a solid legal basis for the action: (1) the lawful governmental authorities of a State may invite the assistance in its territory of military forces of other states or collective organizations in dealing with internal disorder as well as external threats; (2) regional organizations have competence to take measures to maintain international peace and security, consistent with the purposes and principles of the U.N. and OAS Charters; and (3) the right of States to use force to protect their nationals.[37]

"I would emphasize," Mr. Robinson adds, "that the United States has not taken a position as to whether any one of these grounds standing alone would have provided adequate support for the action."

We turn now to a consideration of these legal grounds, as well as ones that have been raised in support of the United States position though not by the United States government itself.

III. Legal Restraints on the Use of Force in International Relations

A. Background

The legal regulation of the use of armed force in international relations has undergone profound change in this century. Prior to the adoption of the

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Minister Bishop had been immediate and virtually unrelenting. At times it was evinced publicly in pointed ways. According to press accounts, as early as 1981 U.S. naval forces staged extensive exercises clearly aimed at signaling U.S. hostility towards Grenada. One involved a mock invasion of an island off Puerto Rico, fictitiously named "Amber and the Amberdines" and said to be "our enemy in the eastern Caribbean." *See* Manning, *supra* note 1, at 81–82. *See also* OAS Transcript, *supra* note 10, at 7–8 (remarks of Ian Jacobs, Grenada's representative). Mr. Jacobs took note of reports that had appeared in the *Washington Post* that in 1980 the Central Intelligence Agency had developed plans to destabilize Mr. Bishop's regime. *Id.*

Throughout the spring of 1983, Grenadian officials repeatedly charged that the United States was plotting to overthrow the Bishop regime. *See, e.g.*, N.Y. Times, March 29, 1983, at A10; N.Y. Times, April 5, 1983, at A3. Even while Mr. Bishop was in Washington in June seeking to improve relations with the United States, he departed from the conciliatory tone of his public statements briefly to charge that the CIA was plotting to overthrow his country and that it was likely that a neighboring country would be used to launch an invasion against Grenada. N.Y. Times, June 10, 1983, at A8. In testimony before the Senate Foreign Relations Committee on October 27th, Deputy Secretary Dam was asked by Senator Dodd whether the United States, prior to the overthrow of the Bishop regime by the RMC, had made any plans to engage in an invasion of Grenada. Mr. Dam replied that the Administration as such had no such plans, although he could not say whether some contingency plan existed somewhere in the Pentagon. Pressed by Senator Dodd, Secretary Dam said he himself was not familiar with any contingency plan to overthrow the Bishop regime. *See* THE SITUATION IN GRENADA, *supra* note 4, at 31.

[37]Letter from Mr. Robinson to Edward Gordon dated Feb. 10, 1984, attached as an annex to this report. Mr. Robinson's letter was in response to a draft of this report and is published here with his permission.

Covenant of the League of Nations[38] and the General Treaty for the Renunciation of War as an Instrument of National Policy (the Kellogg-Briand Pact),[39] resort to armed force by states was generally accepted as lawful. In the absence of an international organ for enforcing existing legal rights of states it supplied a crude means of self help. But it was also seen as a legitimate means for attacking and altering existing legal rights of states, independent of the merits of the attempted change.

The Covenant of the League broke with this legal tradition. Parties to the Covenant undertook to "respect the territorial integrity and existing political independence" of other states and to submit to arbitration or inquiry by the Council of the League such of their international disputes as could not be settled by diplomacy.[40] Similarly, states parties to the Kellogg-Briand pact "condemn[ed] recourse to war for the solution of international controversies and renounce[d] it as an instrument of national policy in their relations with one another."[41] They agreed that "settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them shall never be sought except by pacific means."[42]

The trend toward delegitimation of armed force was reinforced by the growing demand by the Latin American republics for adoption of a general principle of nonintervention to govern relations among states in the western hemisphere. As early as 1927 the Inter-American Commission of Jurists proposed the principle that "no nation has a right to interfere in the internal or foreign affairs of an American Republic against the will of the Republic."[43] This principle was subsequently adopted at the Seventh Interna-

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[38]1 HUDSON, INTERNATIONAL LEGISLATION 1 (1931).

[39]46 Stat. 2343, 94 L.N.T.S. 57, done at Paris, August 27, 1928.

[40]Art. 10.

[41]Art. I.

[42]Art. II.

[43]The United States initially opposed adoption of the principle. When it was formally presented to the Sixth International Conference of American States, in Havana in 1928, the United States delegate, former Secretary of State Hughes, commented:

> Let us face the facts. The difficulty, if there is any, in any one of the American Republics, is not of any external aggression. It is an internal difficulty, if it exists at all. From time to time there arises a situation most deplorable and regrettable in which sovereignty is not at work, in which for a time in certain areas there is not government at all, in which for a time and with a limited sphere there is no possibility of performing the functions of sovereignty and independence. Those are the conditions that create the difficulty with which at times we find ourselves confronted. What are we to do when government breaks down and American citizens are in danger of their lives? . . . I am not speaking of sporadic acts of violence, or of the rising of mobs, or of those distressing incidents which may occur in any country however well administered. I am speaking of the occasions where government itself is unable to function for a time because of difficulties which confront it and which it is impossible to surmount.
>
> Now it is a principle of international law that in such a case a government is fully justified in taking action—I would call it interposition of a temporary character—for the purpose of

tional Conference of American States, in Montevideo in 1933 (with United States reservations), and again at the Inter-American Conference for the Maintenance of Peace, in Buenos Aires in 1936 (without United States reservations).[44] At the latter conference, the American states declared as "inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties . . ." Towards the end of World War II, this principle was reiterated in the so-called Act of Chapultepec, adopted by the Inter-American Conference on Problems of War and Peace early in 1945.[45] By this time, it had become one of the basic organizing principles of the inter-American system.

Thus, by the time the United Nations Charter was drafted at San Francisco later that year, the unilateral resort to armed force had been deprived of much of its prior legitimacy in international law. The Charter both reflects and codifies this change. Its preamble states the determination of the members of the United Nations "to save succeeding generations from the scourge of war" and "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest." Article 2(3) requires all members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." More specifically, Article 33 obliges "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security" to "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judi-

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protecting the lives and property of its nationals. I could say that this is not intervention . . . . Of course, the United States cannot forego its right to protect its citizens. International law cannot be changed by the resolutions of this Conference. . . .

Report of the Delegate of the United States of America to the Sixth International Conference of American States, Washington, 1928, pp. 14–15, quoted in *inter alia*, H.P. DEVRIES & J. RODRIGUES-NOVÁS, THE LAW OF THE AMERICAS 17–18 (1965). *See also* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 293 (1963).

[44]Article 8 of the Convention on Rights and Duties of States, adopted at Montevideo, contained a provision that "No state has the right to invervene in the internal or external affairs of another," i.e., the very words that had been proposed by the Inter-American Commission of Jurists in 1927 and rejected by the United States at the Havana Conference in 1928. Ian Brownlie comments: "American acceptance of this text was thus *prima facie* evidence of a withdrawal of the claim to a right of intervention to protect the lives and property of nationals." BROWNLIE, *supra* note 43 at 97.

The United States reservation was ambiguous. It said that in the absence of a common standard of definition of the principle of nonintervention, the United States would construe it in the light of "the doctrines and policies . . . embodied in the different addresses of President Roosevelt . . . and in the law of nations as generally recognized and accepted." International Conference of American States, First Supplement, 1933–40, Conv. on Rights and Duties of States, 124 (1940), cited in Falk, *American Intervention in Cuba and the Rule of Law*, 22 OHIO ST. L.J. 546, 552–53 (1961). *See also* DEVRIES & RODRIGUEZ *supra* note 43, at 18.

[45]Resolution on Reciprocal Assistance and American Solidarity, T.I.A.S. 1543 (1945). *See* 12 DEP'T ST. BULL. 339 (1945); 39 AM. J. INT'L L. Supp. 108 (1945).

cial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Article 24 of the Charter contains the nub of the system of collective peace-keeping the Charter creates. In it, United Nations members "confer on the Security Council primary responsibility for the maintenance of international peace and security." Article 2(4) is its prescriptive counterpart. It provides:

> All 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 other manner inconsistent with the Purposes of the United Nations.

B. Article 2(4) of The United Nations Charter

These words represent the basic norm of contemporary international law with respect to the use of force. Their historic dimensions were recognized from the outset. As Professor Louis Henkin has written:

> For the first time, nations tried to bring within the realm of law those ultimate political tensions and interests that had long been deemed beyond control by law. They determined that even sincere concern for national "security" or "vital interests" should no longer warrant any nation to initiate war. They agreed, in effect, to forgo the use of external force to change the political status quo. Nations would be assured their fundamental independence, the enjoyment of their territory, their freedom—a kind of right to be left alone. With it, of course, came the corresponding obligation to let others alone, not to use force to resolve disputes, or even to vindicate one's "rights." Change—other than internal change through internal forces—would have to be achieved peacefully, by agreement . . .[46]

However reasonable these aspirations may have seemed to the framers of the Charter, they have not been realized. For one thing, the normative language of Article 2(4) has invited varying, usually self-serving, interpretations because of the words which follow "use of force." In his classic treatise, the late Sir Hersch Lauterpacht noted that the words "against the territorial integrity or political independence of any state" were added to the Charter at the San Francisco conference at the instance of some smaller states, not to weaken the obligation otherwise prescribed, but to strengthen it. "Territorial integrity," he wrote, "especially where coupled with 'political independence,' is synonymous with territorial inviolability." That is, the obligation has been breached even if the attacking state has no intention of interfering permanently with the territorial integrity of the invaded state.[47]

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[46]L. Henkin, How Nations Behave 137 (2d ed. 1979).

[47]2 H. Lauterpacht, Oppenheim's International Law 154 (7th ed. 1952); also I. Brownlie, International Law and the Use of Force by States 266–68 (1963); Waldock, *The Regulation of the Use of Force by Individual States in International Law,* 81 Recueil des Cours 451, 493 (1952, II); L. Goodrich & E. Hambro, Charter of the United States: Commentary and Documents 103, 104–5 (2d ed. 1949). *See, e.g.,* D'Amato, *Israel's Air Strike Upon the Iraqi Nuclear Reactor,* 77 Am. J. Int'l. L. 584, 585 (1983). *Cf.* Gordon, *The World Court and the Interpretation of Constitutive Treaties,* 59 Am. J. Int'l L. 794 (1965).

Professor Lauterpacht also noted, however, that the phrase added at the instance of the smaller states was "a reminder that excess precision may result in weakening the intended object of the law."[48] His point has been borne out by interpretations of Article 2(4) which discount its negotiating history and tend either to minimize the significance of the words "or in any other manner inconsistent with the Purposes of the United Nations" or to treat them as justification for the use of armed force in furtherance of one of the Charter's other principal objectives—for example, self-determination, human rights, and discouraging preparations for acts of international aggression.[49]

The net effect of interpretations such as these is to weaken the constraints of Article 2(4) and, not coincidently, to detract from the Security Council's primary responsibility for peacekeeping. Advocates say it is necessary in light of the failure of the Security Council to carry out this responsibility. It is supported, they contend, by the tacit approval which otherwise extraordinary uses of armed force have received from members of the United Nations in recent years. This approval must be inferred, usually, since it is not reflected in resolutions of the General Assembly or other more or less formal manifestations of the constructions given to the Charter by United Nations members. As noted below ("Current Legal Effect of These Provisions"), in a formal, positivist sense these constitutional conventions or tacit understandings fall far short of being amendments to the Charter. In terms of policy, the issue is whether what is gained by accommodating the language of the Charter to perceived international realities is equal to what is lost both by lowering the legal barrier to the use of force and by lowering the public's expectations concerning the reality of law in relation to the use of force.

This is true as well of attempts to portray Article 2(4) as merely one among several contending policy objectives of the Charter. Thus seen, Article 2(4) constraints on the use of force are not as absolute as they appear, and as the drafting history of the Charter might lead one to believe. They are, rather, simply principles of coequal force with the Charter's prescriptions pertaining to self-determination, human rights, etc., such that in any individual case Article 2(4) and these other policies must be weighed against one another.[50]

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[48]*Id.* at 154n.

[49]*Cf.*, Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L 515 (1963).

[50]*See* Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 229 (1983). In her statement to the United Nations Security Council on October 27th, Ambassador Kirkpatrick said:

> The prohibitions against the use of force in the United Nations Charter are contextual, not absolute. They provide ample justification for the use of force in pursuit of the other values also inscribed in the Charter—freedom, democracy, peace. . . .

83 DEP'T ST. BULL. 74 (1983).

The bare truth of the problem probably lies in Professor Thomas Franck's observation a few years ago that "the high-minded resolve of Article 2(4) mocks us from the grave."[51] The reasons for its unsteady reign are not difficult to discern: i.e., "the mistaken original assumption of Big-Power unanimity; the changing character of war; the loopholes for 'self-defense' and 'regional' action [see below]; the lack of impartial means to find and characterize facts; the disposition of nations to take law into their own hands and destroy and mangle it to their own purpose."[52]

C. Article 20 of the OAS Charter

As noted, the principle of nonintervention is deeply engrained in inter-American relations and law. Article 20 of the OAS Charter,[53] adopted in 1948, provides:

> 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.

Former Legal Adviser Abram Chayes observed recently that the unequivocal terms of Article 20 (which was Article 17 of the OAS Charter as originally adopted) "are not empty, do-good pieties. They are the quid pro quo extracted by the Latin American countries from the United States in return for their participation in the collective defense of the Hemisphere. They wanted to make sure that the alliance would not provide a pretext for the kind of military intervention that had been the hallmark of the United States' Latin American policy."[54]

Any doubts about the inclusiveness of Article 20 are dispelled by Article 18 (originally Article 15), which states:

> 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.

And again Article 21 (originally 18) provides:

> The American States bind themselves in their international relations not to have

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[51]Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809 (1970).

[52]Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 Am. J. Int'l L. 544 (1971), summarizing Franck, *supra* note 51.

[53]2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, entered into force for the United States Dec. 13, 1951, as amended by Protocol of Amendment, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force for the United States Feb. 27, 1970.

[54]Chayes, Op-ed piece, N.Y. Times, Nov. 15, 1983, at A35. *See also* Akehurst, *Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States*, 42 Brit. Y. B. Int'l L. 175 (1967).

recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.

The OAS Charter must be read in conjunction with the Inter-American Treaty of Reciprocal Assistance of 1947 (the Rio Treaty),[55] which replaced and strengthened the Act of Chapultepec, *supra*, and applies to virtually all of the western hemisphere, including the Caribbean Sea (Article 4). The United States is a party to both the OAS Charter and the Rio Treaty.

The Rio Treaty was designed "to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American state, and . . . to deal with threats of aggression against any of them." It provides for collective action, not only in case of an armed attack (covered in Article 3), but also "if 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 . . ." (Article 6).

In such cases, the Rio Treaty says, the Organ of Consultation, consisting of the Foreign Ministers of the member states, or representatives specifically designated for the purpose, is to "meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent" (Article 6). Among the measures which the Organ of Consultation may take is "the use of armed force" (Article 8). Parties to the Rio Treaty "undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty" (Article 1).

The Treaty authorizes the use of armed force in only two circumstances: individual or collective self-defense under Article 51 of the United Nations Charter (Article 3) and, as already noted, when agreed to by the Ministers of Foreign Affairs as a form of assistance to a victim of aggression (Article 8, incorporating Article 6).

At the Extraordinary Session of the Permanent Council of the OAS on October 26th, the day after the invasion, some Latin American states condemned the action in strong terms. The representative of Colombia called it "an open violation of the principle of nonintervention."[56] The representative of Mexico said his government "does not believe the armed intervention constitutes a solution justified by [*ajustada a*] the norms of international law."[57] The representative of Argentina said categorically that

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[55]Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681; T.I.A.S. No. 1838. *See* 43 AM. J. INT'L L. Supp. 53 (1949).

[56]OAS Transcript, *supra* note 10, at 11.

[57]*Id.* at 13.

the states that had invaded Grenada had violated Articles 18 and 20 of the OAS Charter.[58] In the guarded language of diplomacy, other representatives of Latin American countries regretted the action and the failure of the United States and Caribbean states to resolve the matter peacefully through the OAS.

As Mr. Robinson's letter indicates, the United States government takes the position that its action was consistent with Articles 22 and 28 of the OAS Charter. Article 22 (originally 19) says that "measures taken for the maintenance of peace and security in accordance with existing treaties" do not constitute a violation of the principles set forth in Articles 18 and 20, *supra*. Article 28 provides that, in the circumstances described in Article 6 of the Rio Treaty, *supra* (i.e., aggression other than armed attack), "the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject."

In essence, the United States position is that United States-Caribbean Peace-Keeping Force was a collective security measure taken pursuant to an "existing treaty" (Article 22), a "special treaty" (Article 28).[59] This interpretation is not supported by the *travaux préparatoires* of the OAS Charter. (See *infra*, "Collective Action Under Articles 52 and 53 of the United Nations Charter and Articles 22 and 28 of the OAS Charter").

D. Current Legal Effect of These Provisions

Among the arguments not raised by the United States government but offered by others in the course of public discussion of the United States involvement in Grenada is one that says that, in light of frequent violations of Article 2(4) of the United Nations Charter and the emergence of unanticipated forms of international aggression, states are legally justified in falling back to their prior practice of unilateral forcible self-help. The argument is not new. It was advanced as early as the 1950s, when two scholars wrote: "[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."[60] Again in 1963, in defense of the United States quarantine of Cuba, another writer observed:

> The Charter of the United Nations is a treaty, binding as such upon the United States. But what if the treaty has been consistently and at times flagrantly violated

[58] *Id.* at 17.

[59] In his testimony before the Senate Foreign Relations Committee on October 27th, Deputy Secretary Dam said that OAS Charter "envisions" collective action under treaties other than the Rio Treaty: "So in a sense you have an OAS Force, but it is under the security provisions of the OAS envisaging collective defense and security." THE SITUATION IN GRANADA, *supra* note 4, at 35–36.

[60] A. V. THOMAS AND A. J. THOMAS, JR., NON-INTERVENTION 209 (1956).

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? Traditional international law is about as clear as it could be in recognizing the mutuality of contractual obligations.[61]

To the extent that this position bespeaks the need to formally revise the Charter to conform to patterns of mutual compliance, it is political and prospective and need not be considered at this point. But its apparent plausibility as a legal basis for denying the continuing validity of existing treaty obligations does merit immediate attention. It is of course true that good sense and equity rebel at the idea of a state being held to the performance of its obligations under a treaty which other contracting parties are refusing to respect.[62] But it is essential to the preservation of the stability of treaties, upon which so many international rights are based, that the unilateral right to assert the invalidity of treaty obligations be carefully circumscribed.[63]

Customary international law, especially (but not only) as codified in the Vienna Convention on the Law of Treaties,[64] presumes that every treaty is binding upon the parties to it and must be performed in good faith.[65] Certain circumstances, including that of material breach of a treaty, may justify formally abandoning it.[66] But the only relevant grounds short of abandon-

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

[62]*See* comments of Professor Waldock, Special Rapporteur, International Law Commission, 1963 (II) Yb. I.L.C. 73.

[63]Schwelb, *Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach*, 7 INDIAN J. INT'L L. 309, 312 (1967).

[64]U.N. Doc. A/CONF. 39/27 (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969). The Vienna Convention, adopted in 1969, does not purport to apply to treaties previously concluded. Article 4. In matters relevant to the instant study, however, the Convention appears to codify and reflect customary international law.

[65]Article 26 codifies the rule known as *pacta sunt servanda*.

[66]Articles 46–52. The term "material breach" is defined, for the purposes of the Convention, as "a repudiation of the treaty not sanctioned by the . . . Convention," or "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." *Id.*, art. 60(3). See also the discussion of "fundamental change of circumstances," below. Originally, the Special Rapporteur had suggested limiting the unilateral right of denunciation to cases of "fundamental breach," which was defined by him as "a breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty." Fitzmaurice, Second Report, A/CN.4/107, 1957 (II) Y.B. I.L.C. 31. His successor as Special Rapporteur, Sir Humphrey Waldock, preferred the word "material," explaining that "the word 'fundamental' might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter the treaty at all, even though these provisions may be of an entirely ancilliary character." Waldock, Second Report, 1963 (II) Y.B. I.L.C. 75. See the discussion of "changed circumstances," below.

ment for asserting the invalidity of an existing treaty go merely to the question of whether a state validly consented to be bound by it in the first place.[67] It strains credulity to think that the United States or any other original signatory to the United Nations Charter could claim, nearly forty years after its adoption, that its consent had been invalidly obtained.

Article 48 of the Vienna Convention does recognize the right of a state to invoke an error in a treaty as invalidating its consent to be bound by it, "if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound" by it. But not "if the state in question contributed by its own conduct to the error or if the circumstances were such as to put that state on notice of a possible error." International decisions support the conclusion that a state which has benefited from the Charter cannot belatedly interpose the failure of consideration as a ground for invalidating its consent to be bound by it.[68]

1. *Fundamental Change of Circumstances (Rebus Sic Stantibus)*

Prior to the Vienna Convention, states had frequently asserted the doctrine known as *rebus sic stantibus* either as a tacit assumption or clause (*clausula rebus sic stantibus*) or as an independent rule of treaty interpretation for carrying the intention of the parties into effect. It was said to encapsulate the idea that "the obligations of a treaty may terminate when a change occurs in those circumstances which existed at the time of the conclusion of the treaty and whose continuance formed, according to the intention or will of the parties, a condition of the continuing validity of the treaty."[69] As frequently as it was asserted, the doctrine's legitimacy was

[67]Vienna Convention, arts. 42–45.

[68]In the Fisheries Jurisdiction (United Kingdom/Iceland) case, [1973] I.C.J. REP. 3, Iceland unsuccessfully contended that because of changes in international law that had occurred since the 1961 Anglo-Icelandic treaty upon which the United Kingdom was basing its claim the consideration provided by the United Kingdom in the conclusion of that treaty, namely the giving up of its right to fish within twelve miles of the Icelandic coast, no longer constituted consideration at all. The Court rejected this contention "on the basis that, although some of the motives which prompted Iceland to enter into the treaty may have become less compelling or may even have disappeared, this was no ground for repudiating other parts of the treaty the purpose of which had remained unchanged." D.W. GRIEG, INTERNATIONAL LAW 507 (2d ed. 1976). The Court observed:

> [I]n the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of *quid pro quo* for the provisions which the other party has already executed.

[69]C. Hill, *The Doctrine of "Rebus Sic Stantibus" in International Law*, University of Missouri Studies, IX (1934), quoted in H. BRIGGS, THE LAW OF NATIONS 917 (2d ed. 1952).

challenged,[70] its applied meaning was a subject of continuing controversy and its effect on the stability of treaties was deplored. Indeed, when the International Law Commission began drafting a *rebus sic stantibus* provision for the Vienna Convention, several governments, including the United States, expressed concern that unless the principle was carefully circumscribed too much political latitude would be available to a state wishing to avoid its treaty obligations.[71]

The final version of the Convention does not mention the phrase *rebus sic stantibus* at all, referring only to a "fundamental change of circumstances" that was unforeseen at the time a treaty was concluded, where the unforeseen circumstances constitute "an essential basis of the consent of the parties to be bound by the treaty" and where the effect of the change is "radically to transform" the extent of obligations still to be performed under the treaty.[72] The ILC was anxious to avoid the implication that the doctrine as thus enunciated comprehends mere noncompliance with a treaty. It was anticipated that such an interpretation would have the effect of validating deprivations of rights protected by humanitarian treaties that were being abused, in which event "the effects of the illegality would then be visited upon innocent persons."[73] The same reasoning would appear to apply with equal vigor to treaties or treaty provisions restricting the use of armed force in international relations.

In any event, under the Convention a fundamental change of circumstances may be invoked only as grounds for terminating or suspending the operation of a treaty, not for impeaching its continuing validity without formally abandoning it.

2. *Disuse or Obsolescence*

The Vienna Convention makes no mention at all of disuse or obsolescence as a grounds either for invalidating or abandoning a treaty. The omission was deliberate. In connection with its final draft in 1966, the ILC noted that "while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty."[74] Consequently, even if the obsoles-

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[70]British writers were particularly reluctant to accept the principle. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 599 (2d ed. 1973). In the Free Zones case, P.C.I.J. Ser. A, No. 24 (1930) and P.C.I.J. Ser. A/B, No. 46 (1932), the Permanent Court of International Justice implicitly accepted the principle while expressing doubts about whether it existed.

[71]The United States Government objected that, even as limited in the ILC's draft to fundamental changes of circumstances, the doctrine was "too liable to the abuse of subjective interpretation." Comments of United States Government, 1966 (II) Y.B. I.L.C., at 40.

[72]Vienna Convention, art. 62.

[73]Comments of Prof. Waldock, U.N. Doc. A/CN.4/SR. 832, para. 23.

[74]1966 (II) Y.B. I.L.C., at 237. Prof. Grieg notes that "the need for the parties to adopt some view towards 'obsolete' treaties was recognized by Article 19 of the Covenant of the League of

cence of the Charter, or of its prohibition of armed force, could be shown to have reached the proportions sometimes claimed, it would take the formal abandonment of the Charter by the parties to justify the conclusion that its legal obligations have lapsed because of disuse or obsolescence. In fact, however, state practice simply will not support a finding of abandonment, however frequently states may depart from the norms of national behavior directed by the Charter, especially in light of the fact that even in the most blatant instances of abuse of Article 2(4) the state concerned has generally attempted to justify its use of force in terms of the overall pattern of behavior permitted by the Charter.

3. *Impossibility of Performance*

Closely akin to the fundamental change of circumstances justification for terminating a treaty is that of impossibility of performance. The two are treated separately in the Vienna Convention, with the impossibility argument even more narrowly circumscribed than the fundamental change of circumstances one. In any event, it too constitutes grounds for terminating a treaty under limited circumstances, but not for treating its obligations as having lapsed.[75]

4. *Subsequent Practice as a Basis for Inferring a De Facto Amendment of Article 2(4)*

In the debate over the United States involvement in Grenada, renewed attention has been accorded the argument that, although state practice subsequent to the adoption of the United Nations Charter has not resulted in the abandonment of its obligations regarding the use of force, it does manifest a reinterpretation or de facto amendment of these obligations by the parties to the Charter, i.e., a tacit understanding or "constitutional convention."

Article 31(3) of the Vienna Convention provides that in the interpretation of treaties "there shall be taken into account, together with the context[,] (a)

Nations, which empowered the Assembly to 'advise the reconsideration' by Members of the League of Treaties that were 'inapplicable'." D.W. GREIG. *supra* note 68, at 508n.

The subject arose, with the ILC's view noted and affirmed, in the joint dissenting opinion of Judges Onyeama, Dillard, Arechaga and Waldock in the 1974 Nuclear Tests (Australia/France) case. [1974] I.C.J. Rep. 253. Australia had based its contention that the Court had jurisdiction to hear the case in part upon a jurisdictional clause in the 1928 Kellogg-Briand Pact, *supra*. France responded that the Pact was no longer in force, inter alia because of "the desuetude into which it has fallen since the demise of the League of Nations system." The Court did not reach the question, having decided on other grounds that it lacked jurisdiction. But the four dissenting judges, one of whom (Waldock) had been the Special Rapporteur responsible for drafting the relevant portion of the Vienna Convention, rejected France's argument outright. Recalling the reasons for the omission of reference to disuse or obsolescence, they noted that in the instant case, whereas the conduct of the parties to the pact had been spasmodic, it tended to show the Pact's continued operation, not its abandonment. *Id.* at 337–344 (joint dissenting opinion).

[75]Vienna Convention, art. 61.

any subsequent agreement between the parties regarding the treaty or the application of its provisions . . . [and] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." There is some support for the contention that law-declaring resolutions of the United Nations General Assembly represent "authentic" interpretation by the parties to the Charter of their existing treaty obligations.[76] Even accepting this still controversial contention,[77] it would be difficult to find in the resolutions adopted by the United Nations General Assembly anything that supports the idea that the members of the United Nations have sought to modify the obligations contained in Article 2(4).[78]

It has been suggested that even if it has not been amended, in practice Article 2(4) has been superseded by new norms of international behavior which reflect contemporary expectations of how Article 2(4) ought to be applied in practice. It is not easy to evaluate this assertion. Noncompliance with a legal norm does not, without more, evince an intention by states to prescribe a new one. Moreover, such state practice as might be offered in evidence of the emergence of a new legal norm cannot be said to possess anything like the necessary degree of uniformity, frequency and acknowledgement that it is motivated by *opinio juris communis*. In fact, it is probably appropriate to note at this point that the degree of compliance with Article 2(4) is far greater than that of noncompliance, although it is obviously also more difficult to demonstrate inasmuch as a decision not to use armed force does not readily lend itself to formal proof. In any event, the introduction of a new norm in direct contradiction with the terms of an existing codified one should not lightly be inferred.[79]

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[76]*See, e.g.*, Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38, 46–48 (1961); Lachs *The Law in and of the United Nations*, 1 INDIAN J. INT'L L. 429, 439 (1961); *R. Higgins*, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 165, 185–88 (1963–II). The framers of the Charter recognized that interpretation of the Charter is "inherent in the functioning of any body which operates under an instrument defining its functions and powers." Statement of Committee II/2 of the San Francisco Conference, 13 U.N.C.I.O. 709–711 (1945).

[77]In a formal, positivist sense interpretation of the Charter by action of one of its political organs cannot constitute an amendment of the Charter unless it meets the formal requirements for amendment set forth in Chapter XVIII of the Charter. The point need not be pursued here, however, inasmuch as the members of the UN do not appear to have intended to amend or reinterpret Article 2(4). *See generally* Schachter, *The Crisis of Legitimation in the United Nations*, 50 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 3 (1981).

[78]*See* Clark, *Humanitarian Intervention: Help to Your Friends And State Practice*, 13 GA. J. INT'L & COMP. L. 211, 212 (1983). Relevant resolutions tend to trace the language of the Charter. See, for example, the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970), 25 GAOR, Supp. 28, A/8028, at 122–124.

[79]*See* Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 1963 PROCS. AM. SOC. INT'L L. 147, 149.

IV. Countervailing Provisions and Policies

The United Nations Charter, like many multilateral constitutive instruments, is a product of political compromise. The aspirations it reflects and espouses are ultimately in harmony with one another, but in codifying principles and machinery for their implementation the framers had to accommodate positions that were not always logically or practically consistent. Some of these accommodations involve the Rio Treaty and OAS Charter and figure directly in the issue of the lawfulness of the U.S. involvement in Grenada.

A. Individual and Collective Self-Defense Under Article 51

The most prominent of these permits the use of force in self-defense, either by a state itself or by states acting collectively. A number of commentators have assumed, and at least one has insisted, that the military intervention in Grenada was justified as a valid exercise of this legal right. International law has long recognized—indeed, perhaps taken for granted—the right of states to defend themselves. But the scope of this right under the United Nations Charter is more limited than popular discussion of it suggests.

Neither the Covenant of the League nor the Kellogg-Briand Pact referred explicitly to the right of self-defense. In proposing the Pact, however, the French and American governments expressed the view that a right of self-defense "is inherent in every sovereign state and is implicit in every treaty."[80] "Every nation," the United States government said, "is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action."[81] The United States explained the omission of any reference to self-defense in the proposed Pact by saying that its inclusion would make it "too easy for the unscrupulous to mold events to accord with an agreed definition."[82]

The United Nations Charter appears to represent a different approach to the right of self-defense. Article 51 of the Charter expressly recognizes ("in no way impairs") the "inherent right" of individual or collective self-defense "if an armed attack occurs," at least until the Security Council takes measures to restore what the Charter refers to as "international peace and

[80]1928 United States Foreign Relations, I, 36.
[81]*Id.*
[82]*Id.*

security." Self-defense of this sort, whether individual or collective, cannot be construed as a threat or use of force in volation of Article 2(4).

The reference in Article 51 to an "armed attack" appears to represent an unqualified condition, and it was initially interpreted as a limitation upon whatever "inherent right" a state otherwise possesses. Thus, in 1948 Philip Jessup wrote that

> A case could be made out for self-defense under the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.[83]

But as Jessup noted, the documentary record of the discussions at the San Francisco Conference which formally drafted the Charter does not afford conclusive evidence that the words "armed attack" were intended to narrow or preclude the traditional right of anticipatory or preventive self-defense.[84] Some legal scholars have argued that the reference in Article 51 to a state's *inherent* right should be construed as reaffirmation of the traditional rule. "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,' " Professor Myres McDougal has written.[85] "There is not the slightest evidence that the framers of the United Nations Charter by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states."[86]

However, most scholars do not agree with this reading. Indeed, they regard anticipatory self-defense, in situations where no attack is imminent, as incompatible with Article 2(4)'s constraints on the use of force and feel that the very subjectivity of an anticipated attack renders it too manipulable a standard to have been intended by the framers as an exception to Article

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[83]P. JESSUP, A MODERN LAW OF NATIONS 166 (1948). *See also* Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 873 (1947); KELSEN, THE LAW OF THE UNITED NATIONS 269 (1950); 2 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 156 (7th ed. 1952); Wright, *United States Intervention in the Lebanon*, 53 J. INT'L L. 112, 116 (1959).

[84]JESSUP, *supra* note 83, at 166.

[85]McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600 (1963). *See* Professor Henkin's response, *supra* note 79, at 165-66.

[86]McDougal, *supra* note 85, at 600. *See also* MCDOUGAL AND FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, ch. 3 (1961). This view appears strengthened by the fact that the French text is "dans un cas ou un Membre des Nations Unies est l'objet d'agression armée." The words "agression armée" appear to be less categorical in French than "armed attack" is in English. *See* Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECEUIL DES COURS 455, 495 (1952, II). Similarly, Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Self-Defense Claims Valid Under International Law*, 31 GEO. WASH. U. L. REV. 335, 361 (1962). *Cf.* MacChesney, *Some Comments on the 'Quarantine' of Cuba*, 57 AM. J. INT'L L. 592, 596 (1963).

2(4) (in contrast to the comparatively objective standard of an armed attack that has already taken place).[87]

The traditional right of anticipatory self-defense was by no means unrestricted in any event. The rule usually cited was framed by Secretary of State Daniel Webster in the course of diplomatic resolution of the dispute engendered by the destruction by British forces of the American steamer *The Caroline* in 1842, while that vessel was berthed in her American port. The British had learned that *The Caroline* had been chartered by insurgent forces in Canada and that it was loaded with arms which were about to be delivered to the insurgents. Webster insisted its destruction and the consequent death of several crew members were in principle illegal, and he added:

> [W]hile it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for deliberation, and must be limited by that necessity and kept clearly within it.[88]

If this traditional criterion of imminence and overwhelming necessity—"leaving no choice of means and no moment for deliberation"—is borne in mind, the case for armed intervention as an exercise of legitimate anticipatory self-defense usually proves to be weak, and such appears to be the case with regard to Grenada. As a military or other policy matter, the time for intervention may have been ripe. That the military buildup on Grenada genuinely alarmed its Caribbean neighbors is unquestionable, as is their vulnerability to armed aggression and their need, when threatened, to rely on outside help. But as a matter of law the imminence of the threat of armed attack—the *sine qua non* of the legal right of preventive self-defense even under the traditional rule—does not seem to have been of such compelling moment that there was no time for nonforcible alternatives.[89]

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[87]Henkin, *supra* note 79, at 141. *See also* 2 LAUTERPACHT, *supra* note 83, at 156.

[88]2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906). Cited with approval by the International Military Tribunal at Nuremberg in 1945. *See* 2 LAUTERPACHT, *supra* note 83, at 190.

[89]Members of Congress clearly doubted that the use of force was the last option pursued. *See* THE SITUATION IN GRENADA, *supra* note 4, at 17 (question by Senator Kassebaum); and GRENADA WAR POWERS: FULL COMPLIANCE REPORTING AND IMPLEMENTATION, Markup before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. 21 (1983) (remarks of Cong. Mel Levine). At the meeting of the OAS Permanent Council on October 26th, the representative of the Bahamas described the military operation as a case of "premature overreaction." OAS Transcript, *supra* note 10, at 31.

In a leading treatise, Professor Derek Bowett of Cambridge University observes:

> The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence . . . The breach of a duty violates a substantive right, for example, the right of territorial integrity, and gives rise to the right of self-defence. It is this precondition of delictual conduct which distinguishes self-defence from the "right" of self-preservation and the "right of necessity."

BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 9 (1958).

It may well be argued that Webster's classic definition of the circumstances that justify anticipatory self-defense has undergone change; that is, that the "inherent" right of states, always a matter of customary international law, has been modified by post-Charter customary law. Professor Rostow argues as much, saying that "the decisions of states to use force under Article 51 of the United Nations Charter [are] almost always a conditioned reflex under circumstances of stress. Their legality is not determined by how well they are explained, however, but by how well they correspond to the pattern of state practice deemed right by the society of nations."[90]

It should be noted that as early as 1946 the United States government offered as its formal view that "an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons."[91] And, speaking of the effect of new techniques of warfare, the late Hans Kelsen wrote in 1954 that

> [T]he members of the United Nations in exercising their right of individual and collective self-defense may interpret "armed attack" to mean not only an action in which a state uses its own armed force but also a revolutionary movement which takes place in one state but which is initiated or supported by another state. In this case, the members could come to the assistance of the legitimate government against which the revolutionary movement is directed.[92]

In the Grenada situation, assertions have been made, alternatively and sometimes without distinction, that Grenada was acting in its own self-defense, that the OECS states that participated in the intervention were acting collectively in their own self-defense, and that Grenada, the OECS and other Caribbean states, and the United States were acting in their combined right of collective self-defense. To the extent that Grenada's self-defense is involved, these assertions assume, against the weight of present evidence, that the coup that brought the Revolutionary Military Council headed by Army Chief General Hudson Austin to power was instigated or supported by Cuba. They further assume that the Revolutionary Council failed to achieve de facto control of the island and that therefore and in any event the Governor-General of Grenada was authorized to act in Grenada's behalf, that the Governor-General requested the OECS to

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[90]E. V. Rostow, *Law 'Is Not a Suicide Pact,'* Op-ed piece, N.Y. Times, Nov. 15, 1983, at A35.

[91]United States Memorandum No. 3, Dealing with the Relations Between the Atomic Development Authority and the Organs of the United Nations, submitted to Subcommittee No. 1 of the UN Atomic Energy Commission, July 12, 1946, International Control of Atomic Energy; Growth of a Policy (Dep't State Publication 2702, 1946), Appendix No. 16, *quoted in* 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 980. *Cf.* W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 259–260 (1964).

[92]Kelsen, *Collective Security Under International Law,* United States Naval War College, International Law Studies, 1954 (1957), at 88, *quoted in* 5 WHITEMAN, DIGEST OF INTERNATIONAL LAW 981.

intervene in the way it did before the fact, and that the help sought by the OECS from the United States and other Caribbean states was consistent with the Governor General's request.

These assumptions aside, an interpretation of Article 51's reference to the inherent right of states to act in their self-defense which has the effect of vindicating calls by factions in an internal strife for outside help cannot be said to enjoy unanimous acceptance in the world community.[93] It is true that the legitimacy of calls for French assistance in internal uprisings in Francophone Africa, though called into question, does not appear to have been the subject of a sustained challenge by the world community.[94] Nor have Britain's intervention in Tanzania in 1974, Tanzania's intervention in Uganda later, and other incidents of this type elsewhere in Africa. But it would be difficult to find support for the assertion that the legitimacy of such intervention is readily accepted in the Americas, other than pursuant to Article 3 of the Rio Treaty or under the auspices of the OAS, even before but especially in light of the criticism of the military intervention in Grenada by representatives of Latin American states at the meeting of the Permanent Council of the OAS on October 26th, immediately after the intervention.[95]

As noted, the Rio Treaty envisions two kinds of collective self-defense: that permitted by Article 51 of the United Nations Charter and Article 3 of the Rio Treaty itself (i.e., in the event an armed attack occurs), and that permitted by Article 6 of the Rio Treaty itself (i.e., in response to an aggression which is not an armed attack). In the case of the latter, Article 6 calls for an immediate meeting of the Organ of Consultation in order to agree on measures to assist the victim or, in any event, for the common defense.

In theory, Article 6 may not be entirely compatible with Article 51 of the United Nations Charter, in which case (by virtue of the supremacy clause in Article 103 of the United Nations Charter and the acknowledgement in Article 10 of the Rio Treaty) Article 51 must prevail. In the present context, however, this point appears moot, since at no time did the Organ of Consultation meet to (or otherwise) agree upon measures to be taken with regard to the situation in Grenada.

In terms of the purposes and principles of the United Nations Charter and

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[93]Professor Louis B. Sohn recently observed: "Regardless of the merits of a particular situation, the point is clear, I hope, that an invitation by one of the parties to an internal conflict is not a sufficient justification for any intervention." *Supra* note 50, at 227. *See also* Clark, *supra* note 78, *passim*.

[94]For example, in Kolwezi, Zaire, where French paratroopers defeated a rebellious faction of the Zaire army in 1978; and more recently in Chad. *See* Moise, Can France Sustain an Interventionist Consensus, Wall St. J., Nov. 30, 1983, at 29.

[95]*See* Transcript, *supra* note 10, at pp. 11 (Colombia), 13 (Mexico), 17 (Argentina), 33 (Dominican Republic), 34 (Venezuela), 35 (Brazil), and 41 (Uruguay). The Council did not have a resolution before it and did not take a formal vote.

the Rio Treaty, it is difficult to square the commitment to sovereignty, political independence and self-determination with allowing foreign forces to decide which of rival factions will prevail in an internal struggle for power. Where, as was the case here, the foreign forces are called in by a barely credible government, the likelihood that the foreign state will forsake its own national policy interests in favor of unconditional local self-determination is usually scant.[96] In fact, the ordinary course of events leads to the emergence of a government acceptable to the intervening state, whether or not it happens as well to be preferred by the nationals of the state whose independence has thus been compromised. In this respect, one of the least desirable consequences of intervention in circumstances like those presented by the situation in Grenada is to lend a measure of legitimacy to the otherwise discredited Brezhnev Doctrine, under which the Soviet Union claims the right to intervene in any system that has adopted a socialist government, for the purpose of preventing any change in that form of government. That, strictly speaking, the Brezhnev Doctrine does not appear to depend upon a request from the state concerned is of little

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[96]In the Senate Foreign Relations Committee hearing on October 27th, Senator Sarbanes asked Deputy Secretary Dam what would happen in the event elections in Grenada resulted in a government that the United States did not like and thought was a danger to Americans who remain on Grenada. Mr. Dam replied:

> "I think that is an extremely hypothetical question, because I cannot imagine that such a government would be acceptable to—well, first of all, that the Governor-General would appoint such a prime minister. After all, he did not appoint Mr. Bishop. There was a coup d'etat. Second, I cannot imagine that the believers in democracy that the OECS are, and particularly Prime Minister Charles, would encourage the formation of such a government. I understand what you are asking me, but you are asking me to speculate about a situation that I would be extraordinarily surprised were it to occur. It is certainly not our purpose to create such a situation."

THE SITUATION IN GRENADA, *supra* note 4, at 44.

Even in circumstances of civil unrest, aid to an incumbent government presupposes that it is normally strong enough to suppress rebellion and to govern purposefully. Where the requesting government lacks any means of asserting authority, its invitation to a powerful neighboring state is especially susceptible to the latter's self-serving imposition of internal authority structure and/or policies. *See generally* Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 526 (1969); Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 281 (1969); Nanda, *The United States' Action in the Dominican Crisis: Impact on World Order*—Part I, 43 DEN. L. REV. 439 (1966), Part II, 44 DEN. L. REV. 225 (1967).

Prior to the October 25th invasion, the United States had not had continuing diplomatic representation on Grenada since the NJM seized power in 1979. Within five days of the invasion the United States had opened a diplomatic mission, described by a correspondent from the New York Times as the most powerful seat of civil authority on Grenada. N.Y. Times, Nov. 2, 1983, at A16. By November 3rd, Mr. Scoon had ordered the explusion of—and United States officials had evacuated—Cuban, Libyan and Soviet diplomats.

It has been widely reported that Mr. Coard and his politically active wife, Phyllis Coard, were taken aboard a United States helicopter carrier following his capture on October 30th; and that the three RMC leaders were not allowed to return to the island until November 6th, at which time they were incarcerated. *See* Faerron, *Chronology*, 12 CARIBBEAN REV. 11 (1983).

moment, since in practice the Soviet Union has generally contrived to have a request of this sort available from someone in the target state, however flimsy the cover.[97] Similarly, the difference between preventing a prospective deviation from the path of socialism and correcting a deviation that has already occurred from the path of democracy seems more a matter of which system one prefers than a substantive difference in doctrine. The effect in either case is to vindicate the use of force to bring about a change in the nature or political policies of a foreign sovereign state. This objective, however pleasing the result in particular cases, cannot be reconciled with the purposes and principles of the United Nations Charter, the Rio Treaty or the Charter of the OAS.

It is clear by now that the kind of invasion to which Article 51 apparently refers is no longer the only form of aggression to which states find themselves exposed. For the time being, however, the "inherent" right of self-defense referred to in Article 51 does not appear to contemplate military response to all such threats. Since the self-defense permissible under Article 6 of the Rio Treaty contemplates responses authorized by the OAS, and since the OAS did not authorize the intervention in Grenada, self-defense does not appear to be available as a justification for the United States action in Grenada.

The intervention in Grenada is sometimes loosely analogized to the interdiction of missiles into Cuba in 1962. At that time, some legal scholars defended the "quarantine" as an exercise of the right of self-defense under Article 51.[98] The United States government did not do so, however. As Mr. Meeker noted at the time:

> [T]he United States, in adopting the defensive quarantine of Cuba, did not seek to justify it as a measure required to meet an "armed attack" within the meaning of Article 51. Nor did the United States seek to sustain its action on the ground that Article 51 is not an all-inclusive statement of the right of self-defense and that the quarantine was a measure of self-defense open to any country to take individually for its own defense in a case other than "armed attack" . . . [T]he United States took no position on either of these issues.[99]

In the case of Grenada, too, the United States has consciously avoided taking a position on these issues.

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[97]*See* Sohn, *supra* note 50. Professor Moore writes that the Brezhnev doctrine "is actually the converse of self-determination and clearly violates contemporary international law." Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 197 (1983).

[98]*See e.g.*, McDougal, *supra* note 85, and Mallison, *supra* note 86.

[99]Meeker, *supra* note 49, at 523. *See also* Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFFAIRS 554 (1963), and 472 DEP'T ST. BULL. 764 (1962).

B. Collective Action Under Articles 52 and 53 of the United Nations Charter and Articles 22 and 28 of the OAS Charter

1. *Collective Regional Action Prior to Grenada*

In 1962 the United States took the position that in authorizing the quarantine the OAS had acted consistently with the provisions of the United Nations Charter contemplating regional peacekeeping. It will be recalled that the Act of Chapultepec had recommended the execution of a treaty to establish a regional arrangement, and had specifically provided that the "use of armed force to prevent or repel aggression" constituted "regional action which might appropriately be taken by the regional arrangement." When the provisions of the United Nations Charter concerning regional arrangements were discussed at San Francisco, it was against this background.[100]

The result is that the Charter accords "regional arrangements and agencies" special privileges. These include the right of collective self-defense (Article 51), although collective defense, as restricted in the Charter, is available to any group of states, regionally organized or not. More to the point are the kinds of collective action permitted by Articles 52 and 53, in each case subject to the supervision of the Security Council. Article 52(1) provides:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Article 53(1) permits regional arrangements or agencies to take "enforcement action" either on their own if authorized by the Security Council or as agents of the Council if the Council so orders.

That the OAS, although not in existence as such at the time the United Nations Charter was adopted, was clearly envisioned in its provisions on collective regional action cannot be doubted. The inter-American system provided the principal context for the discussions of the proposed Article 52. As noted above, the Act of Chapultepec had specifically provided for a hemispheric arrangement to use "force to prevent or repel aggression;" this arrangement, the OAS, was thus clearly written into the Charter. Arrangements like the OAS may be said to have the advantage of tempering any ardor for unilateral resort to armed force by adding the institutional safeguards of a well-developed regional organization to the supervision of the

[100]Other groups of states, such as the Commonwealth and the newly formed League of Arab States, had similar interests, but it was the inter-American system, and the Act of Chapultepec in particular, that provided the principal context for the discussion. *See* Meeker, *supra* note 49 and Akehurst, *supra* note 54.

Security Council. The Organ of Consultation created by the Rio Treaty, for example, acts by a vote of two-thirds of the signatories to the Treaty (Article 17).[101]

Consequently, when the United States interposed the quarantine of Cuba it said it had done so on the legal basis of the considered action taken by the OAS pursuant to the Rio Treaty, which in turn incorporated the language and purposes of the Act of Chapultepec, all as foreseen and authorized by framers of the United Nations Charter in adopting Article 52.

The caution envisioned by the United Nations Charter before any organ of any regional arrangement or agency uses armed force is evinced in two ways to which reference has already been made. If the use of force is treated as a peacekeeping operation, pursuant to Article 52(1), *supra*, then it is subject to the requirement of Article 52(2) that the United Nations members involved "shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council." If it is considered an "enforcement action," then in order to conform to the requirements of Article 53(1) it has to have been authorized by the Security Council.[102]

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[101]This advantage is illustrated by the careful steps taken by the OAS prior to authorizing the interdiction of missiles into Cuba in 1962. Prior to the October missile crisis itself, a formal meeting of the Foreign Ministers of the OAS had found that the continental unity and the democratic institutions of the hemisphere were endangered by "the subversive offensive of communist governments." Acting pursuant to the OAS Charter as Organ of Consultation under the Rio Treaty, a meeting of the OAS Foreign Ministers held in Punta del Este early in 1962 had taken collective action against Cuba, including a commercial blockade and the exclusion of the Castro government from organs of the inter-American system. Finally, and against this background, the Council of the OAS, meeting on October 23, 1962, had constituted itself as the Provisional Organ of Consultation under the Rio Treaty, considered the evidence before it of the secret introduction of Soviet strategic missiles into Cuba, concluded that it was confronted with a situation that might endanger the peace of America within the meaning of Article 6 of the Rio Treaty, and passed a resolution recommending that the member states, in accordance with Articles 6 and 8 of the Rio Treaty, *supra*, "take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent." *Quoted in* Meeker, *supra* note 49, at 517.

[102]For instance, in 1962 the United States took the position that the Council's authorization could be inferred from the facts that, first, in meeting even before the OAS had adopted its resolution authorizing the quarantine and before the United States Proclamation had been issued putting it into effect, the Council nonetheless had not seen fit to take any action in derogation of the quarantine; second, the Council had refrained from acting upon a Soviet resolution and had decided, instead, by general consent, to promote the course of a negotiated settlement, with the assistance of the United Nations Secretary-General; and third, the Council had continued to pursue this course while the quarantine continued. *See* Meeker, *supra* note 49. This interpretation seems strained. It has been criticized not only for construing nonaction by the Security Council as "authorization," but also for concluding that authorization can come after the fact, that is, after the irreversible fact that force has already been used. In any case, the United States maintained that the quarantine did not constitute an "enforcement action" as that term is used in Article 53(1). "Enforcement action," it said, refers to actions ordered by the

2. *The Grenada Intervention as Regional Collective Security*

At the meeting of the Permanent Council of the OAS on October 26th, the United States Representative, Ambassador J. William Middendorf II, said that "regional collective security measures of the kind taken . . . are expressly contemplated by Article 52 [paragraph 1] of the United Nations Charter."[103] Speaking to the United Nations Security Council the following day, the United States Permanent Representative to the United Nations, Ambassador Jeane J. Kirkpatrick, said that the intervention in Grenada "fully comported with relevant provisions of the United Nations Charter, which accord regional organizations the authority to undertake collective action."[104] And in his statement before the Senate Foreign Relations Committee that same day, Deputy Secretary of State Dam said that "Article 52 of the United Nations Charter expressly permits regional arrangements for the maintenance of peace and security consistent with the purposes and principles of the United Nations. The actions and objectives of the [United States-Caribbean] collective-security force in the circumstances . . . are consistent with those purposes and principles."[105]

The government is not basing its claim on Article 53(1), as was the case, for example, in 1962, perhaps implicitly following the suggestion then made that the "enforcement actions" to which Article 53(1) applies do not include ones made pursuant to mere recommendatory measures by regional organizations.[106] Were it to do so, it would face the difficulty that on October 28th, the Security Council voted 11 to 1 (Britain, Togo and Zaire abstaining) in favor of a resolution in which the Council "deeply deplore[d] the armed intervention in Grenada" as a "flagrant violation of international law and of the independence, sovereignty and territorial integrity of that state."[107] The veto cast by the United States blocked the resolution.

Security Council which are obligatory on United Nations members, not to actions only recommended by the Security Council or by the General Assembly. By extension, Mr. Meeker wrote, it refers as well to action taken by a regional organization that is obligatory upon its members, but not to nonobligatory action. *Id.*, at 521–22. The OAS resolution authorizing the quarantine had been adopted pursuant to Article 6 of the Rio Treaty, *supra*, and was thus the one measure which under Article 20 is not obligatory on parties to the Rio Treaty even when agreed upon by the Organ of Consultation.

Not everyone agreed with the United States position. It was recalled, for example, that the Act of Chapultepec, which the framers of the United Nations Charter were attempting to accommodate, referred only to the collective use of force "to prevent or repel aggression." Seligman, *The Legality of the U.S. Quarantine Action Under the United Nations Charter*, 49 A.B.A.J. 144 (1963). Furthermore, it has been pointed out that in light of the fact that OAS resolutions for the use of force can never be more than recommendations, they would (according to the extended logic of the United States position) never be subject to Security Council authorization. Akehurst, *supra* note 54, at 202.

[103]OAS Transcript, *supra* note 10, at 28–29.

[104]Press Release USUN 103–(83), Oct. 27, 1983, at 6.

[105]THE SITUATION IN GRENADA, *supra* note 4, at 6.

[106]*See supra* note 102.

[107]Text *reprinted in* the N.Y. Times, Oct. 29, 1983, at 4.

On November 2nd, the United Nations General Assembly voted 108 to 9 for a resolution

The United States government's Article 52 argument does not rest upon too firm a foundation in any case. As mentioned above, the second paragraph of Article 52 requires United Nation members entering into regional arrangements to make every effort to achieve pacific settlement of local disputes through such regional arrangements . . . before referring them to the Security Council. So far as is known, neither the OECS nor the states comprising the Grenada peace-keeping force made the kind of effort described in United Nations Charter Articles 2(3) and 33, *supra*, much less "every effort," to resolve the crisis in Grenada through peaceful means.

Many commentators have expressed doubt that either the OECS or the United States-Caribbean Peace-Keeping Force is the kind of regional arrangement or agency the Charter contemplates. It is unlikely that either is what the framers of the Charter had in mind, if only because they seem so ill-suited to provide institutional restraint of the kind that renders Articles 52 and 53 consistent with the objectives of Article 2(4).[108]

The Charter does not define the term "regional arrangements or agencies" in so many words. Article 52(1) appears to establish only three criteria: that is, that the arrangement or agency be (i) regional, (ii) concerned with the maintenance of international peace and security, and (iii) consistent with the principles and purposes of the United Nations. A well-developed organizational infrastructure or control mechanism is not specifically required; hence, the alternative of an "arrangement" or an "agency." Nor does the arrangement or agency have to be concerned primarily with the maintenance of international peace and security, so long as it is functioning in this way in the given situation.[109]

Greater difficulty comes in trying to justify the intervention as collective security consistent with the terms of the Rio Treaty and the OAS Charter.[110] As noted, the United States takes the position that the intervention was undertaken in conformity with Articles 22 and 28 of the OAS Charter, that is, that it constituted a measure taken for the maintenance of peace and security in accordance with "existing treaties" (Article 22) and that it was

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deploring the "armed intervention" in Grenada. Voting in favor of the resolution were such Western states as Australia, Denmark, France, Greece, Iceland, Italy, the Netherlands, Norway, Portugal and Spain. Among the 27 abstentions were Great Britain, Japan, West Germany and Canada. Voting against the resolution were the United States, El Salvador, Israel and the six Caribbean states which had taken part in the operation. Washington Post, Nov. 3, 1983, at A1. In the parlance of the United Nations, to "deplore" something is to condemn it in unusually harsh terms.

[108]Akehurst, *supra* note 54, at 177.

[109]*Id.*

[110]Secretary of State Shultz initially suggested at a news conference that because the United States acted in response to a request from the OECS, which in turn was acting under its own constitutive treaty, it could do so without regard to the obligations contained in the OAS Charter. N.Y. Times, Oct. 26, 1983, at A19. This is clearly incorrect and may be presumed to have been an inadvertent misstatement of the government's position.

done "in furtherance of the principles of continental solidarity or collective self-defense . . . apply[ing] the measures and procedures established in the special treaties on the subject" (Article 28). Whatever ambiguity may be present in the text of these articles isolated from their negotiating history is misleading, since that history refutes any suggestion of an intent to allow parties to the OAS Charter to take part in collective security arrangements within the hemisphere outside the OAS system.[111] Indeed, the original draft version of these two articles had referred specifically to the Rio Treaty, by name. But the delegates foresaw that the Rio Treaty might be amended, revised into several treaties, absorbed in part in the charter they were drafting, etc. So, out of caution they decided to adopt more generalized language describing the Rio Treaty, effectively incorporating it, but avoiding language that would have to be amended every time the Rio Treaty was. At no point in the discussion was the suggestion made that substituting "existing treaties" and "special treaties on the subject" for "Rio Treaty" opened the door for parties to the OAS Charter to engage in a parallel system of collective security in the hemisphere. The objective of assuring the solidarity of the system being completed at the conference, that is, the OAS system, was referred to countless times, without any indication of intent to authorize or permit what would be, for OAS members, an alternative to the OAS.[112]

Beyond consideration of the language of Article 52 of the United Nations Charter and Articles 22 and 28 of the OAS Charter lie profoundly unsettling questions about the effect that strained interpretations of them have as precedent. Once a superpower has effectively asserted such an interpretation it becomes more difficult to repudiate or distinguish from comparably strained interpretations. The fibre of the constraints on the use of force are weakened just when they are most in need of strengthening. Like "collective self-defense" that anticipates improbable armed attacks, "collective security" that serves to justify unilateral prerogatives concerning the use of force is dangerous because it applies reciprocally and is contagious.

Earlier we indicated that we are not in a position to determine whether the OECS states complied with their constituent instrument in joining with Barbados, Jamaica and the United States in using military force to remove

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[111] *See generally*, Fenwick, *The Ninth International Conference of American States*, 42 AM. J. INT'L L. 522, 556 (1948); Kunz, *The Bogota Charter of the Organization of American States*, 42 AM. J. INT'L L. 568, 588 (1948). Moore, *supra* note 96, at 281n.

[112] *See* Actas y Documentos, Novena Conferencia Internacional Americana, Bogota, Colombia, marzo 30-mayo 2 de 1948, vol. II, pp. 218–19, and vol. IV, pp. 22–23, 39–40, 73–78 and 234–46. In his testimony before the Senate Foreign Relations Committee on October 27th, Deputy Secretary Dam said the OAS Charter "envisions" treaties other than the Rio Treaty, "So in a sense you have [in the Grenada operation] an OAS Force, but it is under the security provisions of the OAS envisaging collective defense and security." THE SITUATION IN GRENADA, *supra* note 4, at 35–36.

the threat to their peace and security posed by the situation in Grenada. Of course, if one takes the position that regional action under Article 52(1) of the United Nations Charter can be undertaken by any group of states, however loosely organized, then the OECS states' compliance with the terms of the OECS Treaty may not be critical to compliance with Article 52(1). But if this is the case, it would only seem to strengthen the contention that any collective action involving military force has to be regarded as "enforcement action," that is, it operates under Articles 53 of the United Nations Charter and has to be ordered or authorized by the Security Council. Otherwise, the use of force is open to any two or more states meeting the easy criteria of a regional arrangement, regardless of whether they are subject to any institutional control mechanism. It is difficult to see how such a construction of Article 52 carries out the intentions and policies underlying Article 2(4) of the United Nations Charter or Article 20 of the OAS Charter.

Moreover, for the reasons already adduced, the commitments undertaken by the United States in the Rio Treaty and the OAS Charter are not overcome by the fact, if it is such, that the United States was requested to act by a group of states acting under their own constitutive treaty in the hemisphere but outside the OAS system.

C. Humanitarian Intervention

At the time of the Entebbe rescue mission, the United States government told the United Nations Security Council:

> Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force for the protection of one's own nationals from the imminent threat of injury or death in a situation where the state in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury.[113]

At the time of the intervention in Grenada, the American medical students were believed to be endangered by the collapse of civil authority on the island, the murderous tendencies of the Austin-Coard faction and the possibility that this faction would seize the Americans as hostages. Critics have contended that the danger was overstated, that the principal threat to the safety of the American medical students was posed by the military forces during the initial phases of the invasion. We are not prepared to question the government's judgment that the danger was real and imminent.

Not everyone agrees that a rescue intervention is justified under Article

[113]31 U.N. SCOR (1941st meeting) 31, U.N. Doc. S/P.V. 1941 (1976).

2(4) of the United Nations Charter. It depends upon the assumption that the Charter now admits of tacit understandings or that, in spite of the negotiating history of Article 2(4), the words "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" have the effect of narrowing the scope of the proscription the Article contains.

The case for a rescue mission under Articles 18 and 20 of the OAS Charter is weak, too. Thus, at the October 26th meeting of the OAS Permanent Council, the representative of Colombia said (as translated) that "the protection of the lives of the Americans cannot justify the invasion, because Article 18 of the [OAS] Charter is very clear in saying that it proscribes the right to intervene in the affairs of another whatever the motive."[114] The words of Article 20 are even less compromising, especially the phrases, "even temporarily," "directly or indirectly," and most of all, "on any grounds whatever." Moreover, it is not without historical justification that the Latin American members of the OAS view with suspicion any attempt to infer a humanitarian exception to Article 20 of the OAS Charter.

Even among those who accept the lawfulness of attempts to rescue one's own nationals endangered abroad, as in the Entebbe situation, there is virtual unanimity in the view that only a short-term use of armed force is justified. The United States military troops, as noted, remained on Grenada for nearly two months, long after those Americans who wished to be evacuated had left.[115] The Grenada intervention seems to resemble the United States intervention in the Dominican Republic in 1965 and similar episodes in the past in which the rescue of the intervening state's nationals appears to have been collateral to the primary purpose of favorably resolving an internal political struggle.

Historically, the term "humanitarian intervention" has usually been reserved for those situations in which a state has claimed the right to intervene militarily to protect the human rights of nationals of the target state or other nationals, not its own nationals. The judgment of the world community on this claim is not kind. Thus, Professor Brownlie of Oxford University has written:

> The state practice justifies the conclusion that no genuine case of humanitarian intervention has occurred, with the possible exception of the occupation of Syria

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[114]OAS Transcript, *supra* note 10, at 11.

[115]On November 1st, 300 United States Marines invaded the Grenadian island of Cariacou, located twenty miles north of Grenada itself, looking for Cubans and reportedly detaining some seventeen individuals believed to be members of the RMC. N.Y. Times, Nov. 2, 1983, at A1. By mid-November, United States troops had detained nearly 1,100 Grenadians and Cubans for interrogation. *Id.*, Nov. 14, 1983, at A1. It has been reported that in the wake of the intervention in Grenada, the United States installed a psychological operations team at the radio station in Grenada. Manning, *supra* note 1, at 76.

in 1860 and 1861. With the embarrassing exception provided by Germany, the institution has disappeared from modern state practice. As a matter of legal and international policy this is a beneficial development. The institution did not conspicuously enhance state relations and was applied only against weak states. It belongs to an era of unequal relations . . .[116]

Concluding Observations and Recommendation

We are drawn to the conclusion that the United States' intervention in Grenada is incompatible with those articles of the United Nations Charter, the Rio Treaty and the Charter of the OAS that proscribe the use of force in international relations other than in limited circumstances, none of which appears to be applicable in this instance. We do not suggest, as others have, that the United States was acting insincerely or without regard to the factors which were cited publicly in justification of the intervention. Nor are we to say to what extent these factors implicated important national security interests. But we do say that the constraints imposed by the several relevant treaties are not peripheral regulations; they lie at the core of international efforts to minimize unilateral military intervention by states. For the United States, moreover, they represent treaty commitments of the most fundamental kind. These constraints, our own international commitments and the rule of law themselves represent national security interests, vital ones.

It may be time to reassess these constraints and these commitments to see whether, in fact, they continue to serve the objectives which motivated them. There appears to be room to argue that the United Nations Charter does not deal adequately with externally supported subversion or indirect aggression and anticipatory self-defense, and that it fails to place in proper perspective all the policies that rightly bear upon decisions, made in good faith, to intervene in the protection of human life and civil order. Perhaps, too, the Rio Treaty and OAS Charter should be brought up to date to assure a more efficient and effective role for the Organization of American States in the western hemisphere. In any event, the time seems propitious to initiate a study of these matters and we recommend that the Council consider doing so.

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[116]I. BROWNLIE, *supra* note 47, at 340–342. *See also* Franck and Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 302 (1973); and HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973).