

# Note

## Modern-Day “Guarantee Clauses” and the Legal Authority of Multinational Organizations To Authorize the Use of Military Force

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### I. INTRODUCTION

Recent political developments have brought new significance to a long-standing debate about when regional organizations may legally authorize the use of military force against member states without prior authorization by the United Nations Security Council.

The most striking examples of these developments have occurred in Africa in reaction to the repeated failure of the United Nations to halt civil wars and other humanitarian crises. When African states transformed the Organization for African Unity into the African Union (AU) eight years ago, they granted the new organization the authority “to intervene in a Member State . . . in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”<sup>1</sup> A year earlier, the heads of the Economic Community of West African States (ECOWAS), which had been involved in

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1. Constitutive Act of the African Union art. 4, para. h, July 11, 2000, OAU Doc. CAB/LEG/23.15 (May 26, 2001) [hereinafter AU Charter], available at [http://www.africanunion.org/root/au/AboutAU/Constitutive\\_Act\\_en.htm](http://www.africanunion.org/root/au/AboutAU/Constitutive_Act_en.htm).

several military conflicts during the 1990s, signed a protocol on conflict management. This document authorized ECOWAS to take measures, including the use of military force, to prevent humanitarian disasters and “serious and massive violation of human rights and the rule of law,” and to protect or restore democratically elected governments against unlawful coups.<sup>2</sup> Since the enactment of these two agreements, the United States has spent several hundred million dollars to train and equip African military forces to intervene in the continent’s crises.<sup>3</sup>

African states are at the forefront of the development of such treaties,<sup>4</sup> but similar proposals have been made elsewhere. For example, several scholars have proposed the creation of pro-democracy pacts that would have the authority to use military force to protect signatory democratic governments against coups.<sup>5</sup> In 2000, participants in U.N.-mediated negotiations over Cyprus discussed treaty provisions that would have allowed other nations to intervene in case of conflict.<sup>6</sup> And in 2007, Senator John McCain, now his party’s presidential nominee in the 2008 election, proposed that the United States found a “League of Democracies”; although the powers of the proposed “League” remain unclear, McCain has suggested that it would have the authority to intervene to halt humanitarian suffering if the United Nations failed to act.<sup>7</sup>

This Note analyzes the legality of the use of force pursuant to these kinds of treaty clauses, known as “guarantee clauses.” It concludes that guarantee clauses can offer a legal basis for the use of military force against a treaty signatory, though the use of force pursuant to a guarantee clause is subject to jus cogens norms of international law. The Note concludes with a discussion of several policy considerations that merit consideration during the drafting of guarantee clauses.

This Note proceeds in four Parts. Part II considers the relationship between the U.N. Charter framework and regional organizations, the primary multilateral organizations envisioned during the founding of the Charter, and examines the general legal authority that regional organizations possess to authorize the use of force, both under a traditional, clause-bound view of the Charter and under the more permissive view of international law prevalent in contemporary debates.

Part III turns to guarantee clauses and argues that states may use them to “contract around” the general legal prohibition on the use of force. This

2. Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security art. 25, Dec. 10, 1999, ECOWAS Doc. A/P10/12/99 [hereinafter ECOWAS Conflict Protocol], available at <http://www.sec.ecowas.int/sitecedeo/english/ap101299.htm>. The Conflict Protocol has not been ratified by all member states.

3. NINA M. SERAFINO, CONG. RESEARCH SERV., *The Global Peace Operations Initiative: Background and Issues for Congress 1-2* (2007), available at <http://www.fas.org/sgp/crs/misc/RL32773.pdf>.

4. For a general overview of the evolution of Africa’s collective security landscape, see Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT’L L.J. 785 (2006).

5. See, e.g., Morton H. Halperin, *Guaranteeing Democracy*, 91 FOREIGN POL’Y 105 (1993).

6. Lori Fidler Damrosch, Panel Discussion at The Yale Journal of International Law’s Sixth Annual Young Scholars Conference (Mar. 1, 2008).

7. John McCain, *An Enduring Peace Built on Freedom*, 86 FOREIGN AFF. 19 (Nov.-Dec. 2007).

contractual power, however, is limited: it can be used only against treaty signatories, and all uses of force must be consistent with *jus cogens* norms of international law. These limitations have the effect of minimizing the concerns of critics who may worry that guarantee clauses, no less than other uses of force lacking U.N. authorization, present a Pandora's box of potential abuses.

Part IV explores four classic case studies in which authorization by a regional organization served as at least a partial legal basis for military action: the Cuban Missile Crisis in 1962, the American-led invasion of Grenada in 1983, ECOWAS's intervention in the civil war in Liberia during the 1990s, and NATO's bombing campaign on behalf of Kosovo in 1999. Each case study analyzes the treaty-based legal arguments advanced to support the intervention and assesses the strength of those arguments in light of the framework developed in Part III. Part IV also offers a hypothetical assessment of a fifth case, a potential intervention by the AU against a member state. Finally, Part V addresses policy considerations related to the drafting of guarantee clauses.

## II. THE AUTHORITY OF REGIONAL ORGANIZATIONS UNDER THE U.N. CHARTER

This Part discusses the authority of regional organizations to use force within the U.N. Charter framework. It begins with a classical account of the use of force within the U.N. framework and concludes that, as originally understood, the Charter did not grant regional organizations the authority to use force without prior U.N. authorization. The Part then considers more recent, flexible interpretations of the right to use force within the Charter framework. It concludes that although there is growing support for the use of force even without U.N. approval—particularly for humanitarian interventions—deep divisions remain over the *legality*, as opposed to the *legitimacy*, of such action. The next part, Part III, will argue that guarantee clauses can help to close that gap by providing a legal basis for such uses of force.

### A. *A Classical View of Regional Organizations' Authority to Use Force Under the U.N. Charter*

The delegates who arrived in San Francisco in April 1945 to draft the United Nations Charter wanted to establish a new international order outlawing aggressive warfare. To that end, Article 2(4) of the Charter provided that member states "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."<sup>8</sup>

The delegates were divided, however, on the question of whether the new order would be guaranteed by a centralized United Nations or whether

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

regional collections of states would take primary responsibility for maintaining regional peace. In fact, discussion of the relationship between regional organizations and the United Nations was "second only to the question of voting procedure in the Security Council as a source of bitter argument."<sup>9</sup> Although the United States and the other major Allied powers had already agreed at Dumbarton Oaks that regional organizations would have a role in the postwar world, widespread disagreement remained over crucial details regarding powers of regional organizations—in particular, whether regional organizations would be permitted to use military force without prior authorization from the United Nations.<sup>10</sup>

With memories of Germany's remilitarization of the Rhineland fresh in their memories, French delegates wanted a unilateral right to use force against Germany or another Axis power were it to begin remilitarization.<sup>11</sup> Accordingly, they proposed that the U.N. Charter grant individual states or groups of states the right to take measures, including the use of force, "in the interest of peace, right, and justice," if the Security Council found itself paralyzed due to a veto.<sup>12</sup> Moreover, Australia introduced a similar proposal that would have granted regional organizations the authority to "adopt such measures as they deem just and necessary for maintaining or restoring international peace and security" were the Security Council to fail to act against a threat to the peace.<sup>13</sup>

Latin American delegations, on the other hand, pressed for a broader role for regional organizations within the Charter framework. To this end, a month before the San Francisco conference, Central and South American states had signed the Act of Chapultepec, which was a hemispheric pact binding its signatories to take collective action "in case acts of aggression occur or there are reasons to believe that an aggression is being prepared by any other State against the integrity or inviolability of the territory, or against the sovereignty or political independence of an American State."<sup>14</sup> In particular, Part II of the Act of Chapultepec called on American states to enter into negotiations to establish a permanent mutual defense treaty,<sup>15</sup> which the Latin American delegations in San Francisco anticipated would lead to the creation of a formal hemispheric organization—the Organization of American States (OAS). Although negotiators representing the United States had insisted that the Act of Chapultepec stipulate that "the said [hemispheric] arrangement . . . shall be consistent with the purposes and principles of the [United Nations], when established,"<sup>16</sup> Latin American states were "determined to uphold the inter-American system as the basis of security . . .

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9. Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175, 175 (1967).

10. RUTH RUSSELL & JEANETTE MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 398-99 (1958).

11. *See id.* at 690.

12. *Id.*

13. *Id.*

14. Final Act of the Inter-American Conference on Problems of War and Peace pt. I, ¶ 4, Mar. 8, 1945, 60 Stat. 1831 [hereinafter Act of Chapultepec].

15. *Id.* pt. II.

16. *Id.* pt. III.

in the Western Hemisphere."<sup>17</sup> Meanwhile, Arab delegations in San Francisco hoped to protect the nascent Arab League's authority within the Charter world.<sup>18</sup>

Eventually, the delegates struck a two-part compromise on the authority of regional organizations. Article 51 of the U.N. Charter legitimated collective defense agreements by providing that the Charter would not "impair the inherent right of individual or collective self-defence if an armed attack occurs."<sup>19</sup> Further, Chapter VIII (Articles 52-54) provided an explicit role for regional organizations to operate within the Charter framework. Careful analysis of both Article 51 and Chapter VIII, however, shows that the Charter framers did not intend to grant regional organizations the legal authority to use force—except in self-defense—absent authorization by the U.N. Security Council.

The first half of this compromise, Article 51, provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . . .<sup>20</sup>

In recent years, Article 51's scope has been the subject of tremendous debate regarding whether the phrase "if an armed attack occurs"<sup>21</sup> or subsequent state practice has legalized, or at least legitimated, preventative military action against an emerging threat to peace.<sup>22</sup> Regardless of the ultimate meaning of "self-defence" under Article 51, however, it is clear that the Article offers regional organizations no special authority to use force. Instead, the plain language of the Article—"the inherent right of individual or collective self-defence if an armed attack occurs"<sup>23</sup>—makes clear that the right to use force in self-defense remains the same whether it is exercised by an individual state or a collection of allied states. Article 51 provides a regional organization with the legal authority to use force only insofar as it provides an individual member state of the regional organization with the legal authority to do so. The general question of the scope of the self-defense right under Article 51 has been widely debated elsewhere and is beyond the scope of this Note.<sup>24</sup>

The second half of the compromise, Chapter VIII of the U.N. Charter—Articles 52 through 54—establishes a positive role for regional organizations within the Charter framework. The text and structure of Chapter VIII, however, show that it does not grant regional organizations the legal authority to use force without prior Security Council approval.

17. RUSSELL & MUTHER, *supra* note 10, at 693.

18. See Akehurst, *supra* note 9, at 176.

19. U.N. Charter art. 51.

20. *Id.* (emphasis added).

21. *Id.*

22. See, e.g., Michael J. Glennon, *The Fog of Law. Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 547-48 (2002); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

23. U.N. Charter art. 51.

24. See, e.g., Glennon, *supra* note 22; Reisman & Armstrong, *supra* note 22.

Article 52 states that the Charter should not be read to preclude regional organizations' authority over "matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements . . . are consistent with the Purposes and Principles of the United Nations."<sup>25</sup> Members of the United Nations that enter into regional arrangements "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."<sup>26</sup> Article 52 also provides that the Security Council should encourage the use of regional arrangements in the settlement of disputes.<sup>27</sup>

Article 53 provides that the Security Council "shall, where appropriate, utilize . . . regional arrangements . . . for enforcement action under its authority."<sup>28</sup> But Article 53 contains a sharp limitation on the authority of regional organizations to act independently of Security Council authorization: "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."<sup>29</sup> Article 54 requires regional organizations to keep the Security Council apprised "of activities undertaken or in contemplation . . . for the maintenance of international peace and security."<sup>30</sup>

The plain language of these articles makes clear that while the Charter permits—indeed, even encourages—regional organizations to take measures to protect regional peace, it does not grant regional organizations the authority to use force without receiving Security Council authorization. Article 52 encourages states to use regional organizations for the "pacific settlement" of disputes but makes no reference to military options. Article 53's prohibition on "enforcement actions," meanwhile, should be read as prohibiting "the use of force" in light of its use of the phrase "enforcement action"; the Charter fails to define the phrase, but links it to "the use of force."<sup>31</sup> Article 5, for example, provides for the suspension of U.N. members against which the Security Council has taken "preventive or enforcement action,"<sup>32</sup> suggesting that the two are qualitatively different. Article 45 then draws a link between "enforcement" and "the use of force": "In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action."<sup>33</sup> This link between "military measures," "air-force contingents," and

25. U.N. Charter art. 52, para. 1.

26. *Id.* para. 2.

27. *Id.* para. 3. A limiting clause makes clear that members of regional organizations retain the right to bring any dispute to the attention of the United Nations and that the Security Council retains the authority to investigate any dispute. *Id.* para. 4.

28. *Id.* art. 53, para. 1.

29. *Id.* Article 53's prohibition on the use of force by regional organizations contains a limited exception for the use of force against former Axis powers. *Id.* art. 53.

30. *Id.* art. 54.

31. In French, the Charter uses the phrase *action coercitive* where the English document uses "enforcement action." The literal translation of *action coercitive* would be "coercive action." The Spanish, *medidas coercitivas*, is similar to the French.

32. U.N. Charter art. 5.

33. *Id.* art. 45.

"enforcement action" strongly implies that the phrase "enforcement action" refers to the use of force.

The minutes of the meetings of the U.S. delegation in San Francisco provide additional support for this interpretation of the Charter.<sup>34</sup> Indeed, the U.S. delegates simply assumed that the Charter would preclude the OAS or other regional agencies from using military force without prior Security Council authorization: when Senator Arthur Vandenberg (the head of the U.S. delegation) asked Assistant Secretary of War John McCloy whether the requirement of Security Council authorization for enforcement actions by regional organizations was acceptable to American military officials, McCloy replied that the "military and naval advisors were willing to concede that *force should not be used without the authorization* of the Security Council."<sup>35</sup> The minutes also indicate that there was heated debate about whether to exempt enforcement actions by particular regional organizations from the requirement of prior Security Council authorization—in particular, whether Chapter VIII should have been changed to permit particular regional organizations to use military force if needed to prevent a recurrence of events like those leading up to the Second World War.<sup>36</sup>

Ultimately, the drafters included only one narrow exception to the prohibition on enforcement actions without Security Council approval: language within Article 53 created a limited exception for regional organizations to take enforcement actions against former Axis powers to halt a renewal of aggressive policy on the part of the states defeated in World War II.<sup>37</sup> This decision to include a specific exception authorizing regional enforcement actions against the former Axis powers would have been redundant if the Charter generally permitted regional organizations to use force without Security Council authorization.

#### B. *Contemporary Views of the Use of Force Within the U.N. Charter Framework*

In recent years, international human rights activists as well as scholarly commentators have challenged the traditional understanding of the U.N. Charter as forbidding the use of force without authorization by the U.N. Security Council. In the wake of the apparent inability of the United Nations to stop post-Cold War humanitarian crises in Bosnia, Rwanda, and Kosovo, and driven by emerging threats to global security such as international terrorist groups, legal scholars have advocated a flexible approach to international law that would accommodate changing circumstances even if the formal foundational text of the world legal order—the U.N. Charter—remains unchanged. Scholars have suggested that actions by states (or coalitions) may

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34. Diplomatic Papers, The United Nations conference on international organization, San Francisco, California, Apr. 25-June 26, 1945, in [1945] 1 FOREIGN REL. U.S. 592 (emphasis added).

35. *Id.* (emphasis added).

36. *See id.* at 567-710.

37. U.N. Charter art. 53.

come to be accepted as legitimate, and possibly legal, as new criteria develop for assessing the legitimacy and legality of future actions.<sup>38</sup>

Some of the most significant reassessments of the international law of the use of force have come in the area of humanitarian intervention. A growing body of legal and political commentary suggests that the international legal order should permit either individual states or coalitions of willing nations to use their own forces to stop humanitarian catastrophes (particularly state-sponsored genocide) if the United Nations fails to act. Former State Department Legal Advisor Abraham Sofaer has expressed his support for a “common lawyer” approach to interpreting the U.N. Charter that would, for example, recognize the legality of NATO’s 1999 humanitarian intervention in Kosovo on the grounds that “under all the relevant circumstances presented, the action was reasonable in light of the Charter’s provisions and purposes.”<sup>39</sup> Another scholarly commentator, Ruth Wedgwood, has cited former U.N. Secretary-General Kofi Annan to argue that the “developing international norm in favour of intervention to protect civilians from wholesale slaughter”<sup>40</sup> challenges the traditional, absolutist understanding of Article 2(4)’s prohibition on the use of force. The International Commission on Intervention and State Sovereignty’s 2001 report, *The Responsibility to Protect*, argued that “[s]tate sovereignty implies responsibility” and that “[w]here a population is suffering serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”<sup>41</sup> Nevertheless, the Commission argued that the United Nations should retain responsibility for authorizing interventions. Scholars have also argued for an evolutionary approach to the law of anticipatory self-defense in the wake of the United States-led invasion of Iraq in 2003.<sup>42</sup>

Another group of critics challenges the idea that legality should play a controlling role in international relations and has proposed to open a “gap” between the legality and the legitimacy of the use of force. Michael Glennon, for example, has argued that in the wake of the Iraq war, “[l]awful’ and ‘unlawful’ have ceased to be meaningful terms as applied to the use of force” and that the old order was toppled by “[p]ower disparities, cultural disparities, and differing views on the use of force.”<sup>43</sup> While Glennon’s vision of the total collapse of the legal order remains a minority view, a significant number of

38. See, e.g., W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 86-90 (2003).

39. Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT’L L. 1, 15 (2000).

40. Ruth Wedgwood, *NATO’s Campaign in Yugoslavia*, 93 AM. J. INT’L L. 828, 834 (1999) (quoting Press Release, Secretary-General Kofi Annan, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136 (Sept. 20, 1999)).

41. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at xi (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

42. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563, 573-74 (2003). Anne-Marie Slaughter has argued that “[w]hat we are witnessing today is an unruly process of pushing and shoving toward a redefined role for the United Nations. Practices have to evolve without formal amendment. . . . [D]epending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.” Anne-Marie Slaughter, *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33.

43. Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16, 24, 30 (May-June 2003).



scholars have suggested that the international legal order incorporate a degree of illegality by recognizing the legitimacy of interventions, particularly for humanitarian purposes, while continuing to deny their legality. This approach, in which legitimacy turns on the substantive goals and outcome of an intervention independent of its legal basis, was crystallized by the Independent International Commission on Kosovo, headed by former South African Supreme Court Justice Richard Goldstone, which concluded that NATO's 1999 bombing campaign that ended atrocities in Kosovo was "illegal but legitimate".<sup>44</sup>

It was illegal because it did not receive prior approval from the United Nations Security Council. However, the [Independent International] Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule.<sup>45</sup>

Antonio Cassese articulated similar sentiments in a 1999 essay, noting that while "few states have endeavored to translate [the Kosovo campaign] into legal terms,"<sup>46</sup> the international "opinio necessitatis"—the belief that the action was necessary to prevent massive human rights violations—"was strong and widespread."<sup>47</sup>

In a recent article, Professor Monica Hakimi has begun to address the issue of regional organizations in this evolving view of the international order. Hakimi argues that a split between the international community's continued formal endorsement of Article 2(4)'s prohibition against the use of force and its periodic toleration for the unauthorized use of force, particularly by regional organizations like ECOWAS and NATO, is giving rise to "two different legal regimes": a "legal" one requiring U.N. authorization for the use of force, and an "operational" one that tolerates or condones certain unauthorized uses of force.<sup>48</sup> Noting that regional organizations like ECOWAS and NATO have mounted several interventions without U.N. authorization, Hakimi argues that, as a practical matter, the international community's acceptance of the legitimacy, if not the legality, of these uses of force depends on the substantive ends achieved, the procedural processes that an organization employs when authorizing the use of force, and the characteristics of the regional organization, in particular, the connection between the organization, the target of the action, and the controls over the particular use of force at issue.<sup>49</sup>

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44. INTERNATIONAL INDEPENDENT COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 4 (2000).

45. *Id.* at 4.

46. Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EUR. J. INT'L L. 791, 795 (1999).

47. *Id.* at 798.

48. Monica Hakimi, *To Condone or Condemn: Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANS. L. 643, 647 (2007).

49. *Id.* at 679-83. For another recent analysis of the issue of regional organizations' authority, see Dana Michael Hollywood, *It Takes a Village . . . or at Least a Region. Rethinking Peace Operations in the Twenty-First Century, the Hope and Promise of African Regional Institutions*, 19 FLA. J. INT'L L. 75 (2007).

In the next Part, I propose that guarantee clauses can offer a partial solution to this gap between the legality and legitimacy of uses of force by giving regional organizations the express legal power to authorize the kinds of interventions—notably humanitarian interventions—that, as Hakimi, Cassese, and others note, the international community is already coming to regard as legitimate.<sup>50</sup>

### III. GUARANTEE CLAUSES: INTERVENTION AUTHORIZED BY TREATY

This Part discusses the legality of guarantee clauses under international law. It begins with a discussion of the history of guarantee clauses in the pre-Charter world and argues that their legality survived the creation of the United Nations in 1945. Since the use of force pursuant to a guarantee clause is grounded on the consent of signatory states, guarantee clauses do not violate Article 2(4)'s prohibition of the use of force against the territorial integrity or political independence of states. The Part then discusses jus cogens limits on the use of guarantee clauses and proposes that jus cogens norms can serve as a type of boundary on the use of force that would prevent the abuse of guarantee clauses. Finally, the Part argues that guarantee clauses offer a normatively desirable mechanism for regulating the use of force absent U.N. authorization.

Pre-Charter customary international law held that states could enter into guarantee clauses that legitimated the use of force within their territory under specified circumstances. In 1863, for example, Greece, Great Britain, France, and Russia concluded a treaty that, *inter alia*, provided that “Greece, under the sovereignty of Prince William of Denmark, and the guarantee of the three courts, forms a monarchical, independent, and constitutional state,”<sup>51</sup> and this treaty served as a legal justification for intervention in Greece in 1916.<sup>52</sup> In 1903, Cuba and the United States signed the Treaty of Havana, in which the Cuban government granted the United States a right to intervene to protect “life, property, and individual liberty.”<sup>53</sup> Teddy Roosevelt cited this Treaty in 1906 to justify dispatching troops to quell unrest in Cuba.<sup>54</sup>

Treaties conferring a general right of intervention fell out of favor by the start of the Second World War and today evoke distasteful memories of colonial imperialism.<sup>55</sup> Treaties conferring a right of intervention under limited circumstances, however, continue to the present day: for example, the 1977 treaties granting Panama control over the Panama Canal expressly grant

50. For a discussion of the gap between legality and legitimacy, see Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31 (2002).

51. Treaty Relative to the Accession of Prince William of Denmark to the Throne of Greece, July 13, 1863, *reprinted in* 12 AM. J. INT'L L. 75, 76 (Supp. 1918).

52. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 318 (1963); *see also* LASSA OPPENHEIM & RONALD F. ROXBURGH, INTERNATIONAL LAW 225 (1920).

53. Treaty Between the United States and Cuba Embodying the Provisions Defining the Future Relations of the United States with Cuba, U.S.-Cuba, May 22, 1903, 33 Stat. 2248 [hereinafter Treaty of Relations].

54. *See* GlobalSecurity.org, 1906 Cuban Pacification Campaign, <http://www.globalsecurity.org/military/ops/cuba06.htm> (last visited Apr. 3, 2008).

55. *See* David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 614-15 (1995).

the United States a perpetual right to use military force to ensure that the Canal remains open and free to American traffic.<sup>56</sup>

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Customary international law traditionally recognized the legality of intervention pursuant to such treaties because the intervention was not seen as violating the territory or political independence of a state. The 1920 edition of Lassa Oppenheim's influential treatise *International Law*, for example, provided that:

Wherever there is no right of intervention . . . an intervention violates either the external independence or the territorial or personal supremacy [of a state]. But if an intervention takes place by right, it never constitutes such a violation because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is duty bound to submit to the intervention.<sup>57</sup>

For Oppenheim, treaty provisions authorizing intervention created a valid right for a treaty party to intervene under the circumstances specified in the treaty.<sup>58</sup> Other early twentieth-century legal treatises also accepted the legitimacy of guarantee clauses, with one treatise writer noting that such agreements "were particularly common in the nineteenth century."<sup>59</sup>

Although the U.N. Charter's supremacy clause provides that Charter obligations prevail over other international agreements,<sup>60</sup> there are several reasons to believe that the Charter did not preempt this customary law practice of permitting states to enter into guarantee clauses authorizing intervention within their territory.

First, the plain language of Article 2(4)'s prohibition on the use of force applies to force used "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>61</sup> But force used with the consent of a legitimate government violates neither the territory nor the political independence of a state—indeed, it is an incident of the political independence of a government that it possesses the authority to bind itself to treaty agreements.

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56. See Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, U.S.-Pan. annex A(b)(1), Sept. 7, 1977, 33 U.S.T. 1 ("[I]f the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.").

57. OPPENHEIM & ROXBURGH, *supra* note 52, at 223.

58. *Id.* at 225-26. Oppenheim also believed that a state's failure to adhere to jus cogens norms of international law created a general right for any other state to intervene to stop the violation. "If a State in time of peace or war violates such rules of the Law of Nations as are universally recognized by custom or are laid down in law-making treaties, other States have a right to intervene . . ." *Id.*

59. GEORGE GRAFTON WILSON, HANDBOOK OF INTERNATIONAL LAW 205 (1910). *But see* AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 149-50 (1912). Although Hershey thought that intervention pursuant to a guarantee clause could be legally justified, he questioned the legality of treaties that guaranteed particular dynasties or forms of government on the grounds that they may "constitute a denial of one of the essential rights of independence." *Id.* at 150 n.13.

60. U.N. Charter art. 103.

61. *Id.* art. 2, para. 4.

The writings of several post-Charter scholars support this view, and it receives some additional support from both the International Court of Justice and from resolutions of the United Nations itself. Ian Brownlie's treatise, *International Law and the Use of Force by States*, for example, stated that "[s]tates may lawfully confer by treaty a right to intervene by the use of armed force within the territorial or other legally permitted limits of their jurisdiction."<sup>62</sup> Sean Murphy has suggested that the consent of member states provides a reason for according deference within the Charter framework to actions by regional organizations against their own members:

A loose interpretation of Article 52 is tolerable in situations where a regional organization is pursuing enforcement action against one of its own members in accordance with the constituent instruments of the organization. In such a case, the member state voluntarily enters into a regional arrangement that cedes certain elements of its sovereignty to the decisionmaking of the regional organization . . . . It is when the action of the nonmember state does not rise to the level of an armed attack yet nevertheless threatens the peace that Security Council authorization under Article 53 is presumably needed.<sup>63</sup>

In its influential *Nicaragua* decision, the International Court of Justice also suggested, in dicta, that intervention at the request of a legitimate government was permissible under international law. "[I]t is difficult," the ICJ concluded, "to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition."<sup>64</sup>

The debates surrounding at least two U.N. resolutions relating to armed intervention also lend support to this view. Debate on a 1965 General Assembly resolution condemning armed intervention, for example, "was largely limited to *unwelcome* intervention. Only Argentina and Jamaica addressed intervention by invitation, and both took the position that it did not violate international law."<sup>65</sup> Finally, General Assembly Resolution 3314, which defines "aggression," implicitly recognizes that states can enter into agreements for the active use of armed force within their territory: it provides that aggressive acts include "the use of armed forces . . . which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement."<sup>66</sup> By defining aggression to include the use of armed force exceeding host-state

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62. BROWNLIE, *supra* note 52, at 317. *But see* W. Michael Reisman, Editorial, *Termination of the USSR's Treaty Right of Intervention in Iran*, 74 AM. J. INT'L L. 144, 151-52 (1980).

63. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 342-43 (1996).

64. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27) (emphasis added). *See generally* David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 214-15 (1996) (arguing that most states accept that an incumbent government may legitimately invite external military intervention).

65. Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 268 (1997).

66. G.A. Res. 3314, art. 3, § e, at 143 (annex), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974); *see also* Christopher J. Le Mon, Junior Fellow's Note, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 753 (2003).

authorization, Resolution 3314 suggests that the use of armed force consistent with such authorization does not amount to aggression that would violate Article 2(4) of the U.N. Charter.

Viewing guarantee clauses as consistent with international law does not render Article 53's prohibition on "enforcement actions" "under regional arrangements or by regional agencies without the authorization of the Security Council" meaningless, which would raise a possible objection to whether guarantee clauses could really be consistent with the Charter's language.<sup>67</sup> Article 53 prohibits regional organizations from taking military action against nonmembers or in ways inconsistent with the authority conferred by a regional organization's particular guarantee clause; use of force consistent with a regional organization's guarantee clause does not trigger Article 53 concerns because it simply never rises to the level of a possible violation of Article 2(4).

There remains a question, however, over whether the use of force requires the consent of the host-state government *at the time force is used* or whether a prior treaty agreement can trump the present wishes of the state government. For example, if a state has signed a treaty authorizing a multinational organization to use force to prevent crimes against humanity but subsequently objects to the multinational organization using force against that state to stop its own criminal acts, does the state's prior agreement to the treaty provide the organization with sufficient legal authority to use force in the face of the present objection?

The limited scholarly opinions to consider this issue to date—often ancillary to other arguments—have reached mixed conclusions. Morton Halperin and Tom Farer, for example, have argued that a treaty provision signed by a democratic government to authorize intervention to preserve the democratic regime should override objections raised by a nondemocratic successor government that came to power through unconstitutional means.<sup>68</sup> David Wippman has argued that while a treaty-based right of intervention should ordinarily be seen as revocable, in the context of civil wars or other conditions of societal disintegration, no one faction (including the formal government) should be deemed to possess the authority to revoke an agreement made prior to the conflict.<sup>69</sup> At the other end of the spectrum, Michael Reisman, writing about Iran's 1979 repudiation of a treaty that authorized the Soviet Union to intervene to protect certain Soviet interests in Iran, argued that "insofar as [armed intervention] is not invited by that state *in that particular instance*, it impairs its political independence" in violation of

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67. U.N. Charter art. 53.

68. See Tom J. Farer, *The United States as Guarantor of Democracy in the Caribbean Basin. Is There a Legal Way?*, 10 HUM. RTS. Q. 157 (1988); Halperin, *supra* note 5, at 105. Malvina Halberstam has argued for the existence of an emerging international norm in favor of prodemocratic intervention. Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993). For articles criticizing prodemocratic intervention as illegal—though without addressing the issue of pro-democratic intervention authorized by treaty—see, for example, Ved P. Nanda, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494 (1990); and Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

69. See Wippman, *supra* note 55, at 630-32.

Article 2(4).<sup>70</sup> Careful analysis, however, suggests that prior agreement to the treaty trumps the state's current objection as long as the treaty is otherwise valid and the use of force in the given instance does not violate a *jus cogens* norm of international law.

International law obligates a state to respect treaty obligations unless the state withdraws from, denounces, or suspends its participation in a treaty, or unless a particular treaty provision is invalid. The Vienna Convention on the Law of Treaties, the basic international framework governing treaty interpretation, states that "the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the [Vienna] Convention."<sup>71</sup> Under the Convention, withdrawal or nullification of a treaty is permissible only pursuant to the provisions of the underlying treaty, or if the parties were deemed to have intended to allow withdrawal, or under a number of circumstances expressly defined by the Convention. Most of these circumstances are narrowly defined, including treaties signed under the threat of force or treaties in which one party's representative was coerced, corrupted, or fraudulently induced to sign.<sup>72</sup> The Convention also grants limited rights of withdrawal or termination if performance is impossible or if circumstances that were an "essential basis" for the conclusion of the treaty have fundamentally changed.<sup>73</sup> None of these limited provisions can be squared with a purported state right to shirk a treaty obligation to permit intervention pursuant to a guarantee clause simply because the state has changed its mind about whether intervention is desirable.

The Vienna Convention contains, however, two broader provisions regarding the nullification of treaties, both related to *jus cogens* norms. Under the Convention "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law,"<sup>74</sup> and, likewise, "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."<sup>75</sup>

While there is a great deal of debate over the precise scope of *jus cogens* in international law, several norms are widely accepted—notably, prohibitions against aggressive warfare, slavery, genocide, and possibly other grave human rights crimes.<sup>76</sup> Scholarly literature also suggests that the right to political self-determination of peoples represents a *jus cogens* norm.<sup>77</sup>

70. Reisman, *supra* note 62, at 152 (emphasis added). Although Reisman rejected the legality of *treaty-based* intervention, he has been one of the foremost advocates for a general international law norm that would permit unilateral or collective intervention for humanitarian purposes or to preserve democratic regimes. See, e.g., W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 *FORDHAM INT'L L.J.* 794 (1995).

71. Vienna Convention on the Law of Treaties art. 42, § 1, *opened for signature* May 23, 1969, 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679 [hereinafter Vienna Convention].

72. *Id.* arts. 48-52.

73. *Id.* arts. 61-62.

74. *Id.* art. 53.

75. *Id.* art. 64.

76. See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *L. & CONTEMP. PROBS.* 63, 68 (1996) ("The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.").

77. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 489 (6th ed. 2003) ("Other rules which have [*jus cogens*] status include . . . the principle of self-determination.").

These norms are important to understanding guarantee clauses, because under the Vienna Convention these norms would serve as a type of boundary on the legal use of force pursuant to a guarantee clause. Although this Note has argued that guarantee clauses are generally legal, a guarantee clause purporting to authorize the use of force in violation of a *jus cogens* norm—for example, to support a colonial regime against a popular uprising (a contravention of national self-determination)—would be invalid under the Vienna Convention.

The *jus cogens* limitation addresses several potential policy objections to guarantee clauses,<sup>78</sup> as well as similar objections raised more generally against any use of force without U.N. authorization, specifically that permitting the use of force pursuant to a guarantee clause (or, more generally, permitting any use of force without U.N. authorization) will open the door to widespread armed conflict and abuse, as major powers coerce smaller nations into signing guarantee clauses and use force to serve their own national interests. First, many abusive clauses—like the colonial regime example—would be void in light of the *jus cogens* norm favoring the self-determination of nations, a norm that would sharply curtail the ability of great powers to abuse guarantee clauses. Second, the fact that guarantee clauses can be used to authorize force only against signatory states helps to ensure that guarantee clauses will operate only under a limited range of reasonably desirable circumstances, particularly to protect basic human rights and, possibly, to support democratic regimes, since states are unlikely to agree to a guarantee clause absent assurances that it will prevent abusive intervention within their own territory. The African Union, for example, drafted its guarantee clause to authorize intervention only to prevent war crimes, genocide, or crimes against humanity, while ECOWAS's clause also permits pro-democratic intervention. These limits may reflect concerns that, in light of the African experience, the risk of abuse and the possibility of collateral damage as a consequence of intervention outweighed the possible benefits of permitting intervention under a broader range of circumstances.<sup>79</sup>

Although the legal arguments made in this Part in principle apply not only to regional organizations but to other collections of states inclined to sign guarantee clauses, as a policy and practical matter, channeling guarantee clauses through the charters of regional organizations—as opposed to bilateral agreements or treaties between small numbers of states—provides a check on abuse. While regional organizations are often dominated by one or a few major regional powers, individual powers are less likely to be able to impose their will in the context of a regional organizations given that smaller states can bargain collectively to ensure that their interests are represented. Furthermore, regional organizations typically have a deliberative

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78. See, e.g., Reisman, *supra* note 62, at 153 (expressing concern about abuse by more powerful states directing intervention toward weaker neighbors).

79. Admittedly, hard cases may arise regarding treaties that authorize intervention for a narrow national interest, like the United States's right to intervene in Panama to keep the Panama Canal open to American ships. See Wipman, *supra* note 55, at 681-84 (arguing that while the Panama Canal Treaty did not authorize the U.S. invasion of Panama to depose dictator Manuel Noriega in 1989, the treaty could have been used as the legal basis for a more limited intervention).

decisionmaking process and voting procedures may require a supermajority vote to authorize action, both of which provide checks on abuse that would not be present when a state or an ad hoc coalition decides to use force unilaterally. Indeed, historical evidence suggests that even if one power dominates a given regional organization, the requirement that it negotiate to secure approval for a particular intervention can serve as a significant check against the abusive use of force.<sup>80</sup>

#### IV. CASE STUDIES OF INTERVENTION BY REGIONAL ORGANIZATIONS

This Part uses five case studies to explore the legality of treaty-based intervention in concrete detail. Four of the case studies are historical uses of force by regional organizations: the OAS authorization of the Cuba blockade in 1962, the U.S.-led invasion of Grenada in 1983, the ECOWAS intervention in Liberia in 1990, and NATO's bombing of Kosovo in 1999. These historical case studies show how treaty provisions have been used to justify intervention, and also provide the opportunity to assess the legality of specific interventions within the framework developed in Part III. The fifth and final case study considers the legality of a hypothetical intervention pursuant to the African Union's guarantee clause.<sup>81</sup>

Each of the four historical case studies is a classic in the international law literature. This Note, however, examines only the strength of legal arguments related to the purported *treaty* basis of each intervention—it does not take a position on whether other types of legal arguments offer additional or alternative legal bases for a particular intervention. Indeed, the absence of a treaty basis for a particular intervention does not preclude its legality under alternative legal theories—for example, self-defense or the “common lawyer” approach to international law discussed in Part II above.

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80. For example, despite U.S. dominance of the OAS, it was constrained in its response to the Cuban missile crisis. In fact, the United States chose the quarantine in part because it thought that the OAS would support the action. See ABRAM CHAYES, *THE CUBAN MISSILE CRISES: INTERNATIONAL CRISES AND THE ROLE OF LAW* 68 (1974). Likewise, Nigeria, the dominant ECOWAS power, “frequently had to compromise on ECOMOG’s goals and tactics in order to maintain a consensus within ECOWAS for continued involvement within Liberia.” David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 156, 192 (Lori Fisler Damrosch ed., 1993).

It is important to note that while channeling guarantee clauses through regional organizations reduces the risk of coercion, it does not entirely eliminate the possibility of abuse. Indeed, under certain circumstances, regional organizations—the Warsaw Pact may have been a notable example—might be understood as little more than coerced agreements between regional hegemons and their weaker neighbors. As a practical matter, however, contemporary regional organizations tend to be multipolar, and while it is important to be aware of the potential for abuse created by the unequal bargaining power prevalent in contemporary international relations, neither of the regional organizations’ guarantee clauses signed to date (AU and ECOWAS) appears to give disproportionate advantage to any given nation.

81. The case studies do not consider the long-term practical ramifications of the interventions for the various parties involved. Part V provides a general discussion of some of the practical difficulties—particularly resource shortages—that regional organizations face when attempting to mount an intervention.



A. *The OAS Authorization of the Cuban Quarantine in 1962*

Although policy considerations were predominant in the Kennedy administration's internal debates over the U.S. response to the discovery of Soviet nuclear missile installations in Cuba in 1962, Kennedy and his top advisers wanted to ensure that any U.S. action was grounded in international law. Since the Soviet Union would veto any U.N. resolution condemning the missiles—much less a resolution authorizing a U.S. response—the United States decided to seek a resolution from the Organization of American States providing legal authorization for a naval blockade of the Castro regime.<sup>82</sup>

American states, including Cuba and the United States, had signed the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) in 1947 to "assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and in order to deal with threats of aggression against any of them."<sup>83</sup> The Treaty provided for a joint American response to armed attack,<sup>84</sup> and more broadly, authorized collective action in any instance where

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.<sup>85</sup>

The Rio Treaty also stipulated the range of possible measures that American states could take in response to a threat, including the "recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or . . . communications; and use of armed force."<sup>86</sup> It contained a supermajority provision requiring two-thirds of members to authorize collective action, but any duly authorized decision was binding on all members with the exception that no member state could be "required to use armed force" without that state's consent.<sup>87</sup>

OAS member states met on October 23, 1962,<sup>88</sup> and pursuant to the Rio Treaty, voted to recommend:

[T]hat the member states . . . 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 capabilities from ever becoming an active threat to the peace and security of the Continent . . .<sup>89</sup>

82. CHAYES, *supra* note 80, at 25-40.

83. Inter-American Treaty of Reciprocal Assistance pmbl., Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77 [hereinafter Rio Treaty].

84. *Id.* art. 3.

85. *Id.* art. 6 (emphasis added).

86. *Id.* art. 8 (emphasis added).

87. *Id.* art. 20.

88. President Kennedy first announced the quarantine the day before the OAS vote, but he did not implement the quarantine until he had received formal authorization for the OAS.

89. Council of the Org. of Am. States, *Resolution of the Provisional Organ of Consultation* (Oct. 23, 1962), in 47 DEP'T ST. BULL. 720, 723 (1962).

The State Department's legal memorandum justifying the quarantine under international law relied heavily on this authorization as the legal basis for the naval blockade. First, the State Department argued that the Soviet installation of nuclear missile sites in Cuba amounted to, in the words of the Rio Treaty, a "fact or situation that might endanger the peace of America" that could justify collective action under the Rio Treaty.<sup>90</sup>

The recommendation contained in the [OAS] Resolution for the use of armed force . . . was thus fully authorized by the terms of the Rio Treaty . . . [The blockade] represents a minimal use of force to achieve the stated objectives. The United States action thus falls within the terms of the OAS resolution.<sup>91</sup>

The State Department then analyzed the OAS resolution within the U.N. Charter framework. It argued that the OAS resolution was consistent with Article 52's explicit recognition of a right to enter into regional arrangements "consistent with the Purposes and Principles of the United Nations," particularly in light of drafting history suggesting that the framers of the Charter envisioned a broad role for regional organizations in the maintenance of international security.<sup>92</sup> Finally, the memorandum addressed Article 53's prohibition on enforcement actions by arguing that the OAS measure did not compel, but merely authorized, a member state to take action; the resolution was not an "enforcement action" within the meaning of Article 53.<sup>93</sup>

Although the State Department memorandum did not focus directly on the issue of Cuba's constructive consent to the blockade through its membership in the OAS, the State Department's Legal Advisor during the Cuban Missile Crisis, Abram Chayes, offered Cuba's consent as a key legal justification in his influential book, *The Cuban Missile Crisis: International Crises and the Role of Law*. "As a party to the O.A.S. Charter and the Rio Treaty, Cuba had assented to the powers and procedures of the organization. Its case was therefore very different from that of a non-member of a regional organization, against whom the organization had moved."<sup>94</sup>

90. Memorandum of Dep't of State on the Legal Basis for the Quarantine of Cuba (Oct. 23, 1962), in CHAYES, *supra* note 80, app. III, at 141 [hereinafter Meeker Memorandum] (quoting Rio Treaty, *supra* note 83, art. 6).

91. *Id.* at 143.

92. *Id.* at 144-45 (quoting U.N. Charter art. 52, para. 1). The United States did not invoke its right to self-defense under Article 51 of the U.N. Charter. According to Chayes, the Administration feared that labeling the missile placement an "armed attack" would "amount to a full-scale adoption of the doctrine of anticipatory self-defense" and set an unfavorable precedent that would legitimate military action by other nations facing similar circumstances—a step that it was hesitant to take at the height of the Cold War. *Id.* at 47, 63.

93. *Id.* at 147-48.

94. *Id.* at 53. Chayes conceded that an objection could be raised that, earlier in 1962 the OAS, acting in response to a U.S. request, had enacted a resolution declaring that Cuba's adoption of Marxism-Leninism "excludes the present Government of Cuba from participation in the inter-American system." Resolution VI, Exclusion of the Present Government of Cuba From Participation in the Inter-American System, reprinted in STAFF OF H. COMM. ON FOREIGN AFF., 92D CONG., INTER-AMERICAN RELATIONS: A COLLECTION OF DOCUMENTS, LEGISLATION, DESCRIPTIONS OF INTER-AMERICAN ORGANIZATIONS, AND OTHER MATERIAL PERTAINING TO INTER-AMERICAN AFFAIRS 184 (Comm. Print 1972). In response, Chayes cited a memorandum that the Kennedy administration had prepared while considering the legal issues raised by the U-2 spy-plane overflights of Cuba, which had also been authorized by the OAS. This memorandum concluded that the resolution "did not expel Cuba from the Organization nor release her from obligations under existing treaties"; instead, it merely prevented the Castro government from participating in OAS committees and other institutions until it renounced

The American legal justification came under contemporaneous attack from the Soviet Union and, in later years, in several scholarly articles.<sup>95</sup> Critics generally argued that the blockade did amount to an "enforcement action" under Article 53 of the U.N. Charter and thus required prior authorization by the Security Council.<sup>96</sup> Critics, however, failed to consider the rationale articulated in Part III of this Note, that Cuban consent to the Rio Treaty provided a legal basis for the quarantine. Indeed, Quincy Wright, one of the leading critics, conceded that the blockade might have been legal against Cuban ships "on the ground that as a member of OAS Cuba had constructively consented and so was legally bound by it."<sup>97</sup> Wright thought, however, that the OAS "resolution could not . . . affect the rights of the Soviet Union, against which the quarantine was primarily directed."<sup>98</sup>

Under the framework developed in Part III the legality of the Cuban blockade is a close case. Cuba's signature on the Rio Treaty provided Cuban consent to OAS use of force under a wide range of actions: any situation that threatened the peace of the Americas, a threshold that the installation of Soviet missiles undeniably met. The blockade was duly authorized by the OAS pursuant to its internal procedures, and it did not violate any jus cogens norms of international law. It was, rather, a limited and proportional response to the threat to hemispheric peace. Finally, Wright's objection, that the blockade was illegal against Soviet ships, seems misplaced. Although the Vienna Convention provides that a treaty cannot impose an obligation on a third-party state without that state's express consent,<sup>99</sup> the blockade was fundamentally directed at Cuba's right to receive missile components, not the Soviet right to ship them.

That said, a 1962 OAS resolution suspending Cuba's communist government from actively participating in the organization weakens arguments that Cuba's signature on the Rio Treaty served as consent to the OAS blockade. Temporary exclusion from participation in a regional organization in response to a regime change should not vitiate guarantee clauses. For example, an authoritarian regime that came to power after deposing a democratic government should not be able to claim that its exclusion from participating in a regional organization nullified a prodemocratic guarantee clause. On the other hand, a regional organization's

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communism. Draft Memorandum of the Dep't of State Legal Advisor on Legal Issues Involved in OAS Surveillance Overflights of Cuba (Sept. 29, 1962), in CHAYES, *supra* note 80, at 137. The memorandum also noted that, while the Rio Treaty contained a provision permitting a state to withdraw from its obligations on two years notice, at the time of the Cuban Missile Crisis, Cuba had taken no steps to do so. As the memorandum noted,

Cuba [had] taken no formal action to denounce or abrogate the Rio Treaty or any other inter-American treaty or to withdraw from the OAS. Important rights and obligations running in her favor by virtue of the treaties, other than the right to sit in the organs of the inter-American system, still subsist.

*Id.* at 137. Chayes conceded that this last argument had "soft spots." CHAYES, *supra* note 80, at 62.

95. See, e.g., Stephen R. Shalom, *International Lawyers & Other Apologists: The Case of the Cuban Missile Crisis*, 12 POLITY 83 (1979); Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 559 (1963).

96. Wright, *supra* note 95, at 559.

97. *Id.* at 558.

98. *Id.*

99. Vienna Convention, *supra* note 71, art. 34.

permanent expulsion of a member state would, by breaking the treaty, free that state of its obligations under a guarantee clause. The Cuban case falls somewhere between these two poles, and as a result, it is perhaps fair to conclude that there are "soft spots" in the argument for its legality.<sup>100</sup>

B. *The Organization of Eastern Caribbean States (OECS) Intervention in Grenada in 1983*

Authorization by the OECS was an important part of the Reagan administration's argument that the U.S.-led invasion of Grenada in 1983 complied with international law. The events leading up to the invasion dated to 1979 when Maurice Bishop led a coup against the Grenadian government and began to strengthen the island nation's ties to the Soviet Union and Cuba. By 1981, the U.S. government was accusing Grenada of planning to help the Soviet Union and Cuba transport arms to communist guerillas in Central America.

In mid-October 1983, Grenadian Deputy Prime Minister Bernard Coard, a hard-line Marxist, seized power and executed Bishop. Tensions flared over the next few days as pro-Bishop protesters clashed with government forces loyal to Coard, and the Reagan administration grew concerned that the unrest could destabilize Grenada and possibly its neighbors in the eastern Caribbean. It was also worried that widespread violence would affect several hundred Americans attending medical school in Grenada. On October 24, 1983, Reagan authorized military action, and the following day the U.S. Marines, joined by small contingents from Barbados, Jamaica, and other Caribbean nations, invaded the island.

Reagan administration officials offered three distinct legal rationales for this invasion: the need to protect American nationals; an invitation by Sir Paul Scoon, the British Governor-General; and authorization by the Organization of Eastern Caribbean States. This Section considers the third U.S. rationale.<sup>101</sup>

The OECS had been established in 1981 by seven eastern Caribbean nations.<sup>102</sup> Its constitutive act primarily provided for joint action on trade, economic, and cultural issues.<sup>103</sup> Article 8 also established a Defense and Security Committee to "advise the [OECS Governing Authority] on matters relating to external defence and on arrangements for collective security against external aggression . . . with or without the support of internal or national elements."<sup>104</sup> The OECS's Governing Authority was empowered to "make such recommendations and give such directives as it deems necessary for the achievement of the purposes of the [OECS]."<sup>105</sup> Decisions required "the affirmative vote of all Member States present and voting . . . provided

100. CHAYES, *supra* note 80, at 62.

101. For a detailed analysis of the other legal justifications, see Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765 (1993).

102. Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.

103. See Treaty Establishing the Organization of Eastern Caribbean States art. 3, June 18, 1981, 1338 U.N.T.S. 97 [hereinafter OECS Treaty].

104. *Id.* art. 8, § 3.

105. *Id.* art. 6, § 6.

that such decisions shall have no force and effect until ratified by those Member States, if any, which were not present at that meeting."<sup>106</sup>

On October 21, 1983, the OECS voted to break relations with the Grenadian government and to impose sanctions on the country.<sup>107</sup> On October 24, the OECS authorized military intervention in Grenada, but since the eastern Caribbean states lacked the resources to mount an effective invasion, it was clear that the United States—which may have lobbied the organization to provide authorization—would provide the bulk of the military force. In its statement announcing the authorization of military force, the OECS tried to fit circumstances into the collective self-defense provisions of its treaty by emphasizing its concern that Grenada posed a regional threat: "Three governments have responded to the OECS member governments request to form a multinational force for the purpose of undertaking a preemptive defensive strike in order to remove this dangerous threat to the peace and security of their sub-region . . . ."<sup>108</sup>

The Reagan administration relied heavily on this authorization in its legal defense of the American invasion. Secretary of State George P. Schultz explained that

the President received an urgent request from the countries closest to the area—the Organization of East[ern] Caribbean States—who, of course, followed these developments closely over a long period of time . . . and who determined for themselves that there were developments of grave concern to their safety and peace taking place. They . . . made a request to the United States to help them in their desire to insure peace and stability in their area. . . . And so, in response to the request of this organization, and in line [with] a request that they made pursuant to Article 8 of their treaty bringing the states together, the President decided to respond to their request and to look after the welfare of American citizens in this atmosphere of uncertainty and violence.<sup>109</sup>

Leaders of other states involved in the intervention echoed Schultz. The Jamaican Prime Minister, for example, said that because of the OECS request for a military intervention, "the government of Jamaica decided to engage its Defence Force in a multinational military action to carry out a preemptive strike to remove the threat to peace and security in the area."<sup>110</sup>

In light of the language of the OECS treaty, this purported legal justification fails under the legal framework outlined in Part III of this Note. The language of the OECS charter's defense provisions, which authorized action against "external aggression,"<sup>111</sup> simply did not authorize the use of force under the circumstances present in late 1983: there was virtually no evidence that Grenada was planning to engage in aggressive acts, and the weapons found on the island were primarily defensive in nature. As one

106. *Id.* art. 6, § 5.

107. Press Release, Org. of E. Caribbean States (undated), reprinted in WILLIAM C. GILMORE, *THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION* 92 (1984).

108. Press Release, Org. of E. Caribbean States, Position on Crisis in Grenada (Oct. 26, 1983), reprinted in INSTITUTE OF CARIBBEAN STUDIES, *DOCUMENTS ON THE INVASION OF GRENADA* 85 (1983) [hereinafter *GRENADA DOCUMENTS*].

109. George P. Schultz, U.S. Sec'y of State, News Conference in Washington, D.C. (Oct. 26, 1983), reprinted in *GRENADA DOCUMENTS*, *supra* note 108, at 19.

110. Edward Seaga, Jam. Prime Minister, Statement on Developments in Grenada (Oct. 25, 1983), reprinted in *GRENADA DOCUMENTS*, *supra* note 108, at 73.

111. OECS Treaty, *supra* note 103, art. 8. See also GILMORE, *supra* note 107, at 43-44.

commentator put it, the OECS never “demonstrated how an island state with no air or naval force at its command could actually undertake such a military initiative” against its neighbor.<sup>112</sup>

C. *The Economic Community of West African States Intervention in Liberia in 1990*

Authorization by the Economic Community of West African States (ECOWAS) served as a legal basis for the Nigerian-led West African intervention in Liberia beginning in 1990. The Liberian civil war had broken out a year earlier when rebel leader Charles Taylor launched a cross-border invasion from the Côte D'Ivoire (Ivory Coast). Within months, Taylor's forces threatened to topple the incumbent Liberian regime of Samuel Doe and sparked a humanitarian catastrophe in the countryside.

ECOWAS had been founded in 1975 as an economic association of West African nations.<sup>113</sup> Although ECOWAS's foundational treaty made no reference to collective security provisions, in 1981 ECOWAS member states signed a mutual defense agreement resolving “to give mutual aid and assistance for defense against any armed threat or aggression.”<sup>114</sup> The defense agreement was broadly framed and authorized ECOWAS to “examine general problems concerning peace and security of the Community” and to “decide on the expediency of the military action.”<sup>115</sup> It authorized armed force against “an external armed threat or aggression”<sup>116</sup> and also “[i]n the case where an internal conflict in a Member State of the Community is actively maintained and sustained from outside,” though it precluded intervention “if the conflict remains purely internal.”<sup>117</sup> ECOWAS decisions relating to defense were “immediately enforceable on Member States.”<sup>118</sup> Yet despite the broad language of the treaty, by 1990 no troops had been assigned to serve under the treaty's collective security provisions.<sup>119</sup>

Confronted with spreading violence and human suffering in Liberia, ECOWAS established a Standing Mediation Committee to investigate the conflict in May 1990. Three months later the Committee established the ECOWAS Cease-Fire Monitoring Group (ECOMOG) and authorized it “to conduct military operations for the purpose of monitoring the ceasefire, restoring law and order to create the necessary conditions for free and fair elections to be held in Liberia” and to aid the ‘release of all political prisoners

112. GILMORE, *supra* note 107, at 54.

113. Treaty Establishing the Economic Community of West African States, May 28, 1975, 1010 U.N.T.S. 17 [hereinafter ECOWAS Charter].

114. Protocol Relating to Mutual Assistance of Defense art. 3, May 29, 1981, 1690 U.N.T.S. 52 [hereinafter ECOWAS Defense Treaty].

115. *Id.* art. 6.

116. *Id.* art. 16.

117. *Id.* art. 18.

118. *Id.* art. 6.

119. Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [Heidelberg Journal of International Law] 603, 615 (1993).

and prisoners of war.”<sup>120</sup> Nigerian-led West African forces landed in Monrovia, Liberia’s capital, shortly thereafter.

Initially, ECOWAS defended the legality of its intervention by general humanitarian principles, not ECOWAS’s treaties. In its letter notifying the United Nations of the action, for example, ECOWAS stated that it “must emphasize that the ECOWAS Monitoring Group (ECOMOG) is going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions.”<sup>121</sup> A December 1990 letter to the United Nations cited an ECOWAS nonaggression pact, but made no reference to the defense treaty.<sup>122</sup>

By late 1990, however, it appears that ECOWAS had begun to cite the mutual defense treaty as part of its justification for the intervention. In a November public statement, for example, the ECOWAS Secretary General made reference “to the ECOWAS mutual defense protocol which was an agreement for member states to come to each others’ aid and assistance in case of a threat to the sovereign integrity of member states”<sup>123</sup> in discussing the intervention.

During its early phases, the ECOWAS intervention faced little international criticism,<sup>124</sup> and in fact, it arguably received ex post ratification by the United Nations. Although the United Nations initially took no formal action regarding the intervention, in 1992, pursuant to a request from ECOWAS, the Security Council imposed an arms embargo on Liberia while excluding weapons and other supplies destined for ECOMOG’s forces in the country. The resolution also commended ECOWAS “for its efforts to restore peace, stability, and security in Liberia.”<sup>125</sup> The following year, the United Nations created the United Nations Observer Mission in Liberia (UNOMIL) and formally placed U.N. observers in the country to monitor and supervise ECOMOG forces.<sup>126</sup>

120. Herbert Howe, *Lessons of Liberia: ECOMOG and Regional Peacekeeping*, 21 INT’L SECURITY 145, 151-52 (1996-97) (quoting ECOWAS Standing Mediation Committee, Decision A/DEC (Aug. 1, 1990)).

121. Letter from Ibrahim A. Gambari, Permanent Representative of Nig., to Javier Pérez de Cuéllar, Sec’y-Gen. of the United Nations (Aug. 10, 1990), *reprinted in* U.N. Doc. S/21485.

122. Letter from Ousman A. Sallah, Permanent Representative of Gam., to Javier Pérez de Cuéllar, Sec’y-Gen. of the United Nations (Dec. 21, 1990), *reprinted in* U.N. Doc S/22025. ECOWAS also could arguably have relied on the consent of Doe, who initially welcomed the intervention. However, it chose not to do so, probably because of widespread disgust with the Doe regime’s own human rights abuses, a sense that the collapsing regime could not legally authorize such intervention, and because ECOWAS did not wish to be seen as taking sides in the civil war. *See* Wippman, *supra* note 80, at 224-28.

123. Nolte, *supra* note 119, at 614.

124. Later, as the civil war dragged, ECOWAS was criticized for supporting human rights abuses and for failing to maintain order in Liberia. *See, e.g.*, HUMAN RIGHTS WATCH, WAGING WAR TO KEEP THE PEACE: THE ECOMOG INTERVENTION AND HUMAN RIGHTS (1993), *available at* <http://www.hrw.org/reports/1993/liberia>.

125. S.C. Res. 788, U.N. SCOR, 47th Sess., U.N. Doc. S/INF/48 (Nov. 19, 1992).

126. Chiyuki Aoi, *Conditions for Change in the Norms Governing Humanitarian Intervention: National Interest, Human Rights, and Justifiability of Intervention 109* (2002) (unpublished Ph.D. dissertation, Columbia University) (on file with Library Storage Facility, Yale University).

This U.N. involvement in ECOWAS's Liberia operation has been characterized as "retroactive approval" of the intervention,<sup>127</sup> and as such, the United Nation's own actions might be understood as providing a legal basis for the intervention.<sup>128</sup> The treaty-based framework developed in Part III, however, does not appear to provide a legal justification for the intervention since ECOWAS failed to comply with its own treaty provisions when authorizing the use of force. Although the ECOWAS mutual defense treaty's language was, in theory, broad enough to permit intervention—there was widespread evidence of regional involvement in the conflict and that the civil war, if left unchecked, would threaten the stability of neighboring states<sup>129</sup>—ECOWAS's decision to intervene was marked by procedural irregularities that resulted from a split between Anglophone states who favored intervention and Francophone states who generally opposed it. As a result, ECOMOG was initially authorized by an ECOWAS Monitoring Committee comprised of just five member states, not ECOWAS itself—which would appear to be a requirement of compliance with the ECOWAS treaty language then in effect. While the Monitoring Committee had been established by a unanimous vote of ECOWAS, scholars have noted that "it is quite unlikely . . . that the [ECOWAS] Authority at its meeting . . . had consciously given a mandate to five countries to set up and employ an intervention force in their name,"<sup>130</sup> and at the start of the intervention Burkina Faso (an ECOWAS member) "disputed that an appropriate authorization had in fact been given."<sup>131</sup>

Since its intervention in Liberia, however, ECOWAS has acted as though it believes treaty clauses can provide a solid legal basis for authorizing future interventions, significantly revising its treaty provisions to provide explicit guidelines and more effective procedures for military intervention in member states. A 1999 ECOWAS Conflict Protocol signed by ECOWAS heads of state explicitly authorizes ECOWAS to intervene under a variety of defined circumstances, including humanitarian disasters, human rights crimes, and attempts to topple democratic governments.<sup>132</sup> In order to prevent a repeat of the procedural irregularities that marked the 1990 intervention, decisions to intervene can now be made by two-thirds of voting members present.<sup>133</sup> Under ECOWAS's new agreements, an intervention similar to the 1993 Liberia intervention would likely conform to the legal framework developed in Part II of this Note.

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127. Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795, 818 (2003).

128. See Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts*, 12 TEMP. INT'L & COMP. L.J. 333, 347 (1998) (arguing that U.N. resolutions "placed a *retroactive de jure seal* on the ECOWAS intervention").

129. Indeed, Liberia's collapse played a major role in the outbreak civil war in neighboring Sierra Leone.

130. Nolte, *supra* note 119, at 616.

131. *Id.* ECOMOG also failed to coordinate its intervention with the Doe government (though, as noted, Doe expressly invited the intervention), a possible violation of a defense treaty provision requiring that "in case of internal armed conflict . . . [T]he Authority shall appreciate and decide on this situation in full collaboration with the Authority of the Member State or States concerned." ECOWAS Defense Treaty, *supra* note 114, art. 4, para. b.

132. ECOWAS Conflict Protocol, *supra* note 2, art. 25.

133. *Id.* art. 9.



D. *The North Atlantic Treaty Organization's Intervention in Kosovo in 1999*

In 1998 and early 1999, the Federal Republic of Yugoslavia under President Slobodan Milošević launched a brutal campaign against ethnic Albanians living in Yugoslavia's Kosovo province. Despite international outcry, Russia, a Milošević ally, blocked any significant U.N. response. Faced with mounting domestic political pressure to prevent a reprise of the bloody war that had engulfed Bosnia and Herzegovina in the early 1990s, western political leaders threatened military action, and in March of 1999, the North Atlantic Treaty Organization (NATO) began bombing Yugoslavia in a bid to halt the ethnic cleansing. After a campaign of nearly three months, Milosevic accepted a U.N.-run, NATO-staffed peacekeeping force that largely ended the violence in Kosovo.

NATO was founded in the aftermath of World War II, and was—and remains—a mutual defense pact between the United States and Western European nations. Its foundational document, the North Atlantic Treaty, provides for mutual consultation between NATO member states "whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened,"<sup>134</sup> and further provides that in case of an attack against a NATO member, each signatory "will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."<sup>135</sup>

Under the framework developed in Part III of this Note, however, NATO's treaty provided no legal basis for the action in Kosovo: it simply lacks language providing a basis for authorizing the use of force for purposes other than self-defense. More importantly, Yugoslavia was never a NATO member and thus could not have given its consent to any language authorizing the intervention. Indeed, in discussing the basis for the bombing campaign, NATO leaders relied on general humanitarian principles, not specific treaty language. For example, President Clinton stated:

We act to protect thousands of innocent people in Kosovo from a mounting military offensive. We act to prevent a wider war; to diffuse a powder keg at the heart of Europe that has exploded twice before in this century with catastrophic results. And we act to stand united with our allies for peace. By acting now we are upholding our values, protecting our interests and advancing the cause of peace.<sup>136</sup>

This focus on humanitarianism has been echoed in the scholarly literature regarding the Kosovo campaign; as discussed in Part II, scholars who defend it tend to argue either that it was supported by a general principle of international law permitting intervention for humanitarian purposes, or, alternatively, that the campaign was illegal but nonetheless justified on

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134. North Atlantic Treaty art. 4, Apr 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

135. *Id.* art. 5.

136. Bill Clinton, President of the U.S., Address on NATO Action in Kosovo (Mar. 24, 1999), available at [http://www.pbs.org/newshour/bb/europe/jan-june99/address\\_3-24.html](http://www.pbs.org/newshour/bb/europe/jan-june99/address_3-24.html).

utilitarian grounds. Scholars have, however, argued that NATO's status as a regional organization contributed to the legitimacy of the 1999 campaign, if not its legality. Ruth Wedgwood, for example, wrote that "[a]nother of the elements that bolsters NATO's action is the role of regional organizations under the Charter" and referenced a statement by a U.N. ambassador citing the ECOWAS precedent in support of NATO's action.<sup>137</sup> She also pointed out that action by a regional organization, rather than unilateral intervention, can help to achieve important policy purposes, such as "to guard against partiality, to avoid escalation of conflicts by inadvertent provocation of important actors, and to invoke the authority of a broad normative community."<sup>138</sup>

#### E. *Intervention by the African Union in a Member State*

When the Organization for African Unity reinvented itself as the African Union in 2000, it included a provision in its Charter, Article 4(h), expressly authorizing the AU "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."<sup>139</sup> The AU is empowered to make decisions by consensus or, failing that, by a vote of two-thirds of the AU's members.<sup>140</sup> In 2002, the AU took further steps to implement these provisions by establishing a Peace and Security Council charged with, *inter alia*, monitoring developing conflicts and making recommendations about when the Assembly should intervene in a conflict pursuant to the guarantee clause.<sup>141</sup> It also established an African Standby Force to execute decisions made pursuant to the AU's collective security provisions.<sup>142</sup>

The AU authorized the deployment of peacekeepers to Sudan's Darfur province in 2005, though the treaty was not a necessary legal basis for the deployment, in light of Sudan's acquiescence to the operation.<sup>143</sup> The United Nations has also provided express authorization for the AU's mission in Darfur, though resource shortages and the intransigence of the Sudanese government have contributed to ongoing violence. Under the framework developed in Part III, however, the AU's treaty authority alone would have provided sufficient authority for a mission to stop the genocide in Darfur. The AU Charter's language clearly permits intervention to stop genocide and provides a procedural mechanism—a two-thirds majority—that could override Sudanese objections.

What do these case studies tell us about the guarantee clauses? Widespread acceptance of the legitimacy and, for some scholars, the legality of the Kosovo campaign as discussed in Part II, suggests that interventions

137. Wedgwood, *supra* note 40, at 832.

138. *Id.*

139. AU Charter, *supra* note 1, art. 4, para. h.

140. *Id.* art. 7.

141. Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 7(e) (*entered into force* Dec. 26, 2003) [hereinafter AU Peace and Security Protocol], available at [http://www.africa-union.org/Official\\_documents/Treaties\\_20Conventions\\_20Protocols/Protocol\\_peace%20and%20security.pdf](http://www.africa-union.org/Official_documents/Treaties_20Conventions_20Protocols/Protocol_peace%20and%20security.pdf).

142. *Id.* art. 13.

143. INT'L CRISIS GROUP, THE AU'S MISSION IN DARFUR: BRIDGING THE GAPS 4-5 (2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3547&l=1>.

can be defended on consequentialist grounds and do not require a particular legal basis to achieve at least a degree of legitimacy. The other case studies, however, suggest that states remain drawn to legal rationales for intervention and routinely cite even weak treaty language as providing legal authority for their actions. The framework developed in Part III provides a method for evaluating the legality of intervention purportedly authorized by treaty (other than in self-defense)—though it is important to keep in mind that other legal justifications may support a given intervention even if it does not comply with the framework. Given that recent years have seen both the AU and ECOWAS adopt guarantee clauses that formally permit intervention for humanitarian purposes—and the sad realities of ongoing strife on the African continent—it seems likely that guarantee clauses will play a significant role in providing legal authority for interventions the future. This Note suggests that interventions pursuant to these clauses have the advantage of being not just legitimate, but legal.

## V. POLICY CONSIDERATIONS

This Note has argued that guarantee clauses can provide regional organizations legal authority to use guarantee clauses to authorize intervention against member states, and that, by doing so, they offer a partial mechanism for filling the gap between the law and the legitimacy of the use of force. This Part addresses three distinct sets of policy questions that must be considered when drafting a guarantee clause: scope, process, and resources. The first two of these, the scope of a guarantee clause and the process of authorizing an intervention, are critical to balancing flexibility and the potential for abuse; the first by placing substantive limits on the circumstances under which the guarantee clause applies, and the second by placing procedural limits on any authorization for the use of force. The final consideration, resources, is critical to ensuring that any intervention is successful.

Regional organizations drafting a guarantee clause must strike a delicate balance in defining its scope, which specifies the circumstances under which the clause authorizes the use of force. Broadly defined guarantee clauses can grant a regional organization legal authority to use force when necessary to deal with myriad, often unforeseen threats. On the other hand, a broad clause may open the door to abuse—a clause worded too broadly could permit intervention under circumstances that would not have been acceptable to a nation at the time that it ratified the clause, and could provide an opening for a powerful nation to abuse guarantee clauses to serve its own national interests. The AU's guarantee clause, which recognizes its authority to intervene to prevent "war crimes, genocide and crimes against humanity,"<sup>144</sup> offers a possible model compromise. War crimes, genocide, and crimes against humanity all have discrete legal content in international law, but collectively cover a wide enough range of activities that the AU could rely on the clause to provide authority for action against a variety of state abuses. The ECOWAS

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144. AU Charter, *supra* note 1, art. 4, para. h.

clause, which authorizes interventions for similar purposes as well as pro-democratic interventions, strikes a comparative balance.

A similar balancing task is required when designing the procedural mechanism that triggers action pursuant to a guarantee clause: the procedure must be speedy and flexible enough to permit action to confront a range of circumstances, but robust enough to prevent individual states from misusing guarantee clauses to pursue their own narrow national interests. The AU and ECOWAS both established a two-thirds supermajority vote as the threshold required to commit to military action, which presumably reflects concerns that a U.N. Security Council-style unanimity requirement has hindered the U.N.'s ability to prevent crises.<sup>145</sup> This type of supermajority requirement offers a reasonable balance between the need for flexibility and the fear of abuse. Guarantee clauses should also stipulate that they remain in full force and effect even if a government is suspended from participation in a regional organization because the government is engaging in behavior that the guarantee clause was designed to prevent. Language to this effect would clarify cases like the 1962 Cuban blockade, where it was unclear whether Cuba remained bound by the Rio Treaty's provisions.

Negotiators drafting a guarantee clause could also consider establishing a quasi-independent dispute resolution mechanism that could adjudicate disputes related to guarantee clauses, for example, arguments that the particular facts on the ground failed to meet the circumstances required for action pursuant to a particular guarantee clause. From a purely theoretical perspective a quasi-independent dispute resolution mechanism has a great deal of appeal: it would face fewer political pressures in interpreting the scope of a clause, and a favorable opinion could add a degree of legitimacy to a particular intervention, while an unfavorable one might be able to prevent the misuse of force. Practically speaking, however, a regional organization considering establishing a dispute resolution mechanism would have to deal with the fact that decisions on intervention must typically be made quickly, while dispute resolution mechanisms can take months, if not years, to resolve contested issues. The existence of a dispute resolution mechanism might also serve as a barrier to acceptance of a guarantee clause if potential member states prove reluctant to turn decisions about the use of force—something that has historically been seen as the prerogative of the executive branches of national governments—over to a quasi-judicial body.

The initial decision to use force is only the first step of any intervention pursuant to a guarantee clause, and the procedures used to carry out an intervention are perhaps equally important: a badly-executed intervention can do more harm than good. Both the AU and ECOWAS have established permanent institutions (the AU Peace and Security Council and the ECOWAS Mechanism for Conflict Prevention, Resolution, and Peace-keeping) tasked

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145. The OAS also requires a two-thirds supermajority vote to authorize action. The three regional organizations differ, however, on whether the two-thirds requirement is of signatories or members present at the meeting authorizing force. ECOWAS and the AU permit decisions on the affirmative vote of two-thirds of those voting; the OAS requires two-thirds of signatory states. See AU Peace and Security Protocol, *supra* note 141, art. 8, § 13; ECOWAS Conflict Protocol, *supra* note 2, art. 9; Rio Treaty, *supra* note 83, art. 17.

with organizing and coordinating interventions.<sup>146</sup> The AU's Peace and Security Council is also charged with monitoring regional developments to provide an early warning of situations that may threaten regional peace or the domestic security of a member nation's citizens,<sup>147</sup> and with establishing an African Standby Force that can be used for a variety of purposes, including interventions pursuant to the AU's guarantee clause.<sup>148</sup> Although both the AU and ECOWAS are hampered by resource shortages—an issue discussed immediately below—the existence of these permanent institutions provides an important foundation for any intervention pursuant to either organization's guarantee clauses. Other regional organizations considering drafting guarantee clauses should consider creating similar institutions.

A third, related set of policy considerations surround the limited resources that regional organizations, particularly those in the developing world, can tap to intervene in a conflict. Developing-world militaries frequently lack advanced weaponry and the logistical capabilities—ships, planes, and trucks—required to project and supply forces across national boundaries. Soldiers are often poorly trained and even officers lack the basic material required to mount an effective intervention. For example, ECOMOG commanders reportedly planned the initial invasion of Liberia's capital using a tourist map of the city and lacked adequate maps until they were provided by the American military;<sup>149</sup> the overall efficacy of the intervention has been criticized.<sup>150</sup>

Given these realities, western nations should consider expanding existing programs that partner with regional organizations that have implemented guarantee clauses to offer training and military equipment they could then use to mount effective interventions. The United States, for example, has provided about \$278 million over the last three years to train and equip African forces for peacekeeping missions,<sup>151</sup> funds that have been used to train some 26,000 soldiers.<sup>152</sup> Greater logistical assistance, both for long-term training and during the immediate run-up and early part of a particular intervention, would help to maximize an intervention's effectiveness. Direct military support of a given intervention, like targeted airstrikes in support of a regional organization's own forces, offer another area for possible assistance.

In addition to training, western nations should consider offering direct financial assistance to regional organizations acting pursuant to a guarantee clause, at least for interventions intended to protect human rights—a cause to which western nations have, historically, been reluctant to commit their own military forces. The European Union has already authorized several hundred million euros to help African nations defray the costs of regional

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146. AU Peace and Security Protocol, *supra* note 141, art. 6; ECOWAS Conflict Protocol, *supra* note 2, art. 6.

147. AU Peace and Security Protocol, *supra* note 141, art. 6(b).

148. *Id.* art. 13.

149. Howe, *supra* note 120, at 164.

150. *Id.* at 146. Howe argues that the lessons of ECOMOG's intervention show that "an inadequate peacekeeping force may . . . prolong a war and weaken regional stability." *Id.*

151. Serafino, *supra* note 3, summary.

152. *Id.* at 21.

peacekeeping missions, including the AU's mission in Darfur.<sup>153</sup> While these sums represent a considerable commitment on the part of the EU, they fall far short of the sums required to execute a major intervention. During ECOWAS's intervention in Liberia it was estimated that Nigeria, which provided the bulk of the military forces and other supplies, spent as much as one million U.S. dollars per day.<sup>154</sup> A significant financial commitment by western nations to help underwrite interventions pursuant to, for example, the AU's guarantee clause, would encourage AU member states to commit their own forces to humanitarian interventions knowing that international assistance would be available to help defray their direct costs.

## VI. CONCLUSION

Modern guarantee clauses are far from perfect. A regional organization with clear treaty provisions and a sound process to authorize the use of force may end up using force improperly, or, conversely, failing to intervene when it should. It also seems unlikely that guarantee clauses will provide a legal basis for intervening to stop all human rights abuses in light of the fact that the worst offenders may be unlikely to enter into agreements authorizing the use of force against them—although the African Union's Charter is a promising sign that states are willing, at least on paper, to commit to permitting intervention for humanitarian purposes. But such treaties are a step in the right direction and offer a way of balancing the need to protect human rights and provide collective security against the risks inherent in any system that permits the use of force. Achieving that balance in a way that subjects state action to rules is a central purpose of international law.

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153. Press Release, Eur. Union, Creation of a Peace Facility for Africa (Dec. 11, 2003), <http://europa.eu/scadplus/leg/en/lvb/r12529.htm>.

154. Norimitsu Onishi, *What War Has Wrought: Sierra Leone's Sad State*, N.Y. TIMES, Jan. 31, 1999, at A6.