CHAPTER FIVE
REGIONAL INTERVENTION IN INTERNAL CONFLICTS BEYOND CHAPTER VIII OF THE UNITED NATIONS CHARTER
Chapter – 5: Regional Intervention in Internal Conflicts

5.1. Introduction

At the close of World War II, many nations felt that regional organizations were not merely discredited but dangerous as well. In fact, the U.S. had not originally planned on including any equivalent of Chapter VIII in the U.N. Charter.

The U.S. intended to leave the full responsibility of peacekeeping and the use of regional bodies to the discretion of the Security Council.¹ By 1944, the U.S. had reevaluated its position so that it was more consistent with the majority of the founding nations.² Prime Minister Churchill insisted these organizations were needed, because only those nations “whose interests were directly affected by a dispute . . . could be expected to apply themselves with sufficient vigor to secure a settlement”.

Thus, it was thought that regional arrangements should be used as an alternative to the U.N.O. as their interest in maintaining peace and security would ensure their attempt to bring about an expedient end to conflicts. By the time of Dumbarton Oaks Proposal, U.S. propositions reflected the modification in its thinking regarding the place of regional arrangements. At this time however, the U.S. still did not want the globe to be split into spheres of influence; rather, it felt that the “central organization must be the master”.³ Ultimately, the Charter placed clear limits on the ability of the regional organizations to use force, by requiring prior authorization from the Security Council.

It was this requirement, as well as the danger of collective inaction due to the absolute power of the veto, that lead the American nations to push for the inclusion of Article 51.⁴ That is, there has been a long and continuing tension between the words of the U.N. Charter and the practice of regional organizations and regional arrangements since the creation of the U.N.O.

However, in default of Security Council-led actions, certain regional organizations have assumed responsibility for the maintenance of peace and security in their regions. The Economic Community of West African States (ECOWAS), the

² Ibid. at 164.
³ Ibid. at 166.
African Union (AU) and NATO typify organizations increasingly resisting allowing the iniquitous invocation of the veto power, or the notorious selectivity of the U.N. collective security to hold the world hostage.

Inevitably, this development has deeply impacted (and continues to impact) the U.N. Charter as well as threatening the cohesion of the Charter collective security system. Although there is enormous literature on the theme of regional organizations, there is a lack of a monograph that studies the development of collective security by regional organizations, particularly after the Cold-War, through the prisms of the U.N. Charter and constitutions of regional organizations.

The end of the Cold-War precipitated the increased involvement of regional organizations in the maintenance of peace and security. This development, launched by ECOWAS intervention in Liberia in 1990, has been hailed by the U.N.O. as opening a new era in “which regional arrangements or agencies can render great service if their activities are undertaken in a manner consistent with the Purposes and Principles of the Charter, and if their relationship with the U.N.O., and particularly with the Security Council, is governed by Chapter VIII”. The main principles of the Charter to which the activities of regional organizations are expected to conform are contained mainly in Chapter VIII, Article 2(4) and Article 103 of the Charter.

Chapter VIII empowers regional organizations to settle disputes amongst their member states using peaceful means. This they can, and are encouraged to do entirely on their own initiative and without resort to the Security Council. However, this Chapter forbids regional organizations to take enforcement action without the authorization of the Security Council. In addition, Article 2(4) obligates states to ‘refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state on in any other manner inconsistent with the Purposes of the United Nations’, subject to permissible exceptions under the U.N. Charter. Article 103 enjoins all members of the U.N. to accord primacy to their obligations under the U.N. Charter if such are in conflict with

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7 U.N. Charter. Article 52(2).
8 Ibid. at Article 53(1).
9 Ibid. at Articles. 1-3.
10 Ibid. Article. 51.
their obligations under other international agreements.\(^{11}\) Although the obligations contained in Articles 2(4) and 103 are addressed to states *per se*, such individually assumed obligations do not cease when states congregate as collective groups.

However, contrary to the U.N.’s expectation, regional organizations have not generally conducted their activities in a manner consistent with the principles of the Charter.

### 5.2. What is a Regional Organization?

Although Chapter VIII refers to ‘regional arrangements and agencies’, the expression ‘regional organizations’ is used more frequently in practice and doctrine.

This term is not found in the U.N. Charter. Nevertheless, ‘regional organizations’ is common in U.N. and member state’s parlance. ‘Regional organizations’ appear to be used as shorthand for the ‘regional arrangements and agencies’. In a 2004 Presidential Statement, for example, members recalled that Articles 52 and 53 of the U.N. Charter set forth the contribution of regional organisations to the settlement of disputes as well as the relationship between the U.N. and the regional organizations.\(^{12}\) In operative paragraph 1 of Resolution 1631, the Security Council, “expresses its determination to take appropriate steps to the further development of cooperation between the U.N. and regional and subregional organisations in maintaining international peace and security, consistent with Chapter VIII of the U.N. Charter”.\(^{13}\)

In doctrine, the terms are also frequently used interchangeably.\(^{14}\) The use of shorthand is attractive because of its ease, but there are also disadvantages to its use.

First, there is a risk that the distinctive characteristics of Article 52 are overlooked. As discussed in paragraph 2(2), not every non-universal organization can be taken to be a “regional arrangement or agency”. Article 52 requires that a regional arrangement or agency must have been created for dealing with matters relating to the maintenance of international peace and security. In addition, doctrine requires a procedure for the settlement of disputes between the members for the qualification of a group of states as a regional arrangement or agency. Only if it has such a procedure

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\(^{11}\) Article. 103.


at its disposal can it carry out its responsibility for the maintenance of international peace and security. A group of states without these characteristics can be a regional organization but does not qualify as a ‘regional arrangement or agency’.

At the same time, it appears that a “regional arrangement or agency” is not necessarily a regional organization. It is submitted that the category ‘regional organization’ is legally a subset of the category ‘international organization’. There is no consensus on the definition of an international organization, but there is agreement that one requirement is international legal personality. This requirement is included in the definition of ‘international organization’ in Article 2 of the Articles on responsibility of international organisations adopted by the International Law Commission (ILC) in 2003.

An arrangement does not meet that requirement, while an agency may not necessarily. As discussed in paragraph 2(2), an agency has an institutional superstructure. This is also expressed as the requirement that an agency’s functions are exercised by its own organs. Such organs may be merely organs of treaty implementation, international organs or organs of an international organization.¹⁵


Before any prospective delegation of Chapter VII powers to regional organizations, that delegation would have to be found legal under the terms of the U.N. Charter.¹⁶ When inquiring as to the legality of delegation, then, we must examine the text of the Charter to determine whether the Security Council is precluded from delegating the powers enumerated therein.

Nothing in the text of Chapter VII precludes the Security Council from delegating its powers to regional organizations. A strict reading of Article 39, which states that “the Security Council shall determine the existence of any breach of the...

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¹⁵ Ibid. at 106.
¹⁶ U.N. Charter, Article. 103. (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”). Under the terms of Article 103, the states within a regional organization are prohibited from acting in violation of the U.N. Charter. Therefore, if a delegation of power by the Security Council to a regional organization were found to conflict with the Charter, that delegation would be invalid.
peace, or act of aggression”, would seem to reserve the power to designate threats exclusively to the Security Council.\(^\text{17}\) That interpretation was rejected, however, by the ICJ in the *Nicaragua case*.\(^\text{18}\) In that case, the ICJ addressed an argument on the part of the U.S. that the dispute in question involved (a charge of aggression and armed conflict envisaged in Article 39 of the U.N. Charter, which can only be dealt with by the Security Council in accordance with the provisions of Chapter VII...).\(^\text{19}\)

The Court rejected the argument that only the Security Council may determine the existence of a threat to international peace and security, arguing that Article 24 of the Charter confers primary responsibility for the maintenance of international peace and security on the Security Council, but does not confer exclusive responsibility on the Security Council for the purpose.

The language of Articles 40, 41 and 42 is more conducive to delegation. Each of those Articles allows that the Security Council, once it has designated a threat to international peace and security, ‘may’ take a given action.\(^\text{20}\) The use of the permissive word ‘may’, as opposed to the mandatory ‘shall’, cuts in favor of the argument that the Security Council has the ability to delegate the power to take the actions specified by Articles 40, 41, and 42 to regional organizations.

That argument is bolstered by the prevailing interpretation of Article 42, which allows the Security Council to authorize *ad hoc* forces, composed of military personnel belonging to member states to use force on its behalf to address a specific crisis. The authorization of intervention by willing member states in the name of Security Council is, essentially, a delegation of the Council’s authority to take military action under Article 42 to those member states willing and able to take such action. If such case-by-case delegation is legal under the terms of the Charter, there is no logical barrier to expanding

\(^{17}\) Ibid. Article. 39.
\(^{19}\) Ibid. at 434.
\(^{20}\) See U.N. Charter Article. 40. (“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.”). See also ibid. at Article. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures”). See also, ibid. at Article. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).
the delegation of authority to engage in military intervention to a more prospective model under which regional organizations would automatically be given the power to intervene if certain factual circumstances were found to exist.

Put another way, if the Security Council has the power to authorize military intervention by regional organizations when it finds that a specific factual situation constitutes a threat to international peace and security, then it must have the power to prospectively state that analogous factual situations that arise in the future constitute a threat to peace, and therefore justify the use of force on the part of regional organizations. For example, the Security Council explicitly invoked Article 39 of the Charter in finding that the invasion of Kuwait by Iraqi forces on August 2, 1990 constituted (a breach of international peace and security). After Iraq refused to withdraw, the Council authorized member states to use (all necessary means) to stop the Iraqi occupation of Kuwait and restore stability to the region.

Under a scheme of prospective delegation of Chapter VII powers to regional organizations, then, the Security Council could specify that the invasion of the sovereign territory of a state within a regional body constitutes a per se “breach of international peace and security” under Article 39. It could therefore, authorize military action by regional bodies such as the European Union, AU, OAS, or NATO to repel forces invading the sovereign territory of one of their member states.

5.3.1. The Legal Framework Under Chapter VIII

Chapter VIII lays down the legal framework for the relationship between the regional organizations and the U.N. in the maintenance of international peace and security and gives further support for the delegation of Chapter VII powers. The Chapter presents a compromise between universalistic and regionalist tendencies at the time of the drafting of the Charter. On the one hand, it became clear that the principal drafters of the Charter wanted a world organization with a central role for

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24 The specific regional organizations mentioned are in no way meant to be an exhaustive list of those for whom it would be appropriate for the Security Council to prospectively authorize military intervention. Since a given state may belong to more than one regional organization (for example, the United States is a member of both the O.A.S. and NATO), it is conceivable that more than one regional organization could be prospectively authorized to intervene if the territory of a state that belonged to both organizations were invaded.
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the Security Council. On the other hand, some, in particular Latin American and Arab states, wanted recognition of the legitimacy and role of regional organizations.25 The compromise that was reached in the form of Chapter VIII deals mostly with delimiting the competences of regional arrangements or agencies on the one hand and the Security Council on the other.

The principal feature of this delimitation is the central role entrusted to the Council in the maintenance of international peace and security. In other words, Chapter VIII is principally concerned with laying down the hierarchical relationship between the Council and the regional arrangements or agencies. A large amount of the state practice and legal doctrine that has accumulated in respect of this Chapter has also been concerned with the hierarchical relationship between regional organisations and the Council. Chapter VIII consists of Articles 52-53 and 54. These are briefly discussed separately below.

Article 52 states generally that (nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action) as long as regional organizations act consistently with the Charter's requirements that military force may only be used with Security Council authorization or in self-defence.26

Article 53 explicitly encourages Security Council delegation of enforcement functions to regional organizations by stating that (the Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority). That Article goes on to state that (no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council), but does not require that authorization be given on a case-by-case basis. Nothing in Article 53 precludes the Security Council from making prospective statements that if certain factual circumstances exist; the regional organization is free to engage in military intervention.27

Under Article 54, regional arrangements or agencies are obliged to keep the Security Council at all times informed of activities undertaken or in contemplation for the maintenance of international peace and security.

26 U.N. Charter, Article. 52(1).
27 Ibid. Article. 53(1).
This obligation applies to activities under Article 52 as well as activities under Article 53. In other words, the entire range of activities of regional organisations in the area of securing peace is covered. The purpose of Article 54 is to ensure control by the Security Council. Regional organization’s compliance with the obligation in Article 54 in practice is weak.

5.3.2. The Legal Limits of Regional Organizations When Authorized by the Security Council to Undertake Enforcement Action

A blanket delegation of Security Council power, which allowed regional organizations to use military force where and when they saw fit, would be both undesirable and illegal under the Charter. Even if regional organizations are given the power to carry out military interventions, the terms of Chapter VII preclude intervention except in cases where a factual situation representing a threat to international peace and security exists. Any system involving the delegation of Chapter VII powers must, therefore, avoid authorizing regional organizations to take actions that the Security Council itself could not carry out.

Beyond the obvious proposition that the Security Council may not delegate power that it does not possess, a number of prudential concerns persist. In aiming to increase the effectiveness and representative nature of collective security by delegating Chapter VII powers to regional organizations, one must be careful not to erode the U.N. Charter’s prohibition on the use of force and (launch the international system down the slippery slope into an abyss of anarchy). Specifically, three principles should be respected in any system involving the delegation of Security Council power.

First, the delegation of Chapter VII power to regional organizations should be limited to enforcement actions within the organization’s geographic territory. Second, the Security Council should give a clear statement when delegating its power enumerating the factual situations that constitute a threat to international peace and security, along with specific instructions as to how those situations are to be

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29 U.N. Charter, Article 54.
30 Ibid. Articles. 39-42.
addressed. Finally, the Security Council should act to stop any regional organization enforcement action of which it disapproves.

5.3.2.1. The Geographical Restraint on Enforcement Actions by Regional Organizations

Regional organizations, to which the Security Council delegates Chapter VII functions, should be prohibited from engaging in enforcement actions outside the geographic territory of their member states. The logic behind this rule is threefold.

First, allowing regional organizations to designate and act on threats to international peace and security outside the territory of their member states would undermine the goal of creating a representative system of collective security. In fact, a system of delegation in which regional organizations could undertake enforcement actions outside their geographic territory would decrease the representative character of the Security Council by completely removing any possibility that the states affected by the intervention might be consulted. A hypothetical example illustrates this point.

If NATO were delegated power to (use all means necessary to repel any force sent by one state into the territory of another without consent), it would be free to forcibly intervene in any invasion, anywhere in the world. In the case of Ethiopia's December 2006 invasion of Somalia, for example, NATO would have the power to intervene in the conflict without consulting either country or the AU, the regional organization to which both belong.32

Second, allowing regional organizations to use military force outside the geographic territory of their member states - in the absence of the type of explicit case-by-case authorization traditionally granted by the Security Council - would create the potential for abuse in the form of powerful organizations conducting military interventions based on their own self-interest rather than a genuine concern for international peace and security. That potential for abuse would be especially troubling in light of the current criticisms of the Security Council that allege it is an instrument of Western hegemony and neo-imperialism.33

33 Ibid. at 608. (“The Council is often perceived merely as a tool of its Western members and in particular of the U.S.”). Too often, the U.N. and its Member States have discriminated in responding
Finally, the prohibition on regional organizations using delegated Chapter VII authority to engage in enforcement actions outside their geographic territory would not act as a bar to authorization for such action on the case-by-case basis traditionally utilized by the Security Council. If the Council found that relevant regional organizations lacked the capacity or political will to use the power delegated to them to address threats to international peace occurring within their territory, it would be free to issue a traditional Chapter VII resolution authorizing all U.N. member states to use all necessary means to restore stability.

5.3.2.2. Clear Statements as to When Enforcement Actions are Justified

In order to guard against abuse, the Security Council should limit the discretion of regional organizations in the use of delegated Chapter VII powers as much as possible. Regional organizations should be permitted to engage in enforcement actions only when factual situations that the Security Council has prospectively designated as threats to international peace and security arise. The actions that the regional organization may take with respect to each specific threat to peace should be clearly stated at the time of delegation.

When providing regional organizations guidance on what factual situations constitute threats to international peace and security under Article 39 of the Charter, the Security Council should begin by reviewing the resolutions in which it has found such threats. For instance, it is relatively uncontroversial that invasion of one sovereign state by the forces of another creates a threat to international peace. Other threats to peace and security might include internal conflicts resulting in genocide, and terrorist attacks on civilians.

The prospective designation of threats to international peace and security will be less politicized than the current case-by-case process because designations will...

deal with future hypothetical situations rather than concrete events that may implicate the vested interests of one or more permanent members. Therefore, it is likely that the Security Council may find common ground to designate a greater number of threats requiring action than it has in the past.

For each factual situation that the Security Council prospectively designates as a threat to international peace and security, regional organizations should be given specific instructions as to how the situation is to be addressed. These instructions should take the form of contingency plans. For example, if the Security Council delegates Chapter VII powers to NATO and prospectively designates the invasion of a NATO member state by the forces of another state as a threat to international peace and security, it should instruct NATO as to the permissible nature and timing of enforcement actions by the regional organization. In the example of invasion, it is likely that the Security Council would instruct the regional body to immediately call for the cessation of hostilities and give a deadline for the invading power to withdraw, after which time the regional organization would intervene and use military force to restore stability.  

5.3.2.3. Security Council Action to Stop Unjustified Regional Organization Interventions

As a final safeguard, the Security Council should overturn regional organization enforcement actions that it sees as unjustified. Under Article 54 of the Charter, regional organizations are required to keep the Security Council (fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security).  

When the Security Council is informed of an action that it finds undesirable, unjustified, or in excess of the regional organization’s delegated authority, the Council could pass a resolution calling for a halt to that action and then deal with the underlying threat to international peace and security on a case-by-case basis as it has traditionally done.

37 This model would follow the Security Council’s previous actions during the invasion of South Korea by North Korea and the invasion of Kuwait by Iraq.
38 U.N. Charter, Article. 54.
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Under Article 27(3) of the Charter, any of the five permanent members could perpetuate an enforcement action by a regional organization by vetoing any Security Council resolution calling for its halt.\footnote{U.N. Charter, Article. 27(3). It has been interpreted as allowing action as long as a permanent member does not cast a vote against the proposed resolution. An abstention by a permanent member is not counted as a veto.} The system of delegation to regional organizations would, therefore, encourage a greater amount of intervention to address threats by removing the ability of one permanent member to exercise a “capricious use of the veto” in order to protect its own interests above those of victims of international conflicts and humanitarian crises.

5.4. Guarantee Clauses: Intervention Authorized by Treaty

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, \textit{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”, and this treaty served as a legal justification for intervention in Greece in 1916.\footnote{Treaty Relative to the Accession of Prince William of Denmark to the Throne of Greece, July 13, 1863, reprinted in 12 \textit{Am. J. Int'l L.}, (Supp. 1918), pp.75-76.}


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.\footnote{See David Wippman, “Treaty-Based Intervention: Who Can Say No?”, 62 \textit{U. Chi. L. Rev.}, (1995), p.607, at 614-615.} 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 the U.S. a perpetual right to use military force to ensure that the Canal remains open and free to American traffic.44

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).45

For Oppenheim, treaty provisions authorizing intervention created a valid right for a treaty party to intervene under the circumstances specified in the treaty.46 Other early 20th legal treatises also accepted the legitimacy of guarantee clauses, with one treatise writer noting that such agreements “were particularly common in the nineteenth century”.47

Although the U.N. Charter's supremacy clause provides that Charter obligations prevail over other international agreements, 48 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).

44 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 “If 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”.
46 Ibid. 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 ....).
48 U.N. Charter, Article. 103.
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.

The writings of several post Charter scholars support this view, and it receives some additional support from both the ICJ and from resolutions of the U.N.O. itself.

Ian Brownlie’s treatise, *International Law and the Use of Force by States*, for example, stated that “states 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.” 49 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 decision-making 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). 50

When the OAU reinvented itself as the AU 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”. 51 The AU is empowered to make decisions by consensus or, failing that, by a vote of two-thirds of the AU’s members. 52 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

51 African Union Charter, supra note 1, Article. 4, para. h.
52 Ibid. Article. 7.
intervene in a conflict pursuant to the guarantee clause.\textsuperscript{53} It also established an “African Standby Force” to execute decisions made pursuant to the AU’s collective security provisions.\textsuperscript{54}

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.\textsuperscript{55} The U.N. 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 this framework, 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.

In its influential \textit{Nicaragua} decision, the ICJ also suggested, in dicta, that intervention at the request of a legitimate government was permissible under international law. “It 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”.\textsuperscript{56}

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).\textsuperscript{57}

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


\textsuperscript{54} Ibid. Article. 13.


\textsuperscript{56} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27).

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". 58

By defining aggression to include the use of armed force exceeding host-state 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. 59 Article 53 prohibits regional organizations from taking military action against non-members 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).

5.4.1. The Effect of Consent to Intervention

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

59 U.N. Charter, Article. 53.
to authorize intervention to preserve the democratic regime should override objections raised by a nondemocratic successor government that came to power through unconstitutional means. David Wippman has argued that while a treaty-based right of intervention should ordinarily be seen as revocable, in the context of internal conflicts 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.

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 Article 2(4). 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 (VCLT), 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).

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

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61 Wippman, supra note 55, at 630-32.
representative was coerced, corrupted, or fraudulently induced to sign. 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.

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 VCLT 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), and, likewise, (if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates).\(^{64}\)

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.\(^{65}\)

Scholarly literature also suggests that the right to political self-determination of peoples represents a *jus cogens* norm.\(^{66}\) These norms are important to understanding guarantee clauses, because under the VCLT these norms would serve as a type of boundary on the legal use of force pursuant to a guarantee clause.

Although, 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 VCLT.

The *jus cogens* limitation addresses several potential policy objections to guarantee clauses,\(^{67}\) as well as similar objections raised more generally against any

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\(^{64}\) Ibid. Articles. 48-52, 61-62, 53-64.

\(^{65}\) See M. Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’, 59 L. & Contemp. Probs, (1996), p.63, at 68. (“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.”).


\(^{67}\) Reisman, supra note 62, at 153.
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 AU, 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.  

5.4.2. Models for Analyzing Treaty Authorizing Intervention

At first glance, the freedom-to-contract and *jus cogens* models seem to suggest opposite answers to the question whether treaty authorizing intervention is valid. In fact, however, they diverge only in part. Under both models, states may authorize external intervention by contemporaneous consent. The models differ, however, as to whether a state may bind itself to permit external intervention in the future.

The freedom-to-contract model suggests that a state's ability to bind itself to permit intervention in the future is itself an aspect of sovereignty. Under this

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Admittedly, hard cases may arise regarding treaties that authorize intervention for a narrow national interest, like the United State's right to intervene in Panama to keep the Panama Canal open to American ships. See Wippman, 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).
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approach, it follows that if a state may validly consent to intervention in the present, it may validly consent by treaty to intervention in the future. By contrast, the *jus cogens* model holds that the legal norms governing intervention are peremptory in nature and therefore override the state’s present ability to limit its future freedom in a manner inconsistent with the nonintervention norms.

Accordingly, under that model, a treaty purporting to authorize external intervention against the will of a future government is void *ab initio*. Both of these approaches tend to accept too readily the legal fiction that the incumbent government speaks for the state.

5.4.2.1. The Freedom-to-Contract Model

Supporters of treaty-based intervention usually begin with the generally accepted proposition that states are ordinarily free to enter into treaties governing their future relations and, in so doing, to establish binding limitations on each state’s future freedom of action. In the *S.S. Wimbledon case*, the Permanent Court of International Justice relied on this general rule as a basis for rejecting Germany’s claimed right to avoid limitations placed on it by the Treaty of Versailles.69 Under that Treaty, Germany accepted a permanent right of passage through the Kiel Canal for vessels of all nationalities.70

Following the outbreak of war between Russia and Poland, however, Germany sought to protect its neutral status by denying transit to a ship carrying arms for one of the belligerents. When charged with a breach of the Treaty, Germany argued that a state's ability to declare itself neutral was (an essential part of her sovereignty), and that by signing the Versailles Treaty, Germany “neither could nor intended to renounce by anticipation” what it described as the inalienable right of states to liberty of action.

The Permanent Court held that “the right of entering into international engagements is an attribute of sovereignty”, and that therefore the limitations a state accepts under a treaty cannot later be renounced as impermissible infringements on that state's sovereignty.71

From this starting point, the theoretical argument for the validity of treaty-based intervention is simple. States have the power to consent to limitations on their independence. Indeed, states may surrender their independence altogether by merging

69 1923 PCIJ (ser A) No 1 at 25.
71 The Wimbledon case, 1923 PCIJ (Ser A) No 1 at 25.
with another state. Accordingly, states must be free to yield any lesser measure of their independence, in the form of a license to intervene. As one pair of authors has observed, given that a state may extinguish its legal personality altogether, (it would seem strange if a state could not consent to a less drastic curtailment of its sovereignty by releasing its right of non-intervention . . . ).

But the argument that the greater includes the lesser cannot automatically justify a treaty provision authorizing external military intervention. States can and do merge with other states, and thereby surrender their international legal personality. Because such decisions are ordinarily irreversible, the political independence of the entity that was the first state is restricted to the point of extinction and, in that sense, is more restricted than it would be in the case of an irrevocable grant to another state of authority to intervene. But at the moment of the merger, the first state ceases to be a state; until that point, and so long as it remains a state, it retains its political independence and the other rights associated with sovereignty.

5.4.2.2. The Jus Cogens Model

For critics of treaty-based intervention, the answer is clear: the grant of a right of future military intervention to another state restricts the independence of the grantor in ways that are incompatible with its sovereignty and therefore impermissible. As set out below, the legal basis for this view is simple.

5.4.2.2.1. Applying Jus Cogens Norms and Article 103 of the U.N. Charter

Contemporary international law recognizes the existence of a set of legal norms, commonly referred to as peremptory norms or jus cogens, that are deemed fundamental to the existence of a civilized international community and are therefore non-derogable.

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73 Alfred von Verdross, ‘Forbidden Treaties in International Law’, 31 Am J Intl L, (1937), p.571, at 576. At that point, the citizens and territory of the disappearing state become part of a larger population and territory, that is, a larger state, which is itself entitled to respect for its political independence and territorial integrity. Thus, the essential functions served by the pertinent norms of international law (for example, the preservation of international peace and respect for the right of territorially organized communities to conduct their affairs without external interference) continue to be protected under the new status quo.


Because these norms are fundamental, they constitute part of a body of ‘higher law’ that automatically prevails in the event of any conflict with the usual power of individual states to order their mutual relations by agreement. In the words of Article 53 of the VCLT, “(a) treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”.  

Critics of treaty-based intervention contend that treaties authorizing forcible intervention in another state without its contemporaneous consent necessarily conflict with a variety of *jus cogens* norms designed to protect the independence and autonomy of states, including the principles of non use of force, sovereign equality, self-determination (understood here to be the right of a state to determine its future free from external interference), and nonintervention. Each of these principles is embodied in the U.N. Charter and in numerous other multilateral treaties, declarations, and resolutions.

Although it is possible to debate whether all of these principles qualify as *jus cogens*, at a minimum the prohibition on the use of force embodied in Article 2(4) of the U.N. Charter is widely accepted as such a norm. Therefore, states must consider void any agreement that authorizes intervention in a manner inconsistent with the terms of Article 2(4). Application of Article 103 of the U.N. Charter leads to a similar conclusion. Article 103 provides, (In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail).

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66 Vienna Convention (May 23, 1969), Article 53, 1969 UN Jurid YB 140, 154 (1971). Article 64 of the Convention provides that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”. Vienna Convention, Article. 64, 1969 UN Jurid YB at 157. Article 53 defines a peremptory norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Vienna Convention, Article 53, 1969 UN Jurid YB at 154.

67 Given the overlap in the content of these principles, it is unnecessary, for present purposes, to consider whether all of them are in fact *jus cogens*. Since all of these principles protect state autonomy, it is unlikely that treaty-based intervention would violate one without also violating the others.

68 U.N. Charter, Article. 2(4). As the ILC stated in its commentary on the final draft Articles on the Law of Treaties, “the law of the Charter concerning the prohibition of the use of force . . . constitutes a conspicuous example of a rule in international law having the character of *jus cogens*”. See also, Report of the International Law Commission on the work of the second part of its seventeenth session, 2 YB Intl L Comm'n, 169, 247 (1966), UN Doc A/6309/Rev.1 (1966).

69 U.N. Charter, Article. 103.
Thus, if a treaty permits intervention in a form inconsistent with a Charter obligation, intervention pursuant to the treaty is illicit under Article 103. Critics of treaty-based intervention contend that any treaty purporting to authorize states to use force against another state without its contemporaneous consent necessarily violates Article 2(4) and therefore also Article 103 of the U.N. Charter. As a result, they conclude, such treaties must be considered void.

5.4.3. Some Objections Considered

The view of treaty-based intervention advocated above carries its own theoretical problems and practical dangers. As an initial matter, it might be argued that treaties authorizing military intervention constitute simply an attempt by particular states to circumvent decision-making authority granted to the Security Council under Chapter VII of the U.N. Charter. Chapter VII authorizes the Council alone to determine the existence of threats to or breaches of international peace and security, and to authorize the use of force to address such threats or breaches. Under this view, states that use military force against an incumbent government, even if they act in accordance with a treaty’s terms, are nonetheless usurping the function of the Security Council to determine the occasions on which the transborder use of force (other than in self-defence) is appropriate. While such treaty arrangements might have been acceptable during the Cold-War because the Security Council was then paralyzed by ideological use of the veto power, such treaties should not be deemed lawful in an era when the Council is no longer paralyzed.

In support of this position, it might be argued that guarantor states, when acting as a form of (subglobal arrangement) created by and authorized to enforce a treaty of guarantee, are (at best) in a position analogous to that of regional organizations wishing to use military force for purposes other than self-defence.

Under Chapter VIII of the U.N. Charter, regional organizations are encouraged to use peaceful measures to deal with threats to regional peace and security, but they cannot engage in enforcement action without the authorization of the Security Council. If regional organizations cannot use force without Security Council authorization, one might argue, then a fortiori guarantor states, which have no special status under the Charter, should not be able to do so.

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80 See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, 1984 ICJ 392, 440 (“Nicaragua I”), (“All regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made . . . must be made always subject to the provisions of Article 103 . . . .”).

But treaties authorizing military intervention, so long as they are entered into voluntarily, should not be seen as mechanisms for the usurpation of Security Council authority. As Tom Farer has argued, intervention by a group of states acting pursuant to a treaty whether or not the group constitutes a regional organization is not an enforcement action within the meaning of Chapter VIII, because it (is carried out with the previously expressed consent of the target state. . .). Thus, when states intervene in accordance with the terms of a treaty, they are (not functioning like a mini-Security Council, trumping state sovereignty in matters involving threats to peace and security).  

Insofar as they act to further the will of the target state, as expressed in the treaty, rather than to force their own will upon the target state, the guarantors should not require Security Council authorization for their intervention. In short, treaties authorizing military intervention should be seen as “a third mechanism for the use of force” that, like Security Council authorization and self-defence, is (consistent with the United Nations' Purposes).  

This does not mean, of course, that Security Council involvement is not desirable. Any transboundary use of force carries risks, including the risk that the intervenors may abuse their authority and the risk that third parties may become involved in a spreading conflict. The political checks and balances inherent in Security Council decision making might help to alleviate these risks. Thus, one could argue that for these reasons alone, any use of force other than self-defence should be left to the Security Council. But there are means to contain the risks of abuse and escalation other than exclusive reliance on the Security Council, including careful drafting of treaty provisions authorizing intervention, careful selection of guarantor states, and strict application of principles constraining even lawful uses of force, such as the principles of necessity and proportionality. If these limiting mechanisms appear inadequate in a particular case, the Security Council can always act to preempt or terminate action by particular guarantors.  

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83 Ehrlich, supra note 44, at 1073. As Ehrlich notes, the use of this kind of “third mechanism” was probably not contemplated by the framers of the U.N. Charter. But as Ehrlich goes on to argue, the drafters’ original vision was premised on the belief that the Security Council would exercise a universal policing function, a belief that was never realistic, even apart from the problems created by American-Soviet rivalry. As a result, states have interpreted the Charter with sufficient flexibility to encompass treaty-based intervention.

84 Ibid. at 1075. As Ehrlich has observed, (if the Council is actively seized of a matter . . ., the right (of Guarantor Powers) to act unilaterally must be pro tanto in abeyance).
Ultimately, the risks associated with treaties of guaranty must be balanced against their potential advantages. In some cases, states may reasonably conclude that the only way to end an internal conflict is to accept an externally guaranteed political settlement. Such states may also reasonably fear that at the moment intervention is needed in furtherance of the settlement, the Security Council will either lack the consensus required to act, or for bureaucratic or other reasons prove unable to act with sufficient alacrity. On balance, therefore, the mere possibility of Security Council action should not by itself preclude the use of treaties as an alternative source of authority for intervention.

Even if one accepts that some forms of treaty-based intervention are legitimate, one might argue that what is missing from the analysis is any concept of legitimacy. The concurrent will of the contending parties is to be respected without regard to the substantive desirability of the settlement that issues as a result, and without regard to whether one or more of the parties is an undesirable (because, for example, it is guilty of human rights abuses) participant in the settlement process.

However, the substantive desirability of an intercommunal settlement may be virtually impossible to determine ex ante. Moreover, it is hard to see why, in the absence of external interference in the process of negotiating such settlements, any outside judgment as to desirability ought to be substituted for that of the parties. In practice, of course, there will almost always be some measure of outside involvement, if not interference, in formulating such settlements. But so long as that involvement does not rise to the level of coercion that would invalidate any resulting agreement, it seems reasonable to accept the parties' own judgment as to desirability.

5.4.4. Treaty-Based Intervention in Other Contexts

5.4.4.1. Treaties to Protect Democracy

Recent years have witnessed the rapid spread of liberal democratic values in many formerly authoritarian or dictatorial states throughout Latin America and much

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86 Farer, supra note 51, at 339.

87 Ehrlich, supra note 45, at 1075. In the case of Cyprus, for example, it is easy to criticize the 1960 Accords in retrospect. At the time, however, they seemed a reasonable and imaginative solution to a set of difficult problems.

88 In many cases, outside involvement in the form of mediation is essential to achieving an agreement. Thus, the United Nations is actively involved in attempts to broker settlements in conflicts around the world. See, for example, Boutros Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping, (United Nations, 1992), pp. 20-27.
of Eastern Europe, Africa, and Asia. 89 Remarking upon this trend, many legal scholars have concluded that there either is or will soon be an international legal entitlement to democratic governance. They cite a host of recent international legal instruments proclaiming democracy to be the only legitimate form of government.

Others disagree. They cite, inter alia, the opinion of the ICJ in Nicaragua II, which reiterates the traditional view that each state is free to choose its own form of government, 90 and various legal instruments reaffirming the right of each state to develop in its own way. 91

Even among those who proclaim an existing or emerging right to democracy, there is disagreement over the means by which such a right might properly be vindicated. Some scholars contend that outside states may legitimately use force unilaterally to further democratic rule in countries subject to dictatorial regimes. Others insist that in the absence of Security Council authorization, only peaceful, and preferably multilateral, action is appropriate in such cases. 92

For those who believe that unilateral forcible intervention to promote democracy is already permissible, a treaty purporting to authorize such intervention would probably be seen as procedurally useful but of little substantive significance.

By contrast, for those who cannot reconcile unilateral coercion with Charter norms governing intervention in a state's internal affairs, treaty regimes authorizing such intervention might appear to be a useful alternative.

The possible use of treaties to authorize prodemocratic intervention has received surprisingly little attention, even though recent statements and decisions by various international organizations suggest that treaty arrangements authorizing intervention to promote democracy may not be very far off. The U.N. itself has increasingly come to espouse democratic governance both in general terms and as the preferred solution to a wide variety of internal conflicts around the globe. 93

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90 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, 1986 ICJ 14, 131 (“Nicaragua II”).
91 See Declaration on Friendly Relations, U.N GAOR, 25th Sess, Supp No 28 at 123. (“Every State has an inalienable right to choose its political . . . (system) without interference in any form by another State.”).
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The OAS and the Conference on Security and Cooperation in Europe (CSCE) have gone even further. In its 1991 plenary session, for example, the OAS reiterated its commitment to democracy as the only acceptable form of government for the hemisphere, and mandated prompt consideration of collective measures to restore democracy in any member country subject to an illegal seizure of power.94

Similarly, the participating states in the Moscow Meeting of the Conference on the Human Dimension of the CSCE declared their intent (to make democratic advances irreversible), and to “support vigorously” any democratic government threatened by or subject to an unconstitutional overthrow.95

5.4.4.2. Treaties to Protect Human Rights

Professor Stanley Hoffman has urged establishment of a multilateral treaty regime that would authorize forcible intervention to terminate gross human rights abuses in any signatory state. It is doubtful, of course, whether many of the states most likely to engage in gross human rights abuses would ever sign such a treaty. But at least some probable human rights violators might accept such a treaty as a condition for receiving various benefits. The FRY, for example, accepted a variety of human rights commitments as a condition for recognition by the European Community.96 Other states might be induced to sign a human rights intervention pact in return for access to international financial institutions or regional trading communities.

In fact, however, a treaty that authorizes outside states to ensure a signatory's compliance with its international human rights obligations does place a restraint on the state that it is not under any preexisting legal obligation to accept. Ordinarily, when a state breaches a treaty provision, or improperly renounces a treaty, the remedy is reparations, not coerced performance of the provision at issue. A state that breaches

the substantive provisions of a human rights treaty by committing human rights violations is not therefore subject to forcible intervention as a remedy.\(^97\)

Gross human rights violations directed at a particular subnational community present a somewhat harder case. In such cases, the government may still represent a substantial majority of the state's population. However, if the violations are extensive and systematic, they may again force the conclusion that the state consists of more than one political community.\(^98\) On the other hand, when the state is not so divided, respect for a state's decisional autonomy requires that the state be able to renounce any use of force against it that is not undertaken with the state's contemporaneous consent, as expressed by a government representing the political community or communities that constitute the state.

In short, the viability of treaties authorizing forcible protection of human rights will turn on the extent to which the existence of such violations reflects a cognizable split in the political community of the state. When a split exists, the community that suffers from human rights violations can veto any effort to revoke the treaty's grant of authority to intervene.

5.4.4.3. Treaties to Protect External Interests

On occasion, states enter into treaties designed to permit one state to protect forcibly certain interests that state may have within the territory of the other state. The Panama Canal Treaties represent the best recent example of such a treaty regime and illustrate the disputes such treaties may provoke. In 1977, the U.S. and Panama terminated prior treaties pertaining to the Panama Canal and entered into two new treaties governing the parties' rights with respect to the Canal.\(^99\) Under the new Panama Canal Treaties, the U.S. acknowledged Panamanian sovereignty over the Canal and promised to refrain from intervention in Panama's internal affairs.\(^100\)

In turn, Panama granted to the U.S. the right to “protect and defend the Canal”, and to act unilaterally “to meet the danger resulting from an armed attack or other


\(^{98}\) In such cases, the prior consent of the state to intervention could only be revoked by agreement of the two communities. For practical reasons in particular, the ability to determine with confidence that the state has fractured into two or more communities, the rupture would have to be comparable in scale to the sort of intercommunal conflict that existed in, and precipitated human rights abuses in, places like Cyprus and Bosnia.


\(^{100}\) See Agreement in Implementation of Article IV of the Panama Canal Treaty, Art II, 33 UST at 311.
actions that threaten the security” of the Canal.\footnote{Panama Canal Treaty, Articles I(2), IV(1), 33 UST at 48, 56.} Although the wording of the relevant provisions does not explicitly authorize the U.S. to use military force, the U.S. Senate accepted the treaties only with the understanding that the U.S. could use force to respond to any threat to the Canal.\footnote{In its advice and consent to the Treaty, the Senate added the DeConcini Amendment, which provides: “Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or if 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”. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 33 UST at 2.}

In 1989, the U.S. invaded Panama, triggering the fall of the Noriega government and the establishment of the Endara government. Among the justifications offered by the U.S. in support of its actions was the argument that the invasion was in part a measure to protect the Canal in accordance with the Canal Treaties.\footnote{Louis Henkin, ‘The Invasion of Panama under International Law: A Gross Violation’, 29 Colum J Transnatl L, (1991), p.302.}

As former State Department Legal Adviser Abraham Sofaer put it, “the Noriega regime's policies and conduct posed a serious threat to the rights of the U.S. in the Canal”, permitting the U.S. to use force to ensure the continued safe and efficient operation of the Canal.\footnote{Abraham D. Sofaer, ‘The Legality of the United States Action in Panama’, 29 Colum J Transnatl L, (1991), pp.287-88.} This purported justification attracted little support from either states or commentators, in part, no doubt, because it is unlikely that any real threat to the Canal existed, and because the extent and aim of the U.S. invasion, which was clearly intended to oust Noriega, were difficult to reconcile with the limited purpose of protecting the Canal.\footnote{Henkin, supra note 77, at 302.}

The argument was also legally problematic. First, although the Treaties permit the U.S. to respond to an external attack on the Canal, it is doubtful that they may properly be construed as permitting the U.S. to use force against a threat posed by the government of Panama. Second, and more important for our purposes, one might object that if the Treaties did permit the use of force against the government, they would be invalid. As Professor Louis Henkin put it, in terms that should by now be familiar:

“No government, in Panama or anywhere else, would conclude a treaty that would authorize what the U.S. did in Panama. Even if Panama and the U.S. had
concluded such a treaty, it would be void: such a treaty would violate the U.N. Charter, which by its terms is to prevail over any inconsistent treaties. It would violate the principles of Article 2(4) of the Charter which are *jus cogens*.\(^{106}\)

In this respect, treaties to protect international waterways and other specific state interests are likely to differ significantly from the other kinds of treaties considered above. In other contexts, a grant of coercive authority typically is given to outside states only because of division, whether existing or anticipated, in the political unity of the grantor. The grantor's fear of the effects of internal division leads it to accept treaty-based restrictions that significantly limit its future independence. When revocation becomes an issue, then the state will either still be divided, in which case revocation is likely to be blocked by whichever community believes it might benefit from intervention, or it will be reunified, in which case revocation will ordinarily be possible either because a right of revocation is implicit upon reunification, or because the reunification will constitute a significant change in the circumstances that formed the basis for the treaty.

By contrast, in the case of treaties like the Panama Canal Treaty, there is ordinarily no cognizable division in the state conferring a right of intervention at the moment of treaty formation. In the absence of such division, states are unlikely to accept treaty-based restrictions that seriously limit their future independence. To the contrary, states are likely only to grant intervention rights that are carefully limited in scope and duration, as Panama did in the 1977 Treaties. Accordingly, at the time revocation becomes an issue, there is unlikely to be either an implicit right of withdrawal (since the restrictions at issue will not significantly undermine the grantor's autonomy) or a fundamental change of circumstances (since in the absence of division there will be no reunification) that by itself justifies revocation.

This does not mean, however, that such treaties are never revocable. In the case of Iran's 1921 Treaty of Friendship with the former Soviet Union, for example, changes in the relationship and status of the two countries constituted a basis for concluding that Iran had a right to revoke the Treaty.\(^{107}\) But in general, treaties to protect specific state interests are much less likely to be revocable than the other kinds of treaties considered above.

\(^{106}\) Ibid. at 309.

5.5. Intervention by Invitation

Internal conflicts often result in many of the problems that dominate contemporary discussions of international affairs, including refugee flows, terrorism, gross human rights violations, and famine. As many governments beleaguered by insurgencies are incapable of controlling their internal conflicts unaided, invited intervention exists as a means of forestalling degeneration into internal conflict.

Invited military intervention focuses on the consent of the inviting state to justify action that would, absent such consent, constitute an illegal use of force by states within the territory of another. As such, a determination of the legality of an intervention by invitation centers on the external legitimacy of the inviting government regarding the exercise of the sovereign rights of the state.

5.5.1. Invited Intervention and Governmental Recognition

The sovereign right of a government to invite foreign troops onto its soil is not questioned in times unmarked by civil strife within the state's territory. Besides the question of invitations made under coercion, such an introduction of troops causes no injury to the recipient state’s sovereignty. Rather, the very ability to make such a request reinforces the inviting state's authority. The question of the legality of invited intervention only crops up when the legitimacy of the inviting party is drawn into question. As Brownlie notes, the “difficulty arises when the legal status of the government which is alleged to have given consent is a matter of doubt”.

The question of how the legal status of a government is determined has evoked much debate. The adoption of a specific theory of recognition can affect the determination of a government's legality. This determination, in turn, is crucial for establishing whether an intervention invited by that regime is legal. There is a causal path, then, from modalities of recognition to legality of intervention.

5.5.1.1. Recognition of States and Governments

Two schools of thought predominate traditional discussion of state recognition. Advanced by positivists, the ‘constitutive’ model holds that, a state

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109 Ibid. at 112.
111 Brownlie, supra note 22, at 317.
springs into legal existence at the moment of recognition by other states; it is the very act of recognition that creates the state. The constitutive view is premised on a view of international law in which state consent lies at the core of the international system, and implies a world arena absent rights or rules.\textsuperscript{112} Contrarily, the voluntarist perspective on international law asserts a ‘declaratory’ view of state recognition, in which the act of recognizing a state merely acknowledges the presence of a preexisting factual situation in which the entity in question has already satisfied the legal requirements for statehood.\textsuperscript{113}

Adherents of the two models assert divergent views of the international system: the constitutive model emphasizes the centrality of the state, while the declaratory one locates that state within a system of law and rules. One could mollify both sides by asserting that while the legal rights of statehood may be triggered independent of collective recognition by other states, attempts to exercise such rights will be ineffective, at best, absent decisions by other states to extend recognition. The recognition process, therefore, internalizes the theory underlying the declaratory view, but the inability of an entity that otherwise satisfies the criteria for statehood to exercise the associated sovereign rights indicates the continued relevance of the constitutive theory of recognition.\textsuperscript{114} Given that sovereign rights attach themselves to states, not governments, the question of recognizing a government, rather than a state, might seem improper.

Governments, the argument goes, come and go; while they are capable of exercising the sovereign rights of the state, those sovereign rights exist independent of any government that may exercise them. Though international legal relations exist between states, not governments, questions emerge when multiple competing factions claim to be the legitimate government of a recognized state. Whenever such a situation presents itself, other states must determine which faction is deemed to legally represent the state. Such decisions will be more predictable and sound if they are made in line with a legal doctrine regarding governmental recognition.

\textsuperscript{113} The generally-accepted enunciation of the criteria for statehood is four-fold: a permanent population, a defined territory, a government, and a capacity to enter into relations with other states. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, Articles. 1, 165 L.N.T.S, 3802.
\textsuperscript{114} Brad R. Roth, \textit{Governmental Illegitimacy in International Law}, (Oxford University Press, 2000), p.129.
5.5.2. The Effective Control Test and Its Detractors

The traditional determination of a government's legality as representative for its state asks whether the government exerts *de facto* control over the state's territory.

The effective control test involves no legal inquiry into how the putative government gained control; if it can fulfill the functions of the state, it will be considered the legal government.\(^{115}\) Recognition of governments under the effective control test does not permit extensive flexibility. While a state might withhold recognition by disputing the factual question of whether the putative entity actually exerts control over its territory, there remains little room for consideration of the would-be government's policies or principles. This has troubled scholars and practitioners alike.

Indeed, democratic challenges to the theory of effective control as the basis for recognition have emerged. Academics have suggested that internal democratic legitimacy does play a role in the legal question of external legitimacy.\(^{116}\)

The Security Council, going further, has acted under Chapter VII to restore to power the democratically-elected government of Haiti after it was forced out in a coup d'état.\(^{117}\) The view that the effective control test ignores the principle of self-determination relies, perhaps, on an overly simplistic definition of what constitutes ‘control’: proponents of the doctrine note a requirement of popular acceptance of the putative regime in order that such a body be deemed in effective control.\(^{118}\)

The effective control test, excluding as it does situations in which the population has made clear its opposition to the supposed government through violent revolution, is perhaps a rough attempt to parallel determinations of popular consent. As such, it is not antithetical to the notion of an emerging right to democratic governance, but is perhaps simply less ambitious.

In considering the issues noted above, it may be helpful to characterize invitations to intervene by the relative standing of government and rebel forces at the time an invitation to intervene is issued. A review of past cases suggests the following division: (1) cases in which a recognized government exercises control over most of


\(^{118}\) See Roth, supra note 36, at 138-41.
the state; (2) cases in which the government and rebel forces reach a rough equilibrium, with each in control of a substantial portion of the state; (3) cases in which the incumbent government is merely one of several warring factions; and (4) cases in which all semblance of internal order disappears.

5.5.2.1. Government Control

From a legal standpoint, the simplest cases to analyze are those in which a recognized, incumbent government controls the political apparatus and most of the territory of the state. In such cases, the government ordinarily retains full authority to request external assistance, or even military intervention, to assist it in maintaining control of the state.\textsuperscript{119} The government may seek such assistance from the U.N.O., from regional organizations, or from individual states. As the ICJ observed in \textit{Nicaragua Case}, intervention is generally (allowable \ldots at the request of the government of a state \ldots).\textsuperscript{120}

In some respects, this position is difficult to reconcile with the principle of self-determination. It can be argued that any government forced to call in external military assistance to maintain itself against internal opposition is not genuinely in a position to speak for the state, and that the provision of such assistance by outside states constitutes an impermissible interference with internal political processes.

Further, provision of external aid, even to the government, runs the risk of internationalizing a previously internal conflict. Nonetheless, most states appear to accept the authority of an effective incumbent government to invite external intervention.\textsuperscript{121}

Conversely, neither states nor international organizations may lawfully intervene against the will of an effective, incumbent government. In \textit{Nicaragua Case}, the ICJ concluded that (intervention at the request of opposition forces, even those characterizing themselves as ‘freedom fighters’, violated the non-intervention principle).\textsuperscript{122} For the same reason, the U.S. invasion of Panama was widely condemned even though the invasion ousted a dictatorial regime and replaced it with a democratically elected one.

\textsuperscript{119} Brownlie, supra note 34, at 327.
\textsuperscript{120} Nicaragua, 1986 I.C.J. at 126.
\textsuperscript{121} Farer, supra note 17, at 319. (“Upon authentic invitation, a state may introduce military forces into the territory of another to assist the government for various purposes, including maintaining internal order”).
\textsuperscript{122} Nicaragua, 1986 I.C.J. at 126.
In general, an effective government's right to seek or oppose external intervention does not depend on the manner in which the government acquired power or the manner in which the government exercises power. But, there are several existing or potentially emerging exceptions to this general rule. First, a government may not authorize external military intervention against a national liberation movement opposing racist or colonial domination.

This exception represents a specific application of the more general principle that a state may not lawfully authorize a foreign state to take any action that would be illegal under international law if undertaken by the authorizing state itself. As the process of decolonization accelerated in the 1960s and 1970s, a majority of states in the U.N. concluded that action against national liberation movements constituted a violation of the principle of self-determination. As a result, the usual presumption that the effective government constitutes the sole representative of the state in international affairs was at least partially reversed. Although the incumbent government could continue to represent the state in most aspects of its international relations, it could not lawfully invite external aid in suppressing the efforts of a liberation movement to overthrow the government. To the contrary, the liberation movement alone possessed the right to seek external assistance, although there is considerable controversy over whether such assistance could entail aid amounting to a use of force.

Second, it is at best unclear whether a de jure government overthrown in violation of domestic constitutional law may authorize external intervention to re-establish its authority. The situation arises most commonly in the case of a palace coup, that is, when a small group of military officers engineers the abrupt and forcible

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126 Wilson, supra note 27, at 135-136.
127 See Domingo Acevedo, ‘The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy’, in, Enforcing Restraint: Collective Intervention in Internal Conflicts, L. Damrosch ed., (Council on Foreign Relations; 1993), p.139. (“It is unclear...whether a de jure government that has only formal but not actual power may invite foreign ‘military intervention’ for the purpose of removing the de facto regime”).
ouster of the incumbent head of state. On its face, external military intervention to reinstate the ejected incumbent would seem to constitute impermissible interference in the state’s internal affairs. Nonetheless, a number of countries periodically send troops to help ousted leaders return to the presidential palace.

In 1964 for example, the U.K. came to the aid of President Julius Nyere of Tanganyika. Nyere headed an elected government that lost control of the capital to mutinous army troops. At Nyere's request, British troops intervened to restore order. The British action went largely unremarked in the U.N. Similarly, France has frequently intervened militarily in its former colonies to restore de jure governments to power following internal military coups without attracting much adverse comment from other states.\(^\text{128}\)

Several factors appear to account for the apparent acquiescence of most states in actions of this nature. So long as the interventions at issue are swift and small in scale, most states seem willing to ignore the brief discontinuity in the de jure government’s effective control of the state. In effect, states treat the coup makers as temporary usurpers whose actions do not fundamentally alter the de jure government’s power to speak for the state. This attitude may be attributable in part to a general recognition that political constraints usually preclude the U.N. Security Council from authorizing intervention in such cases, and in part to a sense that the former colonial powers should be allowed leeway to assist their former colonies in maintaining order, even at the cost of some inconsistency with international legal principles.

A third possible exception is a variant of the previous exception, limited, however, to intervention to restore a democratically elected government subjected to an unconstitutional seizure of power by internal forces. The overthrow of the popularly elected government of Haitian President Aristide presents the paradigmatic contemporary example. Aristide became President of Haiti in 1990, following his victory in an internationally monitored and supervised election. Some months later the Haitian military, alarmed by Aristide's populist rhetoric and reformist policies, staged a military coup and forced Aristide to flee the country.\(^\text{129}\)

Had Aristide immediately invited external military intervention, it might conceivably have fallen within the second exception. Aristide, however, was reluctant...  

\(^{128}\) R. Roth, supra note 66, at 135. In 1996, French paratroopers helped the democratically elected but corrupt government of the Central African Republic force mutinous army troops back into their barracks. Although the French intervention was highly unpopular within the Central African Republic itself, most other states paid little attention.  

\(^{129}\) Acevedo, supra note 33, at 129-30.
to invite foreign military forces into Haiti. He did so, grudgingly and obliquely, only after it became clear that months of economic sanctions and diplomatic pressure would fail to dislodge the military junta. In any event, Aristide's ouster was not the typical palace coup. The officers in charge had substantial support throughout the military and also in a significant, although minority, segment of Haitian society. Accordingly, the usurpers could not be summarily dismissed as transient occupants of the Presidential palace whose ouster would have little impact on the Haitian people's right to self-determination.

The argument in favor of permitting intervention based on an invitation from Aristide was simple. As the elected head of state, Aristide represented the people of Haiti as a whole. Following the coup both the U.N. and the OAS continued to recognize Aristide as the legitimate head of state, and both repeatedly demanded his reinstatement. Accordingly, Aristide had a strong claim that he alone was entitled to speak for the state on questions of intervention.

By contrast, the military junta achieved its position by force and maintained that position by terrorizing much of the country. It had no legitimacy, domestic or international, and therefore should have had no authority to speak for the state or to oppose an intervention to restore democracy. Intervention in this context, goes the argument, would further Haitian self-determination and fulfill the much-heralded, but still emerging, right to democratic governance.

This argument is a powerful one. But, when the U.N. Security Council finally authorized military intervention to restore Aristide to power, it relied primarily on its authority to maintain international peace through coercive measures under Chapter VII of the Charter.

The authorizing resolution implicitly took note of Aristide's consent to intervention, but the Security Council was evidently unwilling to treat that consent as

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131 See Acevedo, supra note 33, at 131.

132 See Roth, supra note 26, at 511-12.

133 Ibid. at 511. Roth observed prior to the U.N. authorization of military intervention in Haiti, “in all likelihood, fulfillment of requests for armed assistance would not in this case be deemed a violation of international law”.

sufficient in and of itself to permit military action. Thus, it seems clear that no right of forcible pro-democratic intervention has yet emerged. International law continues to place considerable importance on effective control as an indicator of a government's authority to act in the name of the state.

At the same time, however, intervention to restore or install a democratic government is likely to receive much more sympathetic treatment than most other forms of military intervention, at least if it appears that the intervenors are not motivated by hegemonic or ideological ambitions. In a number of recent cases, both international organizations and individual states have objected vigorously to military coups against elected governments, and have taken limited steps to oppose such coups. Moreover, both the OSCE and the OAS have pledged to take action against the unconstitutional overthrow of a democratic government within their respective regions.

While the growing consensus on the importance of democratic governance has not translated into acceptance of military intervention in most cases, it does make it easier to employ non-coercive sanctions, and in rare cases, as in Haiti, to obtain Security Council authorization for more coercive measures.

5.5.2.2. Equilibrium Between the Government and Its Adversaries

In many cases of internal conflict, the government and its adversaries may achieve a rough balance of power with each controlling a significant portion of the

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135 Ibid. para. 8. In adopting Resolution 940, the Security Council considered the options outlined in the Report of the Secretary-General on the United Nations Mission in Haiti, U.N. Doc. S/1994/828 (1994). In that report, the Secretary-General states that an expanded U.N. force should operate with the consent of the legitimate authorities in Haiti, but also notes that such a force “would have to use coercive means in order to fulfill its mandate”; and that it would therefore “be necessary for the Security Council to act under Chapter VII of the Charter in authorizing its mandate”. During the debate on Resolution 940, several states' representatives noted that Aristide's consent to intervention was an important factor supporting the decision to intervene, but no one identified it as either a necessary or a sufficient legal basis for intervention. See U.N. SCOR, 49th Sess., 3413th mtg. at 17, 19, 23, 24, U.N. Doc., S/PV.3413 (1994), (statements of the representatives of Argentina, Spain, the Russian Federation, and the Czech Republic).


137 Acevedo, supra note 33, at 141.

state and its population. Juridical opinion and state practice in such cases are varied and often contradictory. In theory, external assistance to either side, particularly through military intervention, may violate the right of the people of the state to determine the outcome of the conflict themselves. This theory is problematic, since it privileges an outcome based on the relative strength of the combatants over an outcome determined by the popular support each faction holds or the type of regime each faction is likely to establish should it gain full control of the state. Nonetheless, other approaches may be even more problematic, requiring as they do subjective evaluations by potentially biased external actors of the human rights credentials or democratic prospects of contenders for power in another country.\(^\text{139}\)

In practice, most states continue to accord substantial deference to the will of a recognized, incumbent government, even after it arguably lost control of a substantial portion of the state, so long as the government retains control over the capital city and does not appear to be in imminent danger of collapse.\(^\text{140}\) In virtually all such cases, however, it is possible for the government to allege that the opposition forces are receiving substantial external assistance from third states in violation of the non-intervention principle. Accordingly the government can claim a right to receive outside assistance, including troops, as a form of counter-intervention.\(^\text{141}\)

This claimed right is related to but independent of any authority the government might otherwise have to consent to foreign military intervention. It rests on the premise that aid in such circumstances is not a form of intervention requiring legitimization, but rather a means to neutralize an unlawful, prior intervention, thus returning control over the state's political future to internal actors to the extent that is possible. Alternatively, aid may be characterized as a form of collective self-defence against external aggression directed by third states against the state of the requesting government.\(^\text{142}\)

Unfortunately, the ease with which individual states may invoke asserted rights of counterintervention or collective self-defence makes it difficult to assess the relative significance of consent as an independent justification in most instances of intervention on behalf of embattled but still functioning incumbent governments.

\(^{139}\) Brownlie, supra note 34, at 326-27.


\(^{141}\) Ibid. at 172.

This is particularly true for the many cases in which discussions of legal justification were openly colored by Cold-War tensions. The 1958 U.S. intervention in Lebanon provides a case in point. The Lebanese government, which was facing a substantial and growing insurrection, alleged that the United Arab Republic (UAR) was unlawfully supporting the insurrectionists. The U.S. sent troops to assist the Lebanese government, at its request. The U.S., supported by other western countries, argued that it was entirely in accordance with the U.N. Charter to provide such assistance in the face of (an insurrection stimulated and assisted from outside...). 143

The Soviet Union, however, with support from a number of states in the General Assembly, characterized the insurrection in Lebanon as “a popular movement against the reactionary government” of the Lebanese President, and attacked U.S. involvement as a violation of the non-intervention principle. 144

In most such cases, it is difficult to ascertain with any certainty the facts surrounding a government's claim that its internal armed opposition is receiving significant external support. Even in cases where the facts were reasonably clear, Cold-War constraints and concerns about intruding on a state’s domestic jurisdiction typically precluded the U.N. from taking any effective action against external intervention. As a result, states commonly acted as if incumbent governments had a virtually unlimited right to obtain help from third states in seeking to suppress internal rebellions. With the end of the Cold-War, the members of the Security Council now periodically find it possible to agree on the undesirability of external intervention in particular cases. When such agreement is possible, the Council often imposes mandatory arms embargos on all parties to the conflict. 145

But for the most part, the Council only adopts coercive measures when the incumbent government disappears or becomes simply one of many warring factions. 146 Until that point is reached, third states continue to act as if they have a broad right to aid incumbent governments, provided those governments can plausibly allege that the rebels are receiving external assistance.

144 Perkins, supra note 23, at 175.
146 Wippman, supra note 15, at 473.
Unlike individual states, however, international organizations generally prefer not to rely on counter-intervention or collective self-defence as a justification for military intervention in internal conflicts. Instead, both the U.N.O. and regional organizations usually proclaim that they are neutral with regard to the merits of the underlying conflict. They strive, at least publicly, to avoid siding openly with either the government or its opposition. In general, they seek to play a mediating or peacekeeping function.\footnote{See Tom J. Farer, ‘Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase’, 18 \textit{Hum. Rts. Q.} (1996), p.1, at 4-7.}

Accordingly, such organizations often face a number of problems specific to intervention under this posture. The first issue they must confront is whose consent must be obtained for intervention. As a prudential matter, both the U.N.O. and regional organizations will ordinarily seek the consent of each of the primary warring parties before sending troops into the middle of an internal conflict. The applicable legal requirement, however, is consent of the territorial state. In some cases that requirement may be satisfied by the consent of the incumbent government, even if its authority has been substantially undermined by a significant armed rebellion.

In evaluating the incumbent government’s authority in this context, even widespread recognition of a government is not by itself dispositive. States and international organizations are slow to withdraw recognition from an incumbent government, even when that government has lost control of much of the state. Indeed, premature withdrawal of recognition might be seen as illicit support for the rebel forces.\footnote{Oppenheim, supra note 5, para. 74, at 134-37.}

But, the failure to withdraw recognition does not automatically translate into acceptance of the recognized government’s authority to invite external military intervention on its own behalf. As a legal matter, whether a government is entitled to give unilateral consent to the deployment of troops, even for peacekeeping purposes, depends more on the extent of the government’s control of the state than on the breadth of its recognition in the international community. As enunciated by the British Foreign Secretary, the test is whether the regime in power “exercises effective control of the territory of the state concerned, and seems likely to continue to do so”.\footnote{See Speech of the British Foreign Secretary, Lord Carrington to the House of Lords, 408 Parl. Deb., H.L. (5th sev.) 1121-22 (1980). The Foreign Secretary was discussing Britain’s decision to dispense...}
Again, however, the question of control is complicated by the common existence of illicit foreign intervention. In Cyprus, for example, the resolutions authorizing the continued deployment of U.N. peacekeeping forces cite only the consent of the recognized Greek Cypriot dominated Government, even though Turkish Cypriots have long controlled more than one third of the state.¹⁵⁰ The U.N.’s formal reliance on government consent reflects not only the fact that the Government still controls most of Cyprus, but also the fact that the government would control the entire state but for Turkish military intervention.¹⁵¹

In general, when a government faces substantial armed opposition, both the U.N.O. and regional organizations, more so than individual states, appear to have considerable leeway in determining whether to rely on the consent of the government as a sufficient legal basis for intervention. For example, in 1981 the OAU dispatched an Inter-African Force to conduct peacekeeping operations in Chad on the basis of a request from the Chadian Government, even though that Government’s position was so precarious that the rebel forces overthrew the Government the following year.¹⁵²

Similarly, the Arab League relied on Lebanese Government consent as the basis for intervening in that country’s internal conflict, even though the Government’s authority in much of the country was tenuous at best.¹⁵³ In such cases most states seem willing to defer to the judgment of the appropriate regional organization.

5.5.2.3. Government as Warring Faction

In some internal conflicts, the government loses control over most of the country, ceases to exercise any substantial administrative or governmental functions, and becomes in effect simply one among a number of warring factions. For example, President Samuel Doe’s government in Liberia lost control of most of the state to rebel forces following a rebellion that began on December 24, 1989. By the summer of 1990, most government ministers had fled the country, and all state institutions had ground to a halt. The rebels exercised military but not administrative control over

most of Liberia, with the exception of a portion of the capital still in the hands of what remained of Doe’s military.154

Liberia’s neighbors watched the growing chaos with some dismay, fearing it might spread throughout the region. Nigeria, the dominant regional power and a supporter of the Doe government, pressed for regional military action to restore order in Liberia.155 Doe welcomed the Nigerian initiative, as did Prince Johnson, the leader of the smaller of the two rebel factions then battling Doe’s forces for control of the capital.

However, Charles Taylor, the leader of the main rebel force, strongly opposed external intervention.156 Taylor believed that given time his forces could take control of the entire state, and that any regional intervention led by Nigeria would support the failing Doe regime at Taylor’s expense.157

Although Liberia’s U.N. representative sought to place the Liberian crisis on the Security Council’s agenda, the Council took no action.158 In August 1990, five states, operating under the auspices of the ECOWAS, sent several thousand troops into Monrovia. The troops were instructed to act as a peacekeeping force, to the extent possible. In keeping with this ostensible mission, the peacekeepers were designated as the Economic Community of West African States Monitoring Group (ECOMOG).

Taylor did not view ECOMOG as a neutral peacekeeping force, however, and his forces attacked ECOMOG on its arrival. ECOMOG then launched a military offensive to expel Taylor’s forces from Monrovia and to secure the capital.159

This action and subsequent offensives against Taylor’s forces are not easy to reconcile with international law. ECOWAS did not have Security Council authorization when it sent troops into Liberia. It did not have the consent of the dominant warring faction, which stated in advance that it would treat an ECOWAS military intervention as an illegal foreign invasion. Thus, this was not a classic peacekeeping operation in which the intervening force obtains the advance consent of the primary warring parties.

156 Wippman, supra note 15, at 167.
159 Wippman, supra note 15, at 167-68.
At least one author, Professor Georg Nolte, has argued forcefully that President Doe’s consent to the intervention was sufficient legal authority for it.\(^{160}\)

Nolte contends that it is “irrelevant” that Doe had been reduced to a (minor contender for power) at the time he gave his consent to the intervention. His government was still the recognized government of Liberia, and was (capable, by agreeing to a cease-fire with an otherwise rival faction, of paving the way for entry of the intervention forces into his country).\(^{161}\)

Nolte recognizes that such a rule, allowing an essentially defunct government to invite external military intervention to prevent an adversary from taking power, might be abused by neighboring states with hegemonic aspirations, and might lead to an internationalization of internal conflict. Nolte argues, however, that the regional framework for intervention provides “the necessary degree of impartiality and the chance of containment of the conflict”, and that in situations comparable to Liberia’s, it is necessary to balance the goals served by the non-intervention principle with the need to further humanitarian aims.\(^{162}\)

Thus, Nolte's position is that Doe's consent was sufficient legal justification for regional intervention in Liberia, especially in light of the humanitarian aims of that intervention. This position is logically consistent with the Security Council's reaction to the ECOWAS intervention. Although the Council never formally authorized military action, months after the initial intervention it did issue statements commending ECOWAS for its efforts to restore peace in Liberia.\(^{163}\)

Since the conventional view is that only prior authorization will suffice to legitimize a regional enforcement action, the Council’s post hoc approval suggests that the Council considered the ECOWAS intervention to be a consent-based peacekeeping operation. Moreover, during debate on a later resolution authorizing sanctions against Taylor’s forces, various members of the Council expressly characterized ECOMOG as a peacekeeping force.\(^{164}\)

Since peacekeeping, by definition, is an operation undertaken with the consent of the territorial state, and since Taylor did not consent, one could read this


\(^{161}\) Ibid. at 626.

\(^{162}\) Ibid. at 623-24.

\(^{163}\) See Note by the President of the Security Council, S/22133, January 22, 1991; Note by the President of the Security Council, S/23886, May 7, 1992.

characterization of ECOMOG as an implicit claim that Doe acting alone had the legal authority to consent to ECOMOG’s deployment.

Nonetheless, it is difficult to conclude from the facts of this case that a government, reduced to the status of one among several warring parties, can unilaterally consent to an external intervention, even when the intervention is carried out under the auspices of a regional or subregional organization. ECOWAS itself did not cite Doe's consent as a legal basis for intervention,\(^{165}\) nor did individual states. Given the abysmal nature of the Doe regime, the breadth of opposition to it throughout the country, and the personal ties between Doe and the Nigerian President, reliance on Doe's consent would have been politically intolerable. It would also have run contrary to ECOMOG's claim to be a neutral interposition force. That claim was never entirely credible, since ECOMOG from the start was forced into an adversarial posture with Charles Taylor. But even though ECOMOG intervened against Taylor, it did not intervene for Doe. It made no effort to restore Doe to power. Instead, ECOMOG, and ECOWAS more generally, sought from the outset to arrange internationally monitored elections as the basis for resolving the conflict, and deliberately excluded Doe as a possible candidate in such elections.\(^{166}\)

Indeed, it was precisely because ECOWAS pursued a strategy of national reconciliation through democratic elections that the intervention attracted international support.

By itself, this does not mean that ECOWAS could not rely on Doe's consent as the legal basis for intervention.\(^{167}\) When the U.N.O. first intervened in the Congo, it relied in large part on the beleaguered government's consent, even though the U.N. claimed to be neutral as between the internal warring factions.\(^{168}\) But in the Congo, as in other cases where a multinational intervention force relied on a teetering government's consent, an illicit prior intervention (in that case by Belgium) arguably justified external aid to the government.\(^{169}\) A similar argument could have been made in Liberia since Taylor received substantial support from Libya, Burkina Faso, and Côte d'Ivoire.\(^{170}\)

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\(^{167}\) Nolte, supra note 79, at 626.


\(^{170}\) Wippman, supra note 15, at 188.
But ECOWAS chose not to take that position, preferring to rely instead on a humanitarian justification. Overall, there are good reasons why Doe's consent should be deemed insufficient as a legal justification. Unlike Aristide, Doe lacked the legitimacy that comes with the acquisition of power through internationally monitored elections. Accordingly, once Doe was effectively reduced from head of state to head of a minor warring faction, his authority to speak for the state was nominal and purely formal. Doe’s authority rested on the tenuous prop of external recognition. Though not withdrawn, such recognition says little in this context about outside state’s views of Doe’s authority, and nothing at all about the relationship between effective control and political community that normally underpins a government’s claim in international law to be able to invite intervention on behalf of the state.

In the end, Doe’s invitation adds only a thin patina of legitimacy to the force of the humanitarian arguments for intervention. If those arguments are not sufficient in and of themselves to warrant intervention, it is difficult to conclude, as a matter of law or policy, that the invitation of one faction, even if it is the faction that previously controlled the government, should materially alter the legal calculus.

This is not to say that regional organizations should not have a substantial margin of appreciation when determining whether a government’s political and military position has deteriorated to the point that it no longer possesses sufficient authority to invite outside intervention. States typically do, and should, accord substantial deference to judgments by regional organizations with regard to the standing of a particular government within their region. There are several reasons why such deference is appropriate. First, the process of multilateral decision-making, which requires achievement of a consensus among states with diverse interests, acts as a screen for purely self-interested interventions.

Second, the member states of regional organizations have assented, at least to some degree, to the decision-making procedures at issue. Third, the member states are likely to have a greater expertise on the issues driving the conflict and greater familiarity with the warring parties than extra-regional actors. Regional organizations may thus be in a better position to evaluate and choose among available courses of action than states operating from a greater cultural and political distance.

171 Borgen, supra note 86, at 818. Since ECOWAS marginalized the Doe government and forged a future for Liberia that did not envision Doe at all, the legitimacy of its action cannot be argued to be based on the consent of the parties.
Chapter – 5: Regional Intervention in Internal Conflicts

There are, of course, some countervailing considerations. In particular, the very proximity that affords regional organizations a better understanding of local conditions than more distant states may also generate a greater degree of bias or self-interest than might be expected in other states. Moreover, it is possible in particular cases that a regional organization may simply act as a vehicle to conceal the driving interests of the organization’s most powerful state. Most important, regional organizations typically lack the will, the resources, or both to intervene effectively in large-scale internal conflicts. \(^{172}\)

On balance, it seems appropriate as a legal matter to continue to accord regional organizations a reasonable margin of appreciation in evaluating the authority of particular governments to invite intervention in close cases. Even so, justifications other than governmental consent should be sought when no single faction can credibly claim to speak for the state. One possibility, of course, is consent from all of the principal warring factions. To the extent that international law treats control of the state as a sufficient basis for expressing the state’s consent to external military intervention, it seems reasonable to conclude that the collective consent of the various warring factions, which together control the state as a whole, constitutes the best available alternative to consent by a recognized, effective government. In many cases, it may be politically or morally unattractive to accord substantial legal significance to the will of one or more faction leaders, particularly if such leaders command no significant popular allegiance, rule by terror, and exercise no real governmental functions in their areas of military predominance. \(^{173}\) Unfortunately, external actors wishing to end a protracted and bloody internal conflict often have no choice but to accept such leaders as speaking for the territory and population under their control. \(^{174}\)

5.5.2.4. Collapse of Internal Authority

In some cases, conflict reaches a level of intensity in which the forces of the incumbent government are routed, and no other internal source of authority exercises any meaningful administrative or governmental functions. It is doubtful that this situation presents a significantly different legal posture than a situation in which the


government becomes simply one among a number of warring factions. Some authors have suggested, however, that in a situation of complete breakdown of internal authority, regional organizations have a special competence to intervene to restore order.\textsuperscript{175}

It could be argued that in such a case military action by a regional organization to restore order falls within the bounds of regional authority to deal with problems appropriate for regional action pursuant to Chapter VIII of the Charter.\textsuperscript{176} Absent any viable internal authority, the argument goes, intervention designed to restore conditions under which the population of the state can establish a government of its choosing would not be action against a state, and so would not constitute enforcement action of the sort that would have to be authorized by the Security Council pursuant to Article 53 of the Charter. Accordingly, consent in such cases might be treated as unnecessary.

Alternatively, consent in such cases might be presumed. Under this approach, the assumption would be that intervention in such circumstances would be so clearly in the interest of the affected state that the state, or the people of the state, would certainly consent to such intervention if they could. Either way, interventions to restore order could be deemed to fall within the gray area between Article 52’s peaceful dispute resolution mechanisms and Article 53’s enforcement action.

A variation on this argument would be that in a situation of complete internal breakdown, the highest surviving official of the vanished government should have the authority to invite external intervention to restore order.\textsuperscript{177} This situation arguably differs from the situation where a government’s status is reduced to one of several warring factions, because the surviving official supposedly speaks against a background of anarchy rather than as the representative of one of several factions each claiming the right to speak for the state.

The U.S. invoked both variations of the argument in support of its 1983 invasion of Grenada. The U.S. claimed that anarchy reigned at the moment of intervention, and that swift action was necessary to restore order and to protect U.S. nationals resident in

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\textsuperscript{176} Article 52 of the U.N. Charter provides: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”.

\textsuperscript{177} Moore, supra note 100, at 154.
Grenada. To support its decision, the U.S. invoked, *inter alia*, the authorization of the Organization of Eastern Caribbean States, claiming that it had authority under Chapter VIII of the U.N. Charter to respond to disorder in a member state.

The U.S. also relied on an invitation to intervene issued by the Governor-General of Grenada. Even though the Governor-General's authority within Grenada was largely ceremonial, the U.S. argued that his consent carried substantial weight in the absence of colorable claims by other internal actors to speak for the state.

However, neither of these justifications, either individually or in tandem with the alleged threat to U.S. nationals, proved persuasive to most states.

The notion that states may intervene to substitute an orderly democratic process for anarchic violence as a means to reorder a state's internal political structures is an attractive one, at least on the surface. In theory, an intervention of that sort, if effective and accomplished at a reasonable cost to the affected state, could only benefit the people of that state. Under the conventional understanding of the U.N. Charter, however, any uninvited military intervention that is not undertaken in self-defence or authorized by the Security Council is illegal. Moreover, the risks of abuse associated with a broad license to restore order are substantial, since there will often be a significant, though temporary, vacuum of authority between the overthrow of the incumbent government and the establishment of a successor government.

It might be appropriate, however, to create an exception for cases of protracted anarchy, in which all government functions cease for an extended period, and the warring factions are unable or unwilling to exercise any administrative functions even within the territory they control. Possession of a government is an element and arguably a duty of statehood. The temporary absence of a government cannot by itself suffice to trigger intervention, because internal actors must be given some opportunity to reestablish order on their own terms. At some point, however, the prolonged absence of any government may constitute an abdication of the

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179 Ibid. at 204.
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responsibilities of statehood sufficient to warrant external intervention designed to enable the citizens of the state to resume control over their affairs, and to put an end to destructive and pointless conflict.\textsuperscript{184}

One problem, of course, is determining when that point is reached. The Security Council can decide at any time that the effects of anarchy are intolerable and authorize military intervention simply by finding that the ‘magnitude of the human tragedy’ created by such conditions constitutes a threat to international peace. That, after all, was the basis for the U.N. authorized military intervention in Somalia.\textsuperscript{185}

The question is whether regional organizations should have a similar margin of appreciation, either under a theory of presumed consent, or under the view that action to restore order in such cases does not constitute enforcement action under Chapter VIII of the U.N. Charter. Acceptance of a presumed consent theory, unless based on the terms of a regional organization’s Charter or some other treaty arrangement, would necessarily validate a similar intervention by a state acting unilaterally. That is a dangerous prospect since decisions by individual states are not subject to the checks and balances of a collective decision-making process.\textsuperscript{186}

Accordingly, it seems better to conclude that such interventions, to the extent they are permissible at all without Security Council authorization, fall within the bounds of appropriate action by a regional organization.

5.6. Consent and Its Revocation

What happens when a state consents to intervention and then withdraws that consent? In the ordinary case, the answer is simple. Intervention by consent must remain within the bounds of that consent. Accordingly, if a generally effective incumbent government revokes its prior consent to an external military intervention, the intervenors must withdraw.\textsuperscript{187} Failure to do so amounts to an intervention against the will of the state.

There are circumstances, however, in which a different result might be reached. First, there is some uncertainty about the conditions under which even an effective government can lawfully revoke consent to the deployment of an international

\textsuperscript{184} Ibid. at 220-21.
\textsuperscript{186} See Roberto Ago, as Judge (then Special Rapporteur), argued in his report to the International Law Commission on state responsibility, against acceptance of a theory of presumed consent on the ground that "cases of abuse would be too common". ‘Eighth Report on State Responsibility’, Document A/ACN.4/318 and Add.1-4, 2 Y.B. Int'l L. Comm'n.(1979), p.3, at 35-36.
\textsuperscript{187} Ibid. at 32-33.
peacekeeping force. In 1967, Egypt withdrew its consent to the presence of the United Nations Emergency Force on Egyptian territory, thus paving the way for an Egyptian attack on Israel. The Secretary-General, after studying the legal aspects of the Egyptian position, concluded that (the U.N.O. had no legal option but to withdraw). In his view, the deployment of peacekeepers required the continuous affirmative consent, or at least acquiescence, of the state in which the troops were placed.

The Secretary-General's decision provoked considerable controversy. Some critics felt that Egypt's consent to the deployment, and its acceptance of a status of forces agreement with the U.N., created a legal obligation to permit the force to carry out its mission in accordance with the parties prior agreement. To confer on any state the right to force a unilateral withdrawal of international peacekeepers at any time could stimulate strategic behavior, permitting one party to use peacekeepers as a means to buy time until that party is ready to resume a conflict previously suspended by agreement between the warring parties. On the other hand, deployment of military forces in a state's territory without its actual, contemporaneous consent impinges so directly on the autonomy of the state that the state presumably must retain, by virtue of its sovereignty, the right ultimately to revoke its consent and to force the intervenors to withdraw. The solution to this particular dilemma may lie in simply reading a requirement of reasonable notice into a state's right to revoke consent, thus giving all parties time to prepare for the peacekeepers' departure.

A similar problem arises when consent to intervention comes from two or more warring factions in an internal conflict, rather than from an effective government acting unilaterally. In such cases, states can reasonably rely on the consent of the various factions as collectively constituting the state's consent.

Unfortunately, consent obtained in such fashion is often fragile. Almost inevitably, one faction may come to believe that the presence of external forces benefits the other side, even if the forces act as neutral peacekeepers. At that point, the faction perceiving itself as disadvantaged by intervention may withdraw consent, and

189 Ibid. at 38.
190 In a 1957 Aide Memoire, Secretary-General Dag Hammarskjöld recorded his understanding that Egypt had agreed to constrain its right to revoke consent to the deployment of UNEF. According to Hammarskjöld, Egypt agreed that UNEF could stay until its mission was completed, as determined by both Egypt and the U.N. See Aide Memoire, reprinted in 6 I.L.M.(1967), p.595.
191 Thomas & Thomas, supra note 97, at 215, 221.
even attack the would-be peacekeepers. Clearly, the peacekeepers have the right to defend themselves, but do they have the right to pursue their mission against internal opposition?192

If one assumes that any coercive actions and even the continued presence of the peacekeepers requires either the contemporaneous consent of the state as a whole or Security Council authorization, then withdrawal of consent even by one among a number of factions may amount to the termination of consent as a legal basis for intervention.193

But if one assumes that the withdrawal of consent is as much an act of state will as the grant of consent in the first place, one could argue that revocation requires a collective decision, and that no single faction is entitled to revoke consent unilaterally.

Even if one follows the latter approach, however, consent may still prove to be a dubious basis for intervention, since some of the factions that gave their consent originally may splinter, disappear, or be replaced by new factions. On occasion, factions may reconstitute themselves under new names, precisely in order to escape any obligations they may previously have assumed. At some point, the continued presence of external forces will ordinarily require either renewed consent emanating from the new constellation of warring factions or Security Council authorization.194

When consent broke down as a basis for intervention in Somalia, the Security Council switched to enforcement action under Chapter VII.195 It did the same in the FRY.196 By contrast, the consent of various warring factions to ECOWAS peacekeeping in Liberia has come and gone with some frequency several times over the years. Nonetheless, ECOWAS acts as if it has always had full consent, with the apparent blessing of the U.N.O. In the end, this may be yet another area in which both

192 Schachter, supra note 45, at 408. He states that, noting that U.N. peacekeepers sometimes ‘stretch’ the self-defence principle “far beyond its usual legal meaning”, in part by combining a right to freedom of movement with a claimed “right to use arms in defense of positions occupied”.
193 Ratner, supra note 119, at 38. In many cases, parties dissatisfied with the activities of peacekeeping forces may simply engage in obstructionist tactics rather than explicitly withdraw consent.
194 Ibid, at 39. He argued that the United Nations cannot force parties to comply with a peacekeeping agreement without impermissibly blurring the distinction between peacekeeping and enforcement.
the U.N.O. and regional organizations should be deemed to have a considerable margin for appreciation, that is, some leeway to decide whether a single faction’s withdrawal of consent by itself fatally undermines the authority of the operation as a whole.\textsuperscript{197}

5.6.1. Can Consent Preclude the Operation of Article 2(4) in Respect of Regional Actions Not Violating Peremptory Norms?

In its Articles on Responsibilities of States for Internationally Wrongful Acts (ARSIWA) adopted in 2001, the ILC confirmed the peremptory character of the ban of the use of force under Article 2(4). Article 20 of the ARSIWA expressly states that consent by a state to the commission of a given act by another state precludes wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.

According to Article 26, “nothing in the Chapter precludes the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of general international law”.\textsuperscript{198} The ILC noted that the “criteria for identifying peremptory norms of general international law are stringent” and that so far, relatively few peremptory norms have been recognized as such. The ILC has identified examples of such norms already affirmed by various tribunals, national and international” as those that are clearly accepted and recognized.\textsuperscript{199} These include “the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self determination”.\textsuperscript{200}

It must be stressed that, in the context of use of force, the ILC identified only the prohibition of aggression as a peremptory norm under Article 2(4). It did not identify other types of forces as constituting a peremptory norm in Article 2(4).

However, as already noted above, consent, according to Article 26, does not operate to preclude an obligation arising out of a peremptory norm. Thus, consent cannot excuse the violation of a \textit{jus cogens} rule, such as the prohibition of aggression or genocide. Consistently with the position that the content of Article 2(4) is divisible into rules violating peremptory norms (aggression) and rules violating a general

\textsuperscript{197}Ratner, supra note 119, at 40-41.
\textsuperscript{200}See the Case Concerning East Timor (Portugal and Australia) ICJ Reports 1995, 90 at 102, para 29.
prohibition but not peremptory norms (lesser forces), it can be argued that consent given by states to regional organizations may preclude the application of Article 2(4) insofar as such relates to the second category of forces. Aggression, being the main indisputable example of a peremptory norm under both Article 2(4) and general international law, enjoys special protection. Thus, even if a state consents to the commission of aggression against it by another state, the aggressor is not thereby released from its obligation arising from a peremptory norm under Article 2(4). The aggressor cannot claim that he committed aggression with the consent of the attacked; hence volenti non fit injuria does not apply.

In the context of the prohibition of the use of force, aggression must be regarded as a strict liability offence, the responsibility for which does not depend on the state of mind of the aggressor, and which cannot be precluded by consent of the attacked state.

Thus, whereas states cannot contract out of obligations arising from a peremptory norm of general international law, they should be able to contract out of norms that do not possess a peremptory character. An agreement by states that their regional organizations can, in specified circumstances not involving aggression, use force on their territories, it is submitted, does not violate Article 2(4).

A deployment of force based on a freely given power for the same purpose it is applied, can neither be one used against the territorial integrity or political independence of the donors of that power, nor one used in any manner inconsistent with the purpose and principle of U.N. As one commentator has argued, states have the power to consent to limitations on their independence. Indeed, states may surrender their independence altogether by merging with another state. Accordingly, states must be free to yield any lesser measure of their independence, in the form of a license to intervene.201

Other scholars support this view, stating that, considering that states may extinguish their legal personality altogether, “it would seem strange if a state could not consent to a less drastic curtailment of its right of non intervention”. 202

Examples of such a freely given consent to intervention could be seen in the Treaty of Protective Friendship between France and Monaco203 (Article 4); Treaty of

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201 Whippman, supra note 22, at 616.
202 Thomas & Thomas, supra note 46, at 92.
Friendship between Persia and Soviet Union (Article 6)\textsuperscript{204} and the Treaty of Guarantee between Cyprus and Greece on the one hand, and Turkey and the U.K., on the other.\textsuperscript{205}

The crux of these treaties is that they empower states to deploy their troops to another state, such as French troops to Monaco, without the need to consult the territorial states for their consent in cases of emergency.\textsuperscript{206} In fact Article 6 of the treaty between the Soviet Union and Persia permitted the former to deploy troops to Persia to defend its own interest. Article 4 of the Cyprus Treaty of Guarantee permits the three guarantor states (Greece, Turkey and the U.K) to take certain measures individually or collectively to guarantee the fundamental provisions of the Cyprus constitution.

These treaties have been criticized as violating the peremptory norm of Article 2(4). According to Professor Reisman, “however, a use of force under Article 6 might be rationalized, it necessarily infringes the territorial integrity of the target, and in so far as it is not invited by that state in that particular instance, it impairs its political independence”.\textsuperscript{207} Ronzitti challenged Reisman’s view, attributing it to “a mistaken premiss (sic): the identification of the peremptory norm prohibiting the use of force in international relations with Article 2(4) of the U.N. Charter”. Ronzitti argued that if “our initial assumption is that only the more serious breaches of Article 2(4) - for example, aggression - is forbidden by a peremptory norm, the conclusion is different”.\textsuperscript{208}

Another commentator has stated that a determination of whether the entry of foreign troops into another’s territory constitutes a breach of the peremptory rule prohibiting the use of force “must inevitably depend on the circumstances, which would include the question of consent by the state concerned”.\textsuperscript{209}

\begin{footnotes}
\item[204] 26 February 1921, Société des Nations, Recueil des Traités et des engagements internationaux enregistrés par le Secrétariat de la Société des Nations, vol 9, No 268, at 383 et seq cited in Ronzitti, supra note 92, at 158.
\item[205] 382 United Nations Treaty Series, No 5475.
\item[206] Article 4 of the treaty between France and Monaco; Article 4, Treaty of Friendship between Persia and Soviet Union; Article 6 of Treaty of Guarantee.
\item[208] Ronzitti, supra note 3, at 159-160.
\item[209] Comment of Sir Francis Vallat on Article 29 of the Draft Articles on State Responsibility submitted by Roberto Ago to the ILC. See (1979) (I) \textit{Yearbook of International Law Commission}, p. 38 cited in Ronzitti, supra note 3 at 160.
\end{footnotes}
Whatever view is correct, it seems certain that an intervention by a country in another’s affairs by consent does not violate a peremptory norm prohibiting the use of force. Although Professor Reisman maintained the view that no rationalization of any use of force could make it an exception to the peremptory rule is Article 2(4), he nevertheless qualified his statement. He suggested that “a use of force necessarily infringes the territorial integrity of the target insofar as it is not invited by that state”.

One can conclude from this is that a use of force that is based on the consent of the territorial state may violate the prohibition of force but not a peremptory norm of general international law. The basis of this submission must be distinguished from two similar but unidentical premises.

Firstly, this contention is not based on the ends of such power that is, not based on whether the use of force is for humanitarian purposes, good governance, or self-determination of minority groups. In fact, one of the main reasons for the inability of states and writers to agree on whether humanitarian intervention constitutes an exception to Article 2(4) is that it is a deployment of force without the consent of the territorial state. Secondly, the position is somewhat different in a situation of failed states as in Somalia where there was no functional government in existence.

In such a situation, a regional organization could undertake a consensual intervention if the failed state is a member of the regional organization. In that case, the absence of a government would not prevent its intervention, because once state consent has been given in the form of ratification of the enabling treaty, there is no need for further consent before deployment.

Authoritative writers have long recognized that (the prohibition of intervention must be regarded primarily as a restriction which international law imposes upon states for the protection of the independence of other members of the international community). 210 For this reason, the “notion and prohibition of intervention cannot accurately extend to collective action undertaken in the general interest of states for the collective enforcement of international law”. 211 As Natalino Ronzitti has observed, (the consent of the territorial state operates as a circumstance precluding wrongfulness). 212

211 Ibid. at 179
212 Ronzitti, supra note 3 at 148.
A consideration of the stance taken by the ILC in its Articles on ‘State Responsibility’ and the ICJ in *East Timor Case*, will shed light on the importance of consent in regard to wrongfulness of acts.

### 5.6.1.1. Consent in the ILC Articles on State Responsibility

The attitude of the ILC towards defining *jus cogens* would seem to bear out the above proposition. The ILC observed that although circumstances precluding wrongfulness cannot justify or excuse a breach of a state’s obligations under a peremptory rule, “in applying some peremptory norms the consent of a particular state may be relevant. For example, a state may validly consent to a foreign military presence on its territory for a lawful purpose”. But whether consent in particular cases is valid to excuse wrongfulness is a question of fact. The ILC, however, noted that “whether consent has been validly given is a matter addressed by international law rules outside the framework of state”. Without doubt, such international rules must include issues such as who gives the consent, the legality of consent given, whether consent has been given freely or under duress, and others.

The ILC further raised the possibility of the question being asked whether “consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a state, or whether such consent could only be given by the central government”. Although this question was raised in the context of whether it is the central or regional authority that could authorize an intervention in a federal state, it seems to have been assumed that it is in fact possible that authorized regional intervention is permissible by consent provided such consent emanate from the appropriate authority. In that case, the question of who should have granted the consent is a matter for the internal laws of the federation to resolve either alone or in conjunction with appropriate rules of international law.

The ILC went on to note further that while “the rights conferred by international human rights treaties cannot be waived by their beneficiaries, but individual’s free consent may be relevant to their application”. The ILC also gave examples of humanitarian relief and rescue operations as instances where consent can preclude wrongfulness in international law. If this is so, there is no reason why states cannot consent to a regional treaty codifying such a use of force, and other types, provided none includes aggression.

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213 ILC’s *Commentary*, supra note 5 at 188.
214 Ibid. at 164.
215 Ibid. at 165.
It must be borne in mind that consent, or any other circumstances precluding wrongfulness in international law does not abrogate the particular obligation it precludes.

It merely prevents its applicability for the period in which the precluding circumstance applies. In the context of consensual intervention, it is submitted that responsibility of a regional organization is precluded the moment a state ratifies the organization’s treaty. In the Gabčíkovo-Nagymaros Project case, the ICJ had applied one of the circumstances precluding wrongfulness in international law and concluded that:

“The state of necessity claimed by Hungary-supposing it to have been established - thus could not permit the conclusion that . . . it had acted in accordance with its obligations under 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did”. 216

The ILC maintained its very practical approach towards construing the impact of consent in determining the responsibility of states for acts to which they consent when it commented on Article 26. Thus, to the question whether consensual regional enforcement action can preclude wrongfulness under Article 2(4), the answer is affirmative. Where there is an apparent conflict between primary obligations, one of which arises for a state directly under a peremptory norm of general international law, and other obligations, it is evident that such an obligation must prevail.217

However, whereas there can be said to be conflicting obligation between a prohibited use of force that has emerged into a peremptory norm (aggression), vis-à-vis, consensual intervention, there is no such obligation in respect of ordinary prohibition which does not constitute a peremptory norm. It seems that great caution needs now to be exercised before invalidating a treaty simply because it contains an obligation that is prohibited by international law, even if such prohibited obligation is a peremptory norm. The ILC recognized that when it observed that: in theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen.218

217 Ibid. at 187.
218 Ibid. at 187.
5.6.1.2. State Consent and the ICJ

The approach taken to the question of consent by the ILC above seems to have found support in the approach taken by the ICJ in the *East Timor case.*219 The case arose out of the conclusion of a treaty in 1989 by Australia and Indonesia concerning the delineation a continental shelf by the two states between (1971-72). Portugal brought an action before the ICJ claiming, *inter alia,* that the treaty violated the right of self-determination of the East Timorese people. Portugal therefore requested the Court to declare the conduct of Australia unlawful. Australia objected to the Court’s exercising jurisdiction on this matter since, according to her, a determination of the issue sought by Portugal by the Court would affect the right of a third state (Indonesia) which was not a party to the case.220 In response to Australia’s objection, Portugal argued, that the right to self-determination constitutes an obligation *erga omnes,* and is enforceable by all states irrespective of whether the culprit consents to the suit or not.

The Court agreed with the Portuguese position as to the justifiable basis of an obligation arising out of an *erga omnes* principle, holding in fact, that “the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice . . . is irreproachable”.221 It however held that, the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.

Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a state when its judgement would imply an evaluation of the lawfulness of the conduct of another state which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes.*222

The pronouncement of the Court clearly departs from the theoretical utopia of the academic writer who does not entertain any deviation from norms such as *erga omnes* or *jus cogens* even by consent. Although the Court had rendered its judgment in respect of an *erga omnes* principle it indeed said that “whatever the nature of the obligations invoked”. This means that it would have made no difference to the Court had the East Timorese right violated by Indonesia been *jus cogens.* It would have been expected by Portugal (and by most academic writers) that the obligation in question, being a serious norm under general international law, the Court would have

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219 Case Concerning East Timor (Portugal v Australia) ICJ Report (1995), 90.
220 Ibid. at 100.
221 Ibid. at 102.
222 Ibid. at 102 para 29.
disregarded the fact that Indonesia had not given her consent to the case. No doubt, the ratio decidendi of the Court seems to have been founded on the distinction to be made between the character of a norm in dispute and the need to secure consent from a party which might be affected by the outcome of the dispute. However, the principle of consent established by the Court in the Monetary Gold Case is distinguishable from the instant case in which the obligation sought to be preserved applied to all states.  

It would seem plausible to argue that in arriving at its conclusion in the East Timor case, the Court indirectly affirmed that we cannot throw away states consent when we seek to determine the lawfulness or rightfulness of an action regardless of what types of norms are involved.

5.7. Intervention by Regional Organizations in Post Cold-War: Cases for Study

5.7.1. Liberia 1990-1992

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

5.7.1.1. Facts and Context

The Liberian internal conflict began in December 1989, when Charles Taylor led a group of rebels, known as the National Patriotic Front of Liberia (NPFL), to overthrow President Samuel Doe. The NPFL grew quickly, and by the summer of 1990, it and a splinter rebel group, the Independent National Patriotic Front of Liberia (INPFL), controlled almost the entire country. The fighting caused considerable human casualties: By August 1990, over one million Liberians had been displaced and approximately 5,000 killed.

The conflict in Liberia caused concern among the other ECOWAS states and triggered them to establish a five-member (Standing Mediation Committee) charged with settling disputes among member states. On July 14 1990, Doe sent the Committee a letter suggesting that ECOWAS introduce peacekeeping forces into Liberia. The NPFL, however, made clear from the beginning that it would not consent to the presence of any ECOWAS force in Liberia. Despite the NPFL’s refusal to consent to any ECOWAS action, the Standing Mediation Committee prescribed the terms of a cease-fire and established an armed monitoring group (ECOMOG) to oversee it.

The Committee described ECOMOG as performing a peacekeeping role, but it did not purport to obtain the consent of the parties to the conflict. On the contrary, it appeared to believe that such consent was irrelevant. Upon leaving the meeting at which ECOMOG was established, the Guinean President stated that ECOWAS “does not need the permission of any party involved in the conflict” for ECOMOG to deploy and that, “with or without the agreement of any of the parties, ECOWAS troops will be in Liberia”. The Committee thus understood the intervention to be an enforcement action - one focused on enforcing rather than keeping a peace. Indeed, there was not yet any peace to keep.

The ECOMOG force landed in Liberia in late August 1990 without having obtained authorization from the U.N. Security Council. The force was welcomed by Doe and by the INPFL but came under immediate attack from Taylor’s NPFL.

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231 Ibid. Letter from the Permanent Representative of Nigeria, supra note 125.


By mid-September 1990, the fighting between ECOMOG and the NPFL had escalated, and ECOMOG had gone on the offensive. With time, ECOMOG became a major participant in the conflict - staging its own offensive attacks against the NPFL and supporting anti-Taylor factions even as ECOWAS tried to establish a political process for negotiating a cease-fire. In late November 1990, ECOMOG and the Liberian parties to the conflict finally concluded what would be the first of a number of cease-fire agreements.

The U.N. Security Council for the first time considered the Liberian conflict in January 1991, a few months after that initial cease-fire agreement had been signed. The discussion before the Council was brief; Liberia and Nigeria were the only states that requested the floor, and shortly after the Liberian representative (from an anti-Taylor faction) expressed his appreciation to ECOWAS, the Security Council President issued a statement “commending” its efforts to “promote peace and normalcy in Liberia”. The Council President issued a similar statement in May 1992.

In November 1992, the Security Council adopted its first resolution on the conflict (Resolution 788), which again “commended ECOWAS for its efforts to restore peace, security and stability in Liberia”. Resolution 788 was particularly supportive of an October 1991 cease-fire, the Yamoussoukro IV Accord under which the principal parties to the conflict agreed to disarm with ECOMOG supervision. In addition, Resolution 788 invoked Chapter VII to impose an arms embargo on the Liberian parties to the conflict. Over the next five years, the

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


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


Security Council adopted another sixteen resolutions relating to the situation in Liberia, and virtually every one of them commended ECOWAS for its efforts.  

5.7.1.2. Legal Analysis

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

Some scholars have interpreted the Security Council’s commendations to constitute retroactive authorization for purposes of Article 53. This interpretation is convenient because it places the international response to the Liberian conflict within the legal framework of the U.N. Charter. But it is not completely honest. The Security Council did not, in fact, authorize any enforcement action. Resolution 788 invoked the Council's Chapter VII authority, but it did so only to impose the arms embargo and not also to authorize the use of military force.

Moreover, there is some evidence that the failure to authorize the use of force was deliberate. Western diplomats at the U.N. reportedly were prepared to authorize only political, and not military, action in Liberia.


246 See, Levitt, supra note 129, at 347.

247 S.C. Res. 788, supra note 147. One might respond to the lack of explicit authorization in Resolution 788 by arguing that the Security Council implicitly (and retroactively) authorized the enforcement action.

248 See Kathleen Best, ‘U.N. Moves to Halt Liberian Arms’, St. Louis Post-Dispatch, Nov. 20, 1992, p. 13A. (“Western diplomats, including those in the United States, have pushed to limit U.N. involvement to non-military support because they fear being drawn into yet another regional conflict when the international body is already overtaxed”).
Thus, the fact that the Security Council commended ECOWAS for its multifaceted efforts to establish peace in Liberia does not translate into Security Council authorization for the enforcement action *per se*.\(^{249}\)

And even if it did, the Security Council’s authorization in November 1992 would not explain the failure of the international community to enforce the Charter system up to that point. The less strained analysis is that international actors, including the Security Council, simply overlooked ECOWAS’s deviation from Article 53. A number of states publicly commended ECOWAS before the Security Council even considered the matter.

Moreover, by the time the Security Council adopted its first resolution, the issue of Security Council authorization was essentially beside the point. By then, ECOWAS had successfully negotiated the Yamoussoukro IV Accord, which evinced that, whatever the parties’ original positions concerning an ECOWAS presence in Liberia; they now consented to ECOMOG exercising a peacekeeping role.\(^{250}\)

The Security Council therefore could endorse the Accord, as well as ECOMOG’s involvement in Liberia, without commenting on the (unauthorized) enforcement action that brought it about. At the time, the Yamoussoukro IV Accord seemed to be the only hope for resolving the brutal conflict in Liberia, and the international community was simply relieved that ECOWAS had taken some initiative.\(^{251}\)

### 5.7.2. Sierra Leone 1997-1998

On February 6, 1998, ECOWAS decided to intervene in Sierra Leone to restore the elected government of Ahmed Kabbah. Just as it had done in Liberia, ECOWAS militarily intervened in Sierra Leone was without U.N. authorization.\(^{252}\)

Sierra Leone was the second internal conflict in which the ECOWAS became involved. International support for ECOWAS in Sierra Leone was based solely on humanitarian concerns.\(^{253}\)

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\(^{250}\) The Yamoussoukro IV Accord provided for ECOMOG to supervise the encampment and disarmament of all warring factions in Liberia and for those factions to “recognize the absolute neutrality of ECOMOG and demonstrate their trust and confidence in it”. Letter from the Permanent Representative of Benin, supra note 149.

\(^{251}\) Ofodile, supra note 13, at 410.

\(^{252}\) However, on October 8, 1997 the Security Council adopted Resolution 1132 which imposed an arms and petroleum embargo against the junta. The resolution also imposed travel restrictions against the junta and adult members of their families; ECOWAS was sanctioned to enforce the embargo. See S.C. Res. 1132, U.N. SCOR, 3822nd mtg., U.N.Doc. S/RES/1132 (1997).

\(^{253}\) Levitt, supra note 144, at 373.
5.7.2.1. Facts and Context

The conflict in Sierra Leone has gone through many periods of change. The military government led the country from April 1992 until Ahmed Kabbah was elected president in 1996. Kabbah’s government was subsequently overthrown in 1997. His ousting led to further rampage and cries for international involvement. As of 1999, when the dust of the conflict was still far from settled, the humanitarian crisis was evident.

More than half of the population had either been displaced or became refugees, with modest casualty estimates of 70,000 and hundreds of thousands of amputees. In a strange self-financed intervention, Sierra Leone twice hired outside security forces to help engage and defend against the Revolutionary United Front (RUF). The South African group (Executive Outcomes) was hired in 1995 and stayed until four months before the 1997 coup. A second private security group, (Sandlines International) from Britain, was brought in to help restore Kabbah’s government.\(^{254}\)

The interventions in Sierra Leone came in two stages. The first intervention, by ECOWAS in 1997-1998, had a second goal of restoring the elected government to power. ECOWAS forces, predominantly from Nigeria, operated under the Military Observation Group of ECOWAS (ECOMOG). The ECOMOG actions were at least moderately successful in both political and humanitarian terms. After a brief but intense campaign in February 1998, ECOMOG forces took control of Freetown, captured many of the military junta's leaders, and reinstated the previous government.\(^{255}\) Though the rebel forces were not fully contained and rural areas still suffered from their brutal tactics, the intervention provided at least temporary relief for the population.

The second intervention came with the establishment of the United Nations Mission in Sierra Leone (UNAMSIL) in 1999-2000. UNAMSIL added a much-needed influx of political will and military force to the efforts of ECOMOG; there was finally sufficient force to both keep the government in power and protect the citizens. Especially strong support from the British helped to put an end to the devastating war and its accompanying humanitarian crisis. The British sent 700


combat troops to Freetown in 2000 to restore order after an RUF uprising, and they have been instrumental in training new police and military officers in Sierra Leone.256

In January 2002, Daniel Opande, commander of UNAMSIL, declared the war in Sierra Leone was over when 45,000 rebel forces surrendered.257 By finally getting the sobels (an amalgamated nickname for former Sierra Leonean soldiers turned rebels), and others militias to give up their arms, the people of Sierra Leone have been able to return home and no longer face the perpetuation of humanitarian atrocities that so ravaged the state throughout the 1990s.

5.7.2.2. Legal Analysis

The Sierra Leone intervention has two important and related variables to consider. The first refers to the politico-legal ramifications of the ECOWAS decision to intervene without prior approval from the Security Council. The second refers to the functioning capacity of the state. Based on the protections of Article 2(4) of the U.N. Charter, ECOWAS intervention in Sierra Leone without Security Council authorization was prima facie illegal. However, the Nigerian-led ECOMOG attempted to justify their actions through separate appeals to humanitarian concerns, regional stability, and the request of the legitimate government of Sierra Leone.258

The international community, for its part, did not condemn the intervention as a violation of international law, but instead gave it post facto sanctioning in Resolution 1132 and virtual unanimous assent in the General Assembly.259

The control of Sierra Leone was also a key legal issue for assessing the claim that President Kabbah’s request for military assistance from Nigeria and ECOWAS legitimized and legalized the intervention. Some scholars conclude that Kabbah's government remained the legal ruling authority of Sierra Leone and was, therefore, entitled to ask for outside assistance. This contention contrasts with Louise Doswald-Beck’s earlier finding that a regime may only be legally entitled to invite outside military help if it is a ‘government’ within the meaning of the international law, and must therefore be in de facto control. If, on the other hand, it needs to request assistance to quell an insurrection, i.e. a rebellion of some magnitude, it is by definition not in de facto control and thus cannot speak for the state.260

256 Levitt, supra note 140, at 370.
257 Ibid. at 370.
258 Nowrot & Schabacker, supra note 355, at 320.
259 Levitt, supra note141, at 372-73.
260 Louise Doswald ‘The Legal Validity of Military Intervention by Invitation of the Government’, 56
It would follow that Kabbah’s request for assistance was illegal, as Koromah’s forces comprised a rebellion that had taken de facto control over most of Sierra Leone in 1997. Thus, the argument that ECOWAS intervened as a democracy - defending measure seems to rest on a questionable legal foundation and the practical improbability that a state with a tradition of military rule (Nigeria) would intervene to defend the principles of democracy.

The question of why the ECOWAS intervention was met with widespread acceptance as opposed to criticism for an unsanctioned use of force may be answered by looking at the government capacity in Sierra Leone. The path of Sierra Leone’s state failure began well before the outbreak of war in 1991. Former Sierra Leonean President Siaka Stevens, who was president from 1968-1985, “decapitated the Sierra Leonean state…. Sierra Leone has not yet recovered from Stevens’s depredations”. 261

However, a kleptocratic government is not, by itself, a sufficient condition for state failure. A comprehensive definition of a failed state includes the criteria that a failed state cannot deliver public goods or provide security for its people, possesses weak and flawed institutions, offers no control of its borders, preys on its own citizens, and languishes in civil conflict. 262 Sierra Leone, already weakened by the Stevens and Momoh governments, met the criteria for state failure on the eve of the ECOWAS intervention. In a failed state such as Sierra Leone, there is no functioning and credible central government to give or refuse consent for intervention.

International support for intervention is influenced by the perceived effects on the provisions of state sovereignty. The failed-state status of Sierra Leone allowed states to support the ECOWAS intervention without fear that the traditional definition of sovereignty was being eroded. Furthermore, the ECOWAS intervention would set a dangerous example if it is viewed as legitimizing regional organizations to intervene without recourse to the Security Council. This idea will be further explored when looking at the more controversial NATO intervention in Kosovo.

5.7.3. Kosovo 1999

In 1999, NATO used force without Security Council authorization in order to stop the humanitarian crisis in Kosovo. 263 NATO member states did not address the question of consistency of the action with Article 53, but the deviation from that

263 Ibid. at 87.
Article was apparent. The Security Council had been seized of the Kosovo crisis but had not authorized the use of force. A number of countries, including Russia and China, reacted negatively to NATO’s action, but most international actors tolerated it.264

5.7.3.1. Facts and Context

Until 1989, Kosovo was an autonomous province in the FRY with a majority ethnic Albanian population. In 1989, Belgrade revoked Kosovo’s autonomous status and began subjecting ethnic Albanians to discrimination in public and private employment and in the exercise of civil rights.

Kosovar Albanians responded by seeking independence and, beginning in 1996, attacking Serbian police. As the conflict intensified, FRY forces undertook large-scale and frequently indiscriminate measures against the Kosovar Albanians.265

In March 1998, the Security Council adopted a Chapter VII resolution (Resolution 1160) calling for a political solution to the conflict in Kosovo.266 The situation continued to deteriorate,267 and in September 1998, the Security Council adopted a second Chapter VII resolution (Resolution 1199). Resolution 1199 demanded that the parties to the conflict cease hostilities and take immediate steps to improve the humanitarian situation.268 It also threatened that the Council would consider additional measures should the ones already mandated not be taken. It soon became clear, however, that Russia (and perhaps also China) would veto any proposed Security Council resolution authorizing the use of force against the FRY.

NATO thus took steps outside the U.N. framework. On October 9, the NATO Secretary-General announced that, given “that another U.N. Security Council Resolution containing a clear enforcement action with regard to Kosovo cannot be expected”, NATO “believes that in the particular circumstances with respect to the present crisis in Kosovo . . . there are legitimate grounds for the Alliance to threaten, and if necessary, to use force”.

This threat appears to have had an impact on the FRY. Soon after it was made, the FRY agreed to comply with the Security Council's earlier resolutions. The Security Council responded to this development with Resolution 1203, which endorsed and demanded full implementation of the agreements that the FRY had concluded under NATO’s threat. At the same time, however, Resolution 1203 underscored that the Security Council has “primary responsibility for the maintenance of international peace and security”. This language signaled the clear discomfort of non-NATO states with NATO's threat to use force outside the Charter system.

The humanitarian situation in Kosovo improved briefly in late 1998, but it deteriorated again at the beginning of 1999. After a series of intense negotiations failed to resolve the conflict diplomatically, the FRY launched a massive offensive against the Kosovar Albanians. NATO countered with a bombing campaign that lasted seventy-seven days and ended with a military-technical agreement between NATO and the FRY. The day after that agreement was signed, the U.N. Security Council adopted Resolution 1244, establishing in Kosovo, with the FRY’s consent, an “international security presence with substantial NATO participation”.

5.7.3.2. Legal Analysis

The NATO member states did not set forth a cohesive legal position to support the enforcement action in Kosovo. The acting Legal Adviser at the U.S. (State Department) later explained that “no single factor or doctrine seemed to be entirely satisfactory to all NATO members as a justification under traditional legal standards”. Thus, the NATO members tended to avoid legal arguments and instead to emphasize a combination of factors that, in their minds, together justified the use of force.

This multi-factored approach was pragmatic; by not addressing the basis for their action in international law, the NATO states avoided articulating a position that

269 Simma, supra note 157, at 7-8.
271 Nabati, supra note 166, at 784.
274 These factors included the failure of the FRY to comply with the Security Council's Chapter VII mandates, the exhaustion of efforts to settle the conflict without resort to force, the threat to peace and security in the region, and the danger of a humanitarian disaster in Kosovo. See also statement of the, Secretary General of NATO (Mar. 23, 1999), available at http://www.nato.int/docu/pr/1999/p99-040e.htm.(on Feb, 24, 2009).
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would weaken the traditional constraints on the use of force and thereby minimized
the precedent-setting effects of their action.\textsuperscript{275}

Yet one would be hard-pressed to demonstrate that NATO's enforcement
action was consistent with the design of the U.N. Charter. Article 53 makes clear that
regional arrangements may not take enforcement actions without Security Council
authorization. In the case of Kosovo, the Security Council did deem the situation to
constitute a threat to international peace and security, but it did not authorize any
enforcement action.\textsuperscript{276}

Russia, China, and a few other states underscored this point during Security
Council deliberations; they argued that NATO's action was unlawful because it lacked
Security Council authorization, and they called on NATO to cease the action
immediately.\textsuperscript{277}

Despite the inconsistency with Article 53, however, most international actors
tolerated NATO's use of force in Kosovo. During the Security Council deliberations, a
number of states expressed regret that military action was used and evinced their
discomfort that NATO acted outside the parameters of the U.N. Charter.\textsuperscript{278} Yet instead of
condemning NATO for that action, they tended to apportion blame to Belgrade.

These states avoided the questions of whether and how NATO’s action could
be reconciled with the Charter system, but a number of them underscored that the
Charter system continues to establish the rule of decision-making in this area.\textsuperscript{279}

These states thus took steps to endorse publicly the Charter system even as
they declined to enforce it against NATO. In the end, the Security Council voted
twelve to three to reject a draft resolution introduced by Russia, Belarus, and India
condemning NATO's action.\textsuperscript{280}

\begin{notes}
277 See U.N. SCOR, 54th Sess., 3989th mtg., supra note 182, at 5 (statement of Russia invoking a
violation of “Article 53, on the inadmissibility of any enforcement action under regional
arrangements or by regional agencies without the authorization of the Security Council”); U.N.
SCOR, 54th Sess., 3988th mtg., supra note 182, at 12 (statement of China that the NATO action
“amounts to a blatant violation of the United Nations Charter”, under which only the Security
Council “can take appropriate action” in response to a threat to international peace and security).
278 See, U.N. SCOR, 54th Sess., 3998th mtg., supra note 182, at 10 (statement of Ukraine); U.N.
SCOR, 54th Sess., 3998th mtg., supra note 182, at 6 (statement of Slovenia); ibid. at 7 (statement of
Bahrain); ibid. at 9 (statement of Malaysia); ibid. at 10-11 (statement of Argentina); ibid. at 18
(statement of Albania).
279 U.N. SCOR, 54th Sess., 3998th mtg., supra note 182, at 8 (statement of Malaysia); ibid. at 10
(statement of Ukraine); U.N. SCOR, 54th Sess., 3988th mtg., supra note 182, at 7 (statement of
Gambia); ibid. at 9-10 (statement of Malaysia).
\end{notes}
The resolution was not expected to survive a Security Council vote, but the scale of its defeat was politically significant, for it meant that the international community was overwhelmingly unwilling to condemn NATO for taking an enforcement action outside the parameters of the U.N Charter. Likewise, the U.N. Secretary-General was unwilling to condemn NATO. In a carefully worded statement, the Secretary-General advised that “the Security Council has primary responsibility for maintaining international peace and security” and therefore “should be involved in any decision to resort to the use of force”.

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

5.8. Conclusion

Chapter VIII lays down the legal framework for the relationship between the regional organisations and the U.N. in the maintenance of international peace and security. The Chapter presents a compromise between universalistic and regionalist tendencies at the time of the drafting of the Charter.

In the decades following adoption of the U.N. Charter, regional organizations have used force in a variety of circumstances without authorization of the Security Council. However, it is by no means clear that Security Council authorization is any longer a sine qua non to a legitimate use of force by a regional organization.

The U.N. Charter and the subsequent practice of states call into question whether specific Security Council authorization is any longer required under Chapter VIII. That is, as to Chapter VIII, the meaning of the U.N. Charter may be changed to embrace a presumption that would allow a regional organization to take otherwise appropriate enforcement action unless the Security Council explicitly votes to deny authorization. Such a presumption admittedly may complicate global accountability.

However, any resulting vacuum in the accountability to the global collective could be filled by the General Assembly recommending criteria for enforcement.

For the Security Council vote, see U.N. SCOR, 54th Sess., 3989th mtg., supra note 182, at 6. China, Namibia, and Russia voted to adopt the Resolution; Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, the Netherlands, Slovenia, the United Kingdom, and the United States voted to reject it.

actions. In this way, force will be more likely to be used and used in a timely manner to maintain and restore international peace and security. The old meaning of the U.N Charter meant that, more often than not, either no enforcement action was taken when needed or enforcement action was unduly delayed.

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.

Accepting a changed new meaning in the Charter should help assure that enforcement actions will be undertaken when needed and in a timely manner. Such a result cannot help but strengthen, rather than weaken, the maintenance and restoration of international peace and security. The role that regional organisations can play in the maintenance of international peace and security is presently receiving much attention.

This role is not new, however, regional organizations have made invaluable contributions to resolving conflicts in recent years. Particularly in Africa, there appears to be a security architecture developing. In conclusion based on the states practice discussed in this Chapter, it appears that regional organisations have significantly affected the existing legal framework concerning the use of force.