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## The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone

Karsten Nowrot

Emily W. Schabacker

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# THE USE OF FORCE TO RESTORE DEMOCRACY: INTERNATIONAL LEGAL IMPLICATIONS OF THE ECOWAS INTERVENTION IN SIERRA LEONE

KARSTEN NOWROT\* AND EMILY W. SCHABACKER\*\*

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\* Karsten Nowrot, LL.M., Indiana University School of Law—Bloomington, 1998; First State Exam in Law, University of Kiel (Germany), 1997.

\*\* Emily W. Schabacker, B.A. McGill University (Canada); M.A., University of East Anglia (England); J.D., Indiana University School of Law—Bloomington, December 1998.

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## INTRODUCTION

On April 13, 1998, the Secretary-General of the United Nations, Kofi Annan, issued a report entitled "The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa."<sup>1</sup> The report emphasized the important role democracy plays in fostering "an environment where peace and development can flourish."<sup>2</sup> Annan highlighted the need to strengthen and reinforce the ability of African countries to operate peacekeeping missions and

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1. *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, U.N. SCOR, 52d Sess., Agenda Item 10 para. 77, U.N. Doc. S/1998/318 (1998).

2. *Id.* paras. 41-45; see *Agenda For Democratization: Report of the Secretary General*, U.N. GAOR, 51st Sess., Agenda Item 41 paras. 1-14, U.N. Doc A/51/761 (1996) (stressing the importance of democracy in the struggle to obtain peace).

carry out forceful actions within a framework of regional or sub-regional initiatives.<sup>3</sup>

While a number of African states struggle with political instability, economic stagnation, and cultural disunity,<sup>4</sup> events in some African countries suggest a fragile hope for the future.<sup>5</sup> One such event is the recent reinstatement of the democratically elected president of Sierra Leone.<sup>6</sup> In May 1997, military forces ousted President Ahmed Tejan Kabbah from power and, in the following year, Kabbah became the first democratically elected African leader restored to power through military intervention.<sup>7</sup> Significantly, Kabbah returned to power as the result of actions by a West African regional organization, the Economic Community of West African States ("ECOWAS").<sup>8</sup> The events in Sierra Leone and the reactions of the international community indicate the increasing pressures pushing African states toward democratization and raise a host of issues under international law.

This article evaluates the international legal aspects of the ECOWAS intervention in Sierra Leone and the possible consequences of the intervention for traditional concepts of international law. As the situation in Sierra Leone suggests, the concept of governmental legitimacy has been fundamentally altered in the post-Cold War era.<sup>9</sup> In the post-Cold War international system, states ap-

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3. See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, *supra* note 1, paras. 41-45; see also U.N. Security Council Resolution 1170, U.N. SCOR, 3886th mtg. para. 8, U.N. Doc. S/RES 1170 (1998).

4. See A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 *FORDHAM INT'L L.J.* 1706, 1712 (1995).

5. See *id.* (commenting on the active role many African states have played in global conferences and summit meetings in recent years).

6. See Howard French, *Nigerians Take Capital of Sierra Leone as Junta Flees*, *N.Y. TIMES*, Feb. 13, 1998, at A3.

7. See *Sierra Leone: Putting a Country Together Again*, *ECONOMIST*, Feb. 21, 1998, at 44 (noting the difficult task of building a national force out of an untrustworthy army upon Kabbah's return to power).

8. See James Rupert, *Nigerians Welcomed in Freetown*, *WASH. POST*, Feb. 15, 1998, at A27 (reporting that Nigerian troops were sent to Sierra Leone under Economic Community of West African States ("ECOWAS") authority).

9. See FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION* 225 (1997) (observing that awareness of the link between human rights and peace has produced a change of opinion concerning humanitarian intervention and governmental legiti-

pear increasingly willing to accept military interventions to restore democracy even though, under traditional legal analysis, such interventions may lack legal justification.<sup>10</sup> This article also discusses the implications of the intervention in Sierra Leone for the future role of regional arrangements in the maintenance of international peace and security in general, and in particular, the role in Africa. Although Africa is often viewed as a continent that is the recipient of, rather than a contributor to, the development of international law,<sup>11</sup> its recent contribution to the development of international legal norms governing regional enforcement actions is significant.<sup>12</sup>

Part I provides a factual background to the events leading to the ECOWAS intervention in Sierra Leone. Part II examines the international legal rules governing ECOWAS and its intervention. Part III focuses on the legality of ECOWAS actions in Sierra Leone following the *coup d'état* and examines whether the intervention, despite its purpose of restoring democracy, falls within the prohibition on the use of force pursuant to Article 2(4) of the United Nations Charter. Additionally, the analysis focuses on whether ECOWAS's use of force is justified under international law. A number of possible justifications for the intervention are evaluated, particularly, authorization by the Security Council, the right of self-defense, the doctrine of humanitarian intervention, and the right to restore democracy based on the consent of the legitimate government. This article reveals that, given a paradigmatic shift in the concept of legitimate government since the end of the Cold War, the ECOWAS intervention in Sierra Leone is justified by the request of the democratically elected President-In-Exile for foreign military assistance.

Finally, Part IV examines the benefits and problems associated with the use of regional organizations for the resolution of civil conflicts. Using the example of the ECOWAS Military Observer Group ("ECOMOG") actions in West Africa, this article concludes that al-

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macy).

10. See *id.* at 227-58 (providing examples of interventions in Haiti, Rwanda, and Somalia).

11. See Mutharika, *supra* note 4, at 1719 (suggesting that the marginalization of Africa has led to this "recipient" status).

12. See *id.* at 1712 (pointing to Africa's participation in global summit diplomacy in the mid-1990s).

though the development of effective regional organizations benefits the international community, these organizations must operate under the authorization and watch of the United Nations to remain effective and acceptable under international law.

## I. FACTUAL BACKGROUND

On May 25, 1997, soldiers in Sierra Leone seized power, overthrowing the fourteen-month old civilian government of President Ahmed Tejan Kabbah.<sup>13</sup> The rebel soldiers of the Revolutionary United Front ("RUF") forced President Kabbah into exile in neighboring Guinea and established themselves as Sierra Leone's new government.<sup>14</sup> Although the *coup d'état* received relatively little attention from the international press, in West Africa the event commanded attention as cutting short one of West Africa's "most promising political evolutions."<sup>15</sup>

Sierra Leone has long struggled with authoritarian, oppressive governance.<sup>16</sup> From its days as a British colony, through successive military rulers brought to power by four coups, the people of Sierra Leone know well the costs of political instability. The country is one of the world's poorest, with an average per capita income of \$150 per year. The elections that placed Kabbah, a former lawyer, in the President's Palace were the first free elections in Sierra Leone in over thirty years.<sup>17</sup>

Kabbah came to power in March 1996 and quickly won the favor of Sierra Leoneans and West African statesmen for his role in ending a five year civil war with the RUF.<sup>18</sup> The Abidjan Accord, signed on

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13. See James Rupert, *Civilian Rule Overturned in Sierra Leone*, WASH. POST, May 26, 1997, at A21 (explaining the tactics employed by Revolutionary United Front ("RUF") soldiers).

14. See Claudia McElroy, *Soldiers Topple Government in Sierra Leone*, GUARDIAN, May 26, 1997, at 13 (reporting the soldiers' seizure of parliament, government offices at the state house, and radio and television stations).

15. Rupert, *supra* note 13, at A21.

16. See *id.* (describing the history of authoritarianism in Sierra Leone).

17. See *id.* (describing Kabbah's election as president as one of West Africa's most promising political evolutions).

18. See James Rupert, *Nigerians Drive Junta from Sierra Leone*, WASH. POST, Feb. 14, 1998, at A23 (explaining that Major Johnny Paul Koromah, head of the

November 30, 1996, declared an immediate end to the armed conflict, provided for the demobilization of RUF forces, and set forth political provisions whereby the RUF would register and function as a political party.<sup>19</sup> In addition, the Abidjan Accord called for the deployment of neutral international observers and a “capable security presence” to “deter undisciplined elements” from interrupting the peace process.<sup>20</sup> Kabbah’s government indicated to the United Nations that it did not have the means to ensure an adequate security presence.<sup>21</sup> In January 1997, United Nations Secretary General Kofi Annan proposed a peacekeeping operation in Sierra Leone to “aid in the implementation of the Abidjan Accord.”<sup>22</sup> The eight-month plan included “720 troops, 60 military observers, and 276 civilian staff, at an estimated total cost of \$47 million.”<sup>23</sup>

The Secretary General’s report, however, was never adopted.<sup>24</sup> Reports indicate that Security Council members felt the operation would not gain the support of the United States.<sup>25</sup> Specifically, Security Council members felt the Clinton administration would be loath to engage in a new peacekeeping operation in Africa while in the midst of “delicate negotiations with Congress on the payment of \$1 billion in arrears.”<sup>26</sup>

Without supervisory presence to ensure enforcement, the Abidjan Accord began to unravel when RUF rebels failed to disarm and de-

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RUF, and former Sierra Leonean soldiers joined with the rural rebel group, RUF, to form the junta).

19. See *Report of the Secretary-General on Sierra Leone*, U.N. SCOR, 52d Sess., paras. 5-7, U.N. Doc. S/1997/80 (1997).

20. See *id.* para. 26.

21. See *id.* para. 27 (detailing the United Nations plan to send a mission of both armed and unarmed soldiers to ensure adequate security presence).

22. *Id.* para 1.

23. *Id.*

24. See Mark Tran & Claudia McElroy, *U.N. Failure in Sierra Leone Feeds Recriminations: Foreigners Await Rescue as Nigeria Sends Troops to Reverse Coup*, GUARDIAN, May 29, 1997, at 15 (noting that “Mr. Anan’s report . . . has been gathering dust since January”).

25. See *id.*

26. *Id.*

mobilize according to schedule.<sup>27</sup> Soldiers in Sierra Leone's national army, frustrated by unpaid wages and perceived ethnic favoritism, began to support the rebels.<sup>28</sup> Tensions exploded on May 25, 1997, when soldiers seized government buildings and freed armed prisoners from Freetown's main jail.<sup>29</sup> Notably, the prisoners freed by RUF forces included the head of the RUF, Major Johnny Paul Koromah. Koromah quickly declared himself head of the new government, suspended the constitution, and banned all political parties.<sup>30</sup>

Sierra Leone's struggles with democracy were watched closely by its West Africa neighbor, Nigeria.<sup>31</sup> Since 1990, during the darkest days of Sierra Leone's civil war, Nigerian troops, operating through the ECOWAS, have been present in Sierra Leone.<sup>32</sup> When the RUF staged the *coup d'état*, Nigeria responded by sending more troops and engaging in full-fledged military combat with the rebels.<sup>33</sup> From exile in Guinea, President Kabbah invited Nigeria to take military action in order to overturn the *coup d'état*.<sup>34</sup> A week after the *coup d'état*, Nigerian warships commenced heavy shelling of Freetown, specifically targeting rebel-held locations. Ultimately, military efforts failed, and Nigerian troops were forced to withdraw.<sup>35</sup>

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27. See Rupert, *supra* note 13, at A21 (describing RUF leaders' failure to attend the scheduled demobilization and the continued acts of violence designed to undercut the peace accord).

28. See *id.* (reporting that soldiers resorted to looting as a result of frustration with low wages).

29. See *id.*

30. See *id.*

31. See Gerard Vanderberghe, *West African Troops Join Attack on Liberian Faction*, CHI. SUN TIMES, Sept. 17, 1990, at 19 (stating that Nigeria provided the largest contingent of troops in the ECOWAS force).

32. For example, during Sierra Leone's 1997 democracy struggle, Nigerian troops guarded the international airport in Freetown, the state house, and the presidential complex. See McElroy, *supra* note at 14, at 13.

33. See Rupert, *supra* note 8, at A27 (stating that periodic attacks launched by Nigerian troops resulted in some civilian casualties).

34. See Anthony Goldman, *Humiliated Nigerian Army Retires Hurt: Botched Intervention in Sierra Leone Has Left the Military Regime Morally Exposed*, FIN. TIMES, June 4, 1997, at 3 ("There is complete anarchy in the country. Somebody needs to restore law and order . . .").

35. See *id.* (explaining that Nigerian ground troops could not defend against the alliance between government troops and former rebels).



The Organization of African Unity ("OAU") swiftly condemned the *coup d'état* in Sierra Leone and called for the restoration of democracy.<sup>36</sup> The United Nations Security Council, however, did not act as rapidly. Five months after the *coup d'état*, the Security Council passed Resolution 1132, requesting the military junta to "relinquish power" and allow the "restoration of the democratically elected government."<sup>37</sup> Although the Security Council found that the situation in Sierra Leone constituted a threat to international peace and security in the region, the Security Council stopped short of authorizing military intervention.<sup>38</sup> Instead, it authorized the imposition of sanctions against the regime, prohibiting the sale of petroleum, arms, and military equipment to the RUF junta.<sup>39</sup> The Security Council authorized ECOWAS to ensure the "strict implementation" of the sanctions, but again stopped short of authorizing the use of force by ECOWAS in implementing the provisions of the Resolution.<sup>40</sup>

While the Security Council debated appropriate responses to the *coup d'état*, West Africans attempted to negotiate an end to the RUF's illegitimate regime. After numerous breakdowns and impasses, the negotiations eventually bore fruit. In October 1997, representatives of Major Koromah and President Kabbah signed a peace agreement in Conakry, Guinea.<sup>41</sup> The Conakry Agreement set out a peace plan for Sierra Leone and a six-month timetable for its imple-

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36. See Andrew Meldrum, *Annan and OAU Leaders Endorse Intervention against 'Usurpers'*, GUARDIAN, June 3, 1997, at 14 (explaining that both the OAU and Kofi Annan supported Nigeria's assault on Freetown); see also Howard W. French, *Nigeria, Set Back by Sierra Leone Rebels, Flies in More Troops*, N.Y. TIMES, June 4, 1997, at A7 (noting that "one OAU delegate after another supported Nigeria's efforts").

37. S.C. Res. 1132, U.N. SCOR, 51st Sess., 3822 mtg. para. 1, U.N. Doc. S/RES/1132 (1997).

38. See *id.* para. 4 (encouraging ECOWAS to search for a peaceful end to the crisis).

39. See *id.* para. 8 (calling for ship inspections to verify cargo and final destinations).

40. See *id.*

41. See *Second Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 52d Sess. paras. 2, 25, U.N. Doc. S/1997/958 (1997) (treating the signing of the Agreement as a significant step towards resolving the crisis in Sierra Leone).

mentation.<sup>42</sup> Under the agreement, rebels were to begin demobilizing and disarming immediately, and Kabbah was to be restored as President of Sierra Leone no later than April 22, 1998.<sup>43</sup>

The six-month clock governing the Conakry Agreement began ticking on October 23, 1997.<sup>44</sup> By late 1997, however, it became clear that the peace process was not progressing according to schedule.<sup>45</sup> RUF rebels resisted disarmament and fighting continued in the countryside.<sup>46</sup> By early 1998, guerrilla activity against the junta were intense, particularly around the rural centers of Kenema and Bo.<sup>47</sup> An organization known as the Civil Defense Unit ("CDU"), comprised of a rural militia known as the "Kamajors" and traditional village-based fighters, escalated their activities against the junta forces.<sup>48</sup> As military activities continued, the humanitarian situation in the rural areas, particularly around the southern town of Bo, deteriorated. In February 1998, the United Nations Special Envoy to Sierra Leone reported critical food shortages and a rising number of attacks on civilians.<sup>49</sup> By this time it was clear that the Conakry Agreement alone would not bring peace to Sierra Leone.<sup>50</sup>

On February 13, 1998, with two months remaining for the implementation of the Conakry Agreement timetable, Nigerian troops

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42. *See id.* para. 3.

43. *See id.*

44. *See id.* (providing that ECOWAS Military Observer Group ("ECOMOG") will monitor all parties involved to ensure adherence to the timetable).

45. *See id.* paras. 14-16 (noting that the junta appears to be hesitant to negotiate the implementation of the Conakry Agreement).

46. *See Third Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 53d Sess. para. 10, U.N. Doc. S/1998/103 (1998) (explaining findings by the technical survey team that the security situation in the countryside remained highly volatile).

47. *See id.* (describing intensified guerilla-type actions employed by the Civil Defense Unit ("CDU") against the junta).

48. *See id.* (noting that the CDU obtained control of all major roads in Sierra Leone).

49. *See id.*

50. *See id.* paras. 32-41 (stressing the need for assistance and support from the entire international community in the implementation of the Agreement).

captured Freetown, and ousted Koromah's government.<sup>51</sup> Nigeria's actions were no surprise to those in the region. For months, Nigerian troops in neighboring Liberia armed, trained, and supported the Kamajors in their civil war against the junta.<sup>52</sup> The fall of Freetown marked the end of a nine-day full military offensive by the Nigerian forces, which operated nominally under the auspices of ECOMOG.<sup>53</sup> Nigerian forces captured junta military leaders, but Koromah apparently escaped the country and fled to Guinea.<sup>54</sup> Sierra Leoneans welcomed Nigeria's intervention and reacted with joy to the overthrow of Koromah's regime.<sup>55</sup>

The international community accepted the Nigerian actions in Sierra Leone, apparently willing to turn a blind eye to legality of the intervention.<sup>56</sup> The OAU welcomed Nigeria's actions almost immediately.<sup>57</sup> The United Nations Security Council issued a statement welcoming "the fact that the military junta has been brought to an end" and commended "the important role" that the ECOWAS played in the "peaceful resolution" of the crisis.<sup>58</sup>

On March 10, 1998, President Kabbah returned to power in Sierra Leone and became the first democratically elected African leader to be restored through the use of force.<sup>59</sup> Nine of the fifteen members of the new cabinet served under Kabbah before the May 1997 *coup*

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51. See Rupert, *supra* note 18, at A23.

52. See Howard French, *A West Africa Border with Back-to-Back Wars*, N.Y. TIMES, Jan. 25, 1998, at 3.

53. See Rupert, *supra* note 18, at A23 (explaining overthrow of the *coup d'état* by the Nigerian offensive nine months prior).

54. See *Ousted Sierra Leonean Junta Leader Sighted*, XINHAU ENG. NEWSWIRE, Mar. 2, 1998, available in 1998 WL 2793516 (stating that Koromah escaped by wearing a false beard and posing as a priest).

55. See Rupert, *supra* note 8, at A27 (describing Freetown residents' warm welcome of Nigerian troops and local praise for the ECOMOG).

56. *Sierra Leone: Putting a Country Together*, *supra* note 7, at 44 (arguing that Nigerians did not have a proper mandate to intervene in Sierra Leone).

57. See *id.* (noting that OAU has nominal control of ECOMOG).

58. See *Statement by the President of the Security Council*, U.N. SCOR, 53d Sess. at 1, U.N. Doc. S/PRST/1998/5 (1998).

59. See French, *supra* note 6, at A3 (discussing the details of President Kabbah's return to power).

*d'état*.<sup>60</sup> On March 16, 1998, the Security Council adopted Resolution 1556, welcoming Kabbah's return to power and partly terminating the sanctions imposed by Resolution 1132.<sup>61</sup>

Although a democratically elected government again governs Sierra Leone, the wounds of the civil war have yet to heal.<sup>62</sup> The security situation remains tense in many of the rural areas, and factions loyal to Koromah pose a threat to the fragile peace.<sup>63</sup> In its resolution of April 17, 1998, the Security Council authorized the deployment of up to ten military liaison and security advisory personnel to work with the government of Sierra Leone and ECOMOG to design a disarmament plan and identify former combatants to be disarmed.<sup>64</sup>

Most recently, the situation in Sierra Leone has again deteriorated, with renewed violence spreading throughout the country.<sup>65</sup> RUF soldiers, operating under the code name "No Living Thing" are trying to regain power by capturing rural areas through a campaign of violence and gross violations of human rights. On June 13, 1998, the Security Council passed Resolution 1181 condemning the "continued resistance of the ousted junta and members of the RUF to the authority of the legitimate government," and demanding that the rebels "lay

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60. See *Sierra Leone Names Downsized Post-Junta Cabinet*, AGENCE FRANCE PRESSE, Mar. 20, 1998, available in 1998 WL 2246083 (listing cabinet positions and the newly elected cabinet members).

61. See S.C. Res. 1156, U.N. SCOR, 52 Sess., 3861st mtg. para. 2 U.N. Doc. S/RES 1556 (1998) (terminating the prohibitions on the sale and supply of petroleum to Sierra Leone).

62. See James Rupert, *Sierra Leone Rebels Accused of Atrocities*, WASH. POST, May 14, 1998, at A27 (describing resistance of junta forces to Nigerian efforts to secure the countryside).

63. See *id.* (detailing the killings and mutilation of civilians by junta forces); see also *Statement by the President of the Security Council*, U.N. SCOR, 52d Sess., 3882d mtg. at 1, U.N. Doc. S/PRST/1998/P3 (1998); *U.N. Security Council Resolution 1171*, U.N. SCOR, 52d Sess., 3889th mtg. paras 1-9, U.N. Doc. S/RES 1171 (1998) (condemning the "continued resistance to the authority of the legitimate Government of Sierra Leone").

64. See *U.N. Security Council Resolution 1162*, U.N. SCOR, 52d Sess., 3872d mtg. para. 5 U.N. Doc. S/RES/1162 (1998).

65. See Barbara Crossette, *In West Africa, a Grisly Extension of Rebel Terror*, N.Y. TIMES, July 30, 1998, at A1 (describing the rebel "campaign of butchery" against civilians).

down their arms immediately.”<sup>66</sup> RUF soldiers continue, however, to terrorize rural communities with violence. The Sierra Leonean government estimates that over 1,000 people have had limbs amputated by the RUF since the junta was forced from power.<sup>67</sup>

## II. THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES

In overthrowing the illegitimate Kabbah regime, Nigerian troops acted under the auspices of the ECOWAS.<sup>68</sup> Although ECOWAS has served increasingly as a military force in West Africa,<sup>69</sup> its founders envisioned an economic community similar to the European Community.<sup>70</sup> In May 1975, the Treaty of the Economic Community of West African States entered into force, creating a community of States covering most of West Africa.<sup>71</sup> The founding aims of ECOWAS are to “promote co-operation and development in all fields of economic activity, particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, and in social and cultural matters.”<sup>72</sup> The founding ECOWAS treaty contained no provisions concerning the establishment of a multinational military force.<sup>73</sup>

66. *U.N. Security Council Resolution 1181*, U.N. SCOR, 3902d mtg. para. 1, U.N. Doc. S/RES 1181 (1998).

67. See James Rupert, *Sierra Leone Endures Machete's Edge*, WASH. POST, Dec. 4, 1998, at A1.

68. Since 1990, ECOWAS troops have been stationed in both Liberia and Sierra Leone, playing a critical role in the Liberian civil war. See Rupert, *supra* note 62, at A27.

69. See generally Herbert Howe, *Lessons of Liberia: ECOMOG and Regional Peace Keeping*, in 21:3 INT'L SECURITY 145, 154-60 (1996) (describing the military history of ECOWAS).

70. See Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 1010 U.N.T.S. 17, 14 I.L.M. 1200 (1975) (describing the intended role of ECOWAS in West African peacekeeping).

71. Original ECOWAS signatories were Benin, Gambia, Ghana, Guinea-Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo, and Upper Volta (now Burkina Faso). See *id.*

72. Treaty of the Economic Community of West African States (ECOWAS), *supra* note 70.

73. See *id.*

Indeed, in 1978, the ECOWAS members signed a Protocol on Non-Aggression calling for the peaceful settlement of disputes within the Community.<sup>74</sup>

In 1981, however, ECOWAS members entered into a Protocol Relating to Mutual Assistance on Defense, which established the multinational ECOWAS defense force.<sup>75</sup> The Protocol envisioned a defense force authorized to act in cases of armed conflict between two or more members and "in cases of internal armed conflict within any Member State engineered and supported actively from outside likely to endanger the security and peace of the entire Community."<sup>76</sup> In both cases, intervention is permitted only when the head of state of the member concerned submits a written request to ECOWAS authorities.<sup>77</sup> The Protocol explicitly states that "Community forces shall not intervene if the conflict remains purely internal."<sup>78</sup> As well as authorizing military intervention under certain strict guidelines, the Protocol establishes a command structure to implement its provisions.<sup>79</sup>

The Protocol Relating to Mutual Assistance on Defence remained untested until the Liberian civil war in the early 1990s.<sup>80</sup> When civil

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74. See Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, in 53 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 603, 613 (1993) (citing Protocol on Non-Aggression of ECOWAS (Apr. 22, 1978)) (stating that the Protocol is "based on the consideration that the organisation [ECOWAS] could not attain its objectives without the establishment of a peaceful atmosphere").

75. See Protocol Relating to Mutual Assistance on Defence, U.N. Doc. A/SP3/5/81, available in 4 NIGERIA'S TREATIES IN FORCE 898 (1990) (reasoning that the "external defence" of member states will be more effective with the coordination and mutual assistance of other member states).

76. *Id.* art. 4.

77. See *id.* art. 16 (explaining that a written request indicates proper notification of ECOWAS authority and placement of ECOWAS forces under a state of emergency).

78. *Id.* art. 18.

79. See *id.* art. 12.

80. See Nolte, *supra* note 74, at 613; Kofi Oteng Kufuor, *The Legality of Intervention in the Liberian Civil War by the Economic Community of West African States*, 5 AFR. J. INT'L & COMP. L. 525 (1993); B.G. Ramcharan, *Cooperation between the U.N. and Regional/Sub-Regional Organizations in Internal Conflicts: The Case of Liberia*, 4 AFR. Y.B. INT'L L. 3 (1996).

war erupted in Liberia in 1990, no ECOWAS member had committed troops to serve under the common defense force.<sup>81</sup> When ECOMOG forces landed in Liberia in August 1990, the forces operated under the Chairmanship of ECOWAS, and not within the institutional framework established by the Protocol on Mutual Assistance on Defence.<sup>82</sup> ECOMOG troops, comprised largely of Nigerians, remained active in Liberia through the Liberian elections in July 1997.<sup>83</sup>

The Nigerian troops intervened in Sierra Leone under the auspices of ECOWAS and served, technically, as ECOMOG troops.<sup>84</sup> Many observers in the region, however, considered the intervention a Nigerian action and the international media reported the overthrow of the junta as a Nigerian victory.<sup>85</sup> Nevertheless, the United Nations and the OAU accepted the intervention as an ECOWAS action.<sup>86</sup>

### III. THE LEGALITY OF ECOWAS ACTIONS IN SIERRA LEONE

The legality of ECOMOG's actions in Sierra Leone must be measured according to applicable rules of international law, particularly the international legal norms governing the use of force between states.<sup>87</sup>

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81. See Nolte, *supra* note 74, at 606-08 (explaining ECOWAS's initial attempts to resolve the conflict through peaceful negotiations).

82. See *id.* (noting that ECOWAS, not the United Nations Security Council, authorized the intervention).

83. See *Statement by the President of the Security Council: The Situation in Liberia*, U.N. SCOR, 3805th mtg. at 1, U.N. Doc. S/PRST/1997/41 (1997) (discussing the presence of troops in Liberia from August 1990 through July 1997).

84. See Rupert, *supra* note 62, at A27.

85. See French, *supra* note 6, at A3. Critics of Nigeria's own military government see the intervention as a means to divert international attention away from Nigeria's unpopular military leader, General Sani Abacha, and as a thinly veiled ploy for Sierra Leone's mineral wealth. See A. Bolaji Akinyemi, *End the Military Meddling*, GUARDIAN, June 5, 1997, at 21.

86. See United Nations Press Release, U.N. Doc. SG/SM/6481 AFR/44 (Mar. 10, 1998) (reporting that the overthrow of the military junta accomplishes "a major objective . . . of the Economic Community of West African States").

87. See THOMAS EHRLICH & MARY ELLEN O'CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 157 (1993) (describing the sources of international law relating to the use of force).

Specifically, the legality of the intervention to restore the democratically elected government of President Kabbah must be weighed in light of the general prohibition on the use of force in Article 2(4) of the United Nations Charter and the broader principle of non-intervention, recognized under customary international law.<sup>88</sup>

#### A. ECOMOG ACTION TO RESTORE DEMOCRACY IN SIERRA LEONE AND THE SCOPE OF ARTICLE 2(4) OF THE UNITED NATIONS CHARTER

Article 2(4) of the United Nations Charter explicitly prohibits Member States from threatening or using force against other states.<sup>89</sup> ECOMOG troops clearly adopted aggressive military measures against another state.<sup>90</sup> The shelling of Freetown by Nigerian warships and planes and the attack on Sierra Leonean soldiers with ground troops<sup>91</sup> undoubtedly represents a use of force envisioned by Article 2(4).<sup>92</sup> Thus, there appears to be sufficient grounds to conclude that these measures fall within the scope of this United Nations Charter

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88. See *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 106 (June 27); *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9) (explaining that the alleged right of intervention cannot find a place in international law); see also 1 SIR ROBERT JENNINGS & SIR ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* 428-29 (9th ed. 1997); MALCOLM N. SHAW, *INTERNATIONAL LAW* 797 (4th ed. 1997).

89. See U.N. CHARTER art. 2, para. 4. The United Nations Security Council had the responsibility of implementing and enforcing Article 2. See EHRLICH & O'CONNELL, *supra* note 87, at 305.

90. See *Definition of Aggression Resolution*, Annex, G.A. Res. 3314 (XXIX 1974) (stating that "[t]he first use of armed force by a state in contravention of the Charter shall constitute prima facie evidence of an act of aggression").

91. See James Rupert, *Nigerian Navy Shells Sierra Leone Rebels; Move Draws Counterattack in Capital*, WASH. POST, June 3, 1997, at A13 (describing the Nigerian attack on Freetown after rebels overthrew the government). Significantly, the goal of the Nigerian-led effort was to force the rebels to surrender. See *id.*

92. The discussion whether Article 2(4) of the United Nations Charter encompasses only armed force or is also applicable to economic coercion is therefore not relevant in the analysis of this case. For an overview of this problem, see Albrecht Randelzhofer, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 106, 112 (Bruno Simma et al. eds., 1994) (reviewing the question of whether Article 2(4) of the United Nations Charter encompasses only armed force, or is also applicable to other contexts, such as economic coercion).



provision.<sup>93</sup> Article 2(4), however, requires Member States to refrain from the threat or use of force only in cases where it is used “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>94</sup> The formulation of this provision suggests that Article 2(4) is not an absolute prohibition on the use of force.<sup>95</sup> Because the ECOWAS intervention in Sierra Leone sought to restore the democratically elected government, questions arise as to whether ECOMOG’s military actions fall beyond the reach of the Article 2(4) prohibition on the use of force.<sup>96</sup>

It has been argued that Article 2(4) must be read to prohibit only those military measures that are accompanied by a specific intent to violate the territorial integrity or political independence of a state.<sup>97</sup> Some authors suggest that force aimed at restoring a democratically elected government does not fall within the scope of the prohibition on the use of force contained in Article 2(4).<sup>98</sup> These authors argue that such interventions are not undertaken with the intent to annex another state’s territory and, thus, do not threaten a state’s territorial integrity.<sup>99</sup>

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93. See EHRlich & O’CONNELL, *supra* note 87, at 305 (noting that the United Nations General Assembly drafted the definition of aggression in response to the debate surrounding Article 2(4)). Specifically, the definition of aggression describes those state actions, which are prohibited uses of force. *See id.*

94. U.N. CHARTER, art. 2, para. 4. For a detailed discussion of Article 2(4), see Randelzholfer, *supra* note 92, at 106-28.

95. See PHILIP C. JESSUP, A MODERN LAW OF NATIONS 162 (1950) (stating that “if force can be used in a manner which does not threaten the territorial integrity or political independence of a state, it escapes the restriction of the first clause”).

96. *See id.* at 158 (noting that justifications for war have frequently been placed on high political aspirations and ideals).

97. *See* Argumentation of the United Kingdom Agent, Sir Eric Beckett, before the ICJ in the Corfu Channel Case, I.C.J. Pleadings (3 Corfu Channel) 264, 296 (Nov. 11, 1948); *see also* D. W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 152 (1958).

98. *See* FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 151 (2d ed. 1996) (arguing that the use of force to overthrow “despotic regimes” cannot be prohibited).

99. *See* Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516, 520 (1990) (stating that “there was never an intent to annex part or all of Panamanian territory, and hence, the intervention left the territorial integrity of Panama intact”); *see also* Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT’L L.J.

Furthermore, pro-democratic interventions do not violate the political independence of a state.<sup>100</sup> Rather, interventions to restore democratically elected governments support the political independence of a state by enforcing the nation's political will and sovereignty, which was violated by the overthrow of the government.<sup>101</sup> Thus, pro-democratic interventions are consistent with the purposes of the United Nations as they seek to further human rights<sup>102</sup> in accordance with the Preamble and Article 55 of the United Nations Charter, as well as principles of self-determination.<sup>103</sup>

Article 2(4)'s exclusion of pro-democratic interventions is further supported by the teleological argument that democracies do not attack

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163, 167 (1993).

100. See TESÓN, *supra* note 98, at 150 (stating that the use of force is banned when its use impairs territorial integrity, affects political independence, or goes against the purposes of the United Nations).

101. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990) (citing claims of the Nicaraguan Permanent Representative to the United Nations that the both the United Nations and OAS Charters establish "a flagrant violation of Panama's sovereignty and territorial integrity"); see also Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 374 (1995) (observing that sovereignty is derived from the will of the people, therefore, sovereignty does not belong to the ruler and, consequently, the ruler can actually violate state sovereignty).

102. For the discussion about an evolving human right to democratic governance, see, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 89 AM. J. INT'L L. 46 (1992); Gregory H. Fox, *The Right of Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992) (explaining the manner in which domestic democratic developments are affecting traditional concepts of state sovereignty in international law). See also Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289 (1995) (arguing that democracy has achieved universal recognition as an international legal right).

103. See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984) (noting that "the basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them"); see also Robert F. Turner, *Haiti and the Growth of a Democracy Entitlement*, in THE UNITED NATIONS AT FIFTY—SOVEREIGNTY, PEACEKEEPING, AND HUMAN RIGHTS 18, 25 (Don M. Snider et al. eds., 1995); Jeanne Kirkpatrick, DEP'T ST. BULL., No. 2081, Dec. 1983, p. 74; Halberstam, *supra* note 99, at 167.

each other and are less likely to wage war.<sup>104</sup> The fundamental purpose of Article 2(4), when read with the Preamble and Article 1(1) of the United Nations Charter, is the maintenance of international peace.<sup>105</sup> If democracy is viewed as a *conditio sine qua non* of peaceful relations among states,<sup>106</sup> the United Nations Charter provision on the prohibition of the use of force may be interpreted as excluding “pro-democratic” interventions in its scope.<sup>107</sup>

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104. For further discussion on this argument, see Immanuel Kant's explanations of his First Definitive Article in IMMANUEL KANT, *ETERNAL PEACE*, 76 (W. Hastie & Edwin D. Mead, eds., 1914); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs* (pts. 1-2), 12 PHIL. & PUB. AFF. 205, 323 (1983). See also Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANSNAT'L L. 449, 454 (1997) (tracing the roots of the theory linking constitutional organization to international peace).

105. See ANTONIO CASSESE, *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 3 (1986) (explaining that the United Nations Organization and its proclaimed purpose in Articles 1(2) and 2(4) are primarily “an attempt to institute a regime of collective peace enforcement”).

106. In addition to the argument of war avoidance through democratization, democracy is also closely linked to other important policy goals such as the protection of human rights, economic development, and environmental protection. See W. Michael Reisman, *Humanitarian Interventions and Fledgling Democracies*, 18 FORDHAM INT'L L.J. 794, 804 (1995) (stating that “[d]emocracy is a right guaranteed by international law and the *condition sine qua non* for the realization of many other internationally prescribed human rights”); see also Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 332 (1996) (detailing reasons to doubt the conclusion that international law should be concerned with democratic legitimacy). These include; the question of agency, grounds for believing democratic rule to be a necessary condition for other human rights, and the democratic peace thesis. See *id.* In addition to the argument of war avoidance through democratization, democracy is also closely linked to other important policy goals, such as, the protection of human rights, economic development, and environmental protection. For further analysis of this proposition, see John Norton Moore, *Towards a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 833, 826 (1997) (noting that this link suggests “a multiplicity of reasons to support democratic structures”).

107. See Reisman, *supra* note 103, at 644 (describing various constructions of Article 2(4)); D'Amato, *supra* note 99, at 520 (submitting that the use of force for territorial aggrandizement or colonialism does not qualify as humanitarian intervention); see also Richard B. Lillich, *Kant and the Current Debate over Humanitarian Intervention*, 6 J. TRANSNAT'L L. & POL'Y 397, 402 (1997) (interpreting Kant as supportive of the argument for humanitarian intervention to protect human rights).

A legal construction excluding the use of force for "benign ends"<sup>108</sup> from the scope of Article 2(4), however, raises serious issues concerning the interpretation of the prohibition of force, which is considered "the cornerstone of peace in the Charter."<sup>109</sup> These concerns are not based on the character of inventions seeking to restore democratically elected government, but on the fear that any exception to the prohibition will create the possibility of a "legion of loopholes"<sup>110</sup> in the norm and leave it vulnerable to abuse.<sup>111</sup> Making exceptions for "higher values," Oscar Schachter points out, may lead to a dilution of the norm to a point where "it could have no application except in the unlikely case of an announced aggression."<sup>112</sup> Such a narrow reading

108. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1626 (1984) (noting that the use of force to achieve a "benign end" does not fall within the scope of Article 2(4)). The International Court of Justice, for example, answered this question in the *Corfu Channel Case* of 1949 by rejecting the British claim that it has used minesweeping to vindicate legal rights. See *id.*

109. Humphrey M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 492 (1852 II); see generally Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971) (calling Article 2(4) "the heart of the United Nations Charter"); JAMES L. BRIERLY, *THE LAW OF NATIONS* 414 (Sir Humphrey Waldock ed., 6th ed. 1963) (declaring Article 2(4) as the "cornerstone of the Charter system").

110. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 85 (2d ed. 1994) (arguing that the injunction against resort to force in international relations should not be confined to specific situations affecting the territorial and political independence of states). Another author suggests that:

[S]ituations may arise in which attempts to settle disputes by peaceful means may be so delayed, and prospects of success so fantastically remote, that a minimal regard for law and justice in interstate-state relations might require the use of force in due time to vindicate these standards, and avoid even more catastrophic resort to force at a later stage . . . .

JULIUS STONE, *AGGRESSION AND WORLD ORDER* 43 (1958).

111. See Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291, 294 (1985); see also, M. K. Nawaz, *What Limits to the Use of Force: Can Force be Used to Depose an Oppressive Government?*, 24 INDIAN J. INT'L L. 406, 410 (1984).

112. Oscar Schachter, *Is There a Right to Overthrow an Illegitimate Regime?*, in *LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT—MELANGES MICHEL VIRALLY* 423, 427 (1991); see LOUIS HENKIN, *HOW NATIONS BEHAVE* 145 (2d ed. 1979) (noting that even intervention for humanitarian purposes can all too readily be used as a pre-text for aggression); Sarah A. Rumage, *Panama and the Myth of Humanitarian Intervention in U.S.*

of Article 2(4), excluding military measures undertaken by states for a variety of purposes from the scope of this provision, cannot control when the accepted rules of interpretation of international treaties,<sup>113</sup> which apply to the United Nations Charter, are employed.<sup>114</sup>

The wording of Article 2(4) is ambiguous.<sup>115</sup> The language concerning territorial integrity and political independence may be understood as restricting the scope of the prohibition on the use of force.<sup>116</sup> Alternatively, territorial integrity and political independence may simply explicate particularly egregious violations of the prohibition, in order to strengthen the guarantee against foreign military intervention.<sup>117</sup> In that case, the last clause functions as "a residual 'catch-all' provision."<sup>118</sup> Given this ambiguity in Article 2(4), alternative methods of interpretation, such as a systematic interpretation of the treaty, its purpose, and the *travaux préparatoires*, should be considered.<sup>119</sup>

*Foreign Policy: Neither Legal nor Moral, Neither Just nor Right*, 10 ARIZ. J. INT'L & COMP. L. 1, 27 (1993).

113. See Nawaz, *supra* note 111, at 409.

114. For further interpretations of the United Nations Charter, see Georg Ress, *Interpretation*, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 25 (Bruno Simma et al. eds., 1994) (detailing the Charter's legal position, interpretation in light of the Vienna Convention, and its revision); Pollux, *The Interpretation of the Charter*, 23 BRIT. Y.B. INT'L L. 54 (1946); Krzysztof Skubizewski, *Remarks on the Interpretation of the United Nations Charter*, in FESTSCHRIFT FÜR HERMANN MOSLER 891 (Rudolf Bernhardt et al. eds., 1983).

115. See CASSESE, *supra* note 105, at 3 (commenting on the various differences of opinion concerning the scope and content of Charter provisions).

116. See *id.* at 4 (observing that only certain specified types of force are proscribed by the Charter "namely, force directed against the territorial integrity or political independence of any State, or force inconsistent with the purposes of the United Nations").

117. See Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations*, 255 RECUEIL DES COURS 9, 199 (1995).

118. Manfred Lachs, *The Development and General Trends of International Law in Our Time*, 169 RECUEIL DES COURS 9, 162 (1980 IV).

119. See Ress, *supra* note 114, at 30 (discussing the interpretation of the United Nations Charter and the rules of the Vienna Convention on the law of treaties). The methods of treaty interpretation are codified in the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, Jan. 27, 1980, arts. 31-33, 1155 U.N.T.S. 331, 340. In accordance with Article 4 of the Convention, it is applicable only to treaties concluded after the Vienna Convention entered into force on January 27, 1980, and thus not to the United Nations Charter. Nonetheless, the general principles of treaty interpretation apply because of their status as

Under the systematic method of interpretation, the meaning of the norm is ascertained by comparison with other norms set forth in the treaty and by referencing the entire structure of the treaty.<sup>120</sup> The first section of the Preamble of the United Nations Charter, which sheds an interpretive light on the ensuing provisions,<sup>121</sup> refers to the goal of "sav[ing] succeeding generations from the scourge of war . . . ."<sup>122</sup> Furtherance of this goal requires "that armed force shall not be used, save in the common interest . . . ."<sup>123</sup> Article 1 defines the purpose of the United Nations and characterizes the Organization as a system of collective security, which holds a general prohibition on the use of force as its central tenant.<sup>124</sup> This tenant is also expressed in Article 24, under which Member States confer primary responsibility for the maintenance of international peace and security upon the Security Council.<sup>125</sup> Reviewing these provisions, it is possible to conclude that

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customary international law. See JENNINGS & WATTS, *supra* note 88, at 1271.

120. Ress, *supra* note 114, at 43 (discussing systematic interpretation in both the narrow and broad context). For an application of the principle of systematic interpretation see *Case Concerning Border and Transborder Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 94 (Dec. 20); *Advisory Opinion No. 13, Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of the Employer*, 1926 P.C.I.J. (ser. B) No. 13, at 23.

121. See Rüdiger Wolfrum, *Preamble, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 45, 48 (Bruno Simma et al. eds., 1994) (discussing the function of preambles in the interpretation of international treaties). To this end, the Preamble serves "as an interpretive guideline for the provisions of the Charter." *Id.* For further discussion on the function of preambles in the interpretation of international treaties, see *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 282 (Nov. 20).

122. U.N CHARTER preamble (explaining the United Nation's commitment to establish an international organization committed to human rights, justice, social programs and better standards of living).

123. *Id.* The attainment of the United Nation's goals are sought by practicing tolerance, maintaining international peace and security, and employing international machinery for the promotion of economic and social advancement. See *id.*

124. See Jost Delbrück, *Collective Security*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 646, 651 (Rudolf Bernhardt ed., 1992); Wolfrum, *supra* note 121, at 51 (explaining the defining characteristic of collective security to be the protection of members of a system from attack by other members).

125. See HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 283 (1951); Jost Delbrück, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 397, 400 (Bruno Simma et al. eds., 1994) (discussing the historical background, interpretation, and practice of Article 24).

the primary purpose of the United Nations Charter is to prohibit unilateral recourse to the use of force as broadly as possible.<sup>126</sup>

The fact that the United Nations adopts the promotion of human rights among its purposes does not contradict this finding.<sup>127</sup> Although there is no general agreement on how to resolve a possible conflict between the different purposes and principles of the Charter, the order in which the purposes and principles are set forth indicates a substantive priority.<sup>128</sup> In both the Preamble and Article 1, the prevention of war and the maintenance of international peace and security are listed before the promotion of human rights.<sup>129</sup> Thus, the United Nations Charter expresses a clear hierarchy by declaring peace "as the supreme value . . . more compelling even than human rights."<sup>130</sup> This does not mean human rights must always be subordinate to the maintenance of international peace and state sovereignty.<sup>131</sup> It indicates, however, that the protection of human rights through military measures are primarily

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126. See Krysztof Skubiszewski, *Use of Force by States, Collective Security, Law of War and Neutrality*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 739, 746 (Max Soerensen ed., 1968) (explaining that the framers of the Charter intended to remove force as a means of settling international disputes).

127. See TESÓN, *supra* note 98, at 3 (explaining that restraint from use of force and fundamental human rights are central concepts in legal and moral judgments).

128. See Albrecht Randelzhofer, *Purposes and Principles of the United Nations*, in 2 *UNITED NATIONS: LAW, POLICIES AND PRACTICE* 994, 996 (Rüdiger Wolfrum & Christiane Philipp eds., 1995).

129. The Preamble states, in relevant part, "[w]e the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights." U.N. CHARTER preamble. Similarly, Article 1 of the Charter provides that "[t]he Purposes of the United Nations are to maintain international peace and security, and . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. CHARTER art. 1.

130. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 146 (1990); see Tom J. Farer, *Human Rights in Law's Empire: The Jurisprudence War*, 85 AM. J. INT'L L. 117, 121 (1991) (explaining that an interpretation of the Charter that considers any use of force, humanitarian or otherwise, illegal is consistent with the intent of the Charters framers); see also EHRlich & O'CONNELL, *supra* note 87, at 328 (discussing the legal context for asserting a right of forcible humanitarian intervention).

131. See JESSUP, *supra* note 95, at 169 (stating that "[t]raditional international law has recognized the right of a state to employ its armed forces for the protection of the lives and property of its nationals abroad").

reserved to collective actions under the authority of the United Nations.

This interpretation is supported by Article 2(3), which obliges Member States to pursue the peaceful settlement of disputes, and influences the interpretation of Section 4 of this Article.<sup>132</sup> In addition, other United Nations Charter provisions that include exceptions from the prohibition on the use of force, such as Articles 42, 51, and 53, set up detailed procedural requirements.<sup>133</sup> From these provisions, one may conclude that the United Nations Charter permits the use of force only under narrow, explicitly stated prerequisites.<sup>134</sup> Thus, the systematic interpretation demonstrates that Article 2(4) entails a comprehensive prohibition on the use of force covering all forms of interstate armed conflicts regardless of their purpose.<sup>135</sup>

This conclusion is supported by a teleological interpretation of Article 2(4).<sup>136</sup> The teleological interpretation addresses the meaning of a treaty provision in light of the purpose pursued by the treaty as a whole.<sup>137</sup> The primary purpose of the United Nations Charter is to

132. See U.N. CHARTER art. 2, para. 3 (stating that “[m]embers shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”); DINSTEIN, *supra* note 110, at 85 (noting that the term “war” is not dispensed within the Preamble).

133. See DINSTEIN, *supra* note 110, at 86 (articulating that, “[n]ot counting the license to take action against the enemy states of the Second World War (Articles 53 and 107), there are only two enduring settlements in which the Charter permits the use of inter-state force: collective security (Article 42) and self-defense (Article 51)”).

134. See *id.* (describing attempts to limit the scope of the prohibition on the use of force).

135. See LASSA OPPENHEIM & HERSCH LAUTERPACHT, INTERNATIONAL LAW 154 (7th ed. 1952); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963); Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 91 (1978 I).

136. See Ress, *supra* note 114, at 42.

137. See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 et seq. (May 28) (listing elements of interpretation of the Genocide Convention to include, “[t]he origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, [and] the relations which exist between the provisions of the Convention”); Case Concerning the Aerial Incident of July 27th, 1955 (Isr. v. Bulg.), 1959 I.C.J. 127, 142 (Preliminary Objections of May 26); Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151, 157 (July 20); see also Ress, *supra* note 114, at 42 (stating that interpretations relating to the



comprehensively prohibit the use of force with the explicitly and detailed provisions of the United Nations Charter itself as the only exceptions.<sup>138</sup> Contrary to this goal, a narrow interpretation of Article 2(4) would exclude a substantive portion of intrastate armed conflicts from the scope of the prohibition.<sup>139</sup> In accordance with the interpretive rule of *effet utile* or the effectiveness principle, used to interpret international treaties such as the United Nations Charter,<sup>140</sup> when two or more possible interpretations conflict the one that best serves the recognizable purpose of the treaty prevails.<sup>141</sup> Because a broad understanding of Article 2(4) best serves the United Nations Charter's aim to prohibit the use of force, the teleological interpretation also supports a wide reading of this United Nations Charter provision.<sup>142</sup>

Finally, the legislative history as manifested in the *travaux préparatoires* indicates the wording of Article 2(4) was not intended to restrict the scope of this provision but to give specific guarantees to small states fearful of foreign interventions by powerful countries.<sup>143</sup>

purpose of the Charter should be confined to the provisions of the treaty); Skubiszewski, *supra* note 126, at 893.

138. See Ress, *supra* note 114, at 42.

139. See DINSTEIN, *supra* note 110, at 85 (commenting that violation of territorial integrity does not occur where the use of force is confined within a foreign state's boundaries).

140. See International Status of South-West Africa, 1950 I.C.J. 128, 187 (July 11) (de Visscher, J., dissenting) (urging that an interpretation of treaty clauses should not deprive the treaty of the practical effect of benefiting others); see also Ress, *supra* note 114, at 42 (discussing the "Practical-Effects" rule).

141. See International Status of South-West Africa, 1950 I.C.J. at 187 (arguing for systemic-wide efforts at reconciling treaty texts and for the preservation of the practical effects of each treaty); see also Ress, *supra* note 114, at 42 (stating that an interpretation which best serves the purpose of the treaty should be followed); Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness*, 26 BRIT. Y.B. INT'L L. 48, 67 (1949).

142. See Bert V.A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in CASSESE, *supra* note 105, at 7 (explaining Article 2(4) as a prohibition on war and a "precondition of life itself in the atomic era").

143. For a more detailed description, see BROWNLIE, *supra* note 135, at 266. An indication of the original intent is revealed in discussions of the preparatory committee. The delegate from Brazil, for example, objected to the possibility of a restricted interpretation of the wording of Article 2(4) of the United Nations Charter. In response, the United States delegate made clear that the intention of the authors of the original text was to state in the broadest terms an absolute, all-inclusive prohibition. See VI UNC.I.O., at 334-35; see also Edward Gordon, *Article 2(4) in*

Accordingly, an interpretation of Article 2(4) indicates a presumption against unilateral military measures underlying the United Nations Charter as a whole.<sup>144</sup> Any military intervention by a foreign state falls under the scope of Article 2(4), regardless of whether its purpose is benign or hostile.<sup>145</sup>

Another line of argument against this interpretation of Article 2(4) emphasizes that the potential contribution of international law to controlling the use of force remains of limited practical significance until the international politics move toward further democratization as the only guarantee for a reciprocal observance of international norms.<sup>146</sup> This argument is reflected in the general position of a number of legal and international relations scholars.<sup>147</sup> Unless the system of collective security envisioned at the signing of the United Nations Charter is effectively enforced, the prohibition on the use of force in Article 2(4) is altered by the contrary subsequent practice of states, as adopted to conform to the realities of the international system.<sup>148</sup>

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*Historical Context*, 10 YALE J. INT'L L. 271, 276 (1985).

144. See BROWNLIE, *supra* note 135, at 268.

145. See CASSESE, *supra* note 105, at 4 (commenting that the qualification that force must be directed "against the territorial integrity of political independence" of the injured state stems from Article 10 of the Covenant of the League of Nations).

146. See David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 75 (1994) (noting that the progressive liberal thought believes in the notion that the "use of force in international politics could be controlled through international law").

147. See Jeane J. Kirkpatrick, *Law and Reciprocity*, 78 AM. SOC. INT'L L. 59, 60 (1984). For an overview of this position, see Fidler, *supra* note 146, at 75 (arguing that liberal realism recognizes the potential limitations of international law to control the use of force "unless international political conditions charge significantly so that reciprocity will be effective when vital national interests are at stake").

148. See, e.g., Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 105 (1987) (commenting that the state practice of interpreting customary international law or the Charter has drastically altered the meaning of Article 2(4)); W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 281 (1985); Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of Its Best Friends*, 27 HARV. INT'L L.J. 599, 620 (1986); see also JULIUS STONE, *AGGRESSION AND WORLD ORDER* 96 (1958) (questioning what it means to be in the position of a wronged state when the determination of "collective interest" fails); A.V. THOMAS & A.J. THOMAS, *NON-INTERVENTION* 209 (1956). The most extreme position in the legal literature suggests that due to a lack of effective

These arguments, however, are not sufficient to justify a narrow interpretation of the prohibition on the use of force in Article 2(4).<sup>149</sup> In addition, no state has invoked another state's breach of Article 2(4) as a legal justification for abrogating this provision.<sup>150</sup> Furthermore, whether the United Nations Charter's rules on the use of force have changed through contrary subsequent state practice remains questionable.<sup>151</sup> Although the practice of states is a generally recognized method of treaty interpretation,<sup>152</sup> the frequent violations of the prohibition on the use of force throughout the history of the United Nations did not lead to a reinterpretation or even abrogation of Article 2(4). It is questionable whether the Charter, in light of its express and detailed

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enforcement, Article 2(4) has become a "dead letter." See Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); see also Eugene Rostow, *The Legality of the International Use of Force by and from States*, 10 YALE J. INT'L L. 286, 287-88 (1985); Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 45 (1990) (explaining that states have chosen to reject the strict norm of Article 2(4)). Instead, states favor a more permissive interpretation that allows for the use of force in certain circumstances. See Arend, *supra*, at 45. States have not reached a consensus on a permissive norm that limits intervention to situations where it is used for democratic self-determination. See *id.*

149. As one author observes, the legislative history of this provision does not support the notion that an effective functioning of the collective security system is a prerequisite to renouncing the use of force. See Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 125 (1986) (arguing that the Charter's drafters realistically and properly preserved the right of self-defense in response to an armed attack); see also HENKIN, *supra* note 130, at 138; Randelzhofer, *supra* note 92, at 128.

150. See Schachter, *supra* note 149, at 128-29 (discussing various legal theories supporting the view that new developments in international relations have weakened rules on the use of force).

151. See *id.* at 130 (stating that some commentators consider consistent violations of Article 2(4) to supercede the Charter rules and corresponding customary international law).

152. See Vienna Convention on the Law of Treaties, *supra* note 119, art. 31(3)(b), 1155 U.N.T.S. at 340; see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 22 (June 21) (explaining that successfully passed United Nations resolution should be presumed valid); ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 424 (1961); Ress, *supra* note 114, at 39 (analyzing subsequent practice as an autonomous element of interpretation and of constitutive Charter adoption).

provisions concerning amendments to the treaty,<sup>153</sup> is open to a process that amounts not to a mere reinterpretation, but a fundamental change in the meaning of one of its core provisions.<sup>154</sup>

Assuming the United Nations Charter is a flexible, "living constitution"<sup>155</sup> that permits such extreme interpretations,<sup>156</sup> it is not clear that state practice supports the proposition that the scope of Article 2(4) has changed.<sup>157</sup> Treaties are never changed through the practice of states alone. Change requires at least an implicit agreement between all parties concerning the changed meaning of the treaty provision in question.<sup>158</sup> In nearly every case, when a state turned to military means without a valid justification, a large number of states condemned these

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153. See U.N. CHARTER arts. 108, 109.

154. See Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism under the United Nations Charter*, 31 TEX. INT'L L.J. 353, 372 (1996) (describing attempts to move beyond the traditional paradigm as efforts leading to a new law of "constitutional interpretation"). For a skeptical view on fundamental changes of the United Nations Charter through subsequent practice in general, see Bruno Simma & Stefan Brunner, *Article 27, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 430, 450 (Bruno Simma et al. eds., 1994) (offering a skeptical view on fundamental changes of the United Nations Charter through subsequent practice).

155. Jost Delbrück, *Peacekeeping by United Nations and the Rule of Law, in DECLARATIONS ON PRINCIPLE—A QUEST FOR UNIVERSAL PEACE* 73, 79 (Robert J. Akkerman et al. eds., 1977); see LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS—COMMENTARY AND DOCUMENTS* 23 (3d ed. 1969).

156. For a discussion on modification of the Charter in connection with the requirement of the 'concurring votes' of the permanent members of the Security Council under United Nations Charter Article 27(3), which in practice also allows abstentions of the permanent members, see Simma & Brunner, *supra* note 154, at 447. The validity of the practice was also confirmed by the I.C.J. See Vienna Convention on the Law of Treaties, *supra* note 119, art. 31(3)(b), 1155 U.N.T.S. at 340; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (June 21).

157. See Ress, *supra* note 114, at 39 (discussing subsequent practice in a historical subjective perception).

158. See Simma & Brunner, *supra* note 154, at 450; Wolfram Karl & Bernd Mützelburg, *Article 108, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 1163, 1167 (Bruno Simma et al. eds., 1994) (discussing informal modification of treaties and constitutive instruments of international organizations).

acts as a violation of international law.<sup>159</sup> Furthermore, in justifying the use of force, states have been reluctant to rely on a narrow interpretation of Article 2(4), they have instead based their actions on a broad understanding of the right of self-defense, thus recognizing the validity of this Charter provision.<sup>160</sup> If these arguments had merit during Cold War super-power confrontations, they have now lost much of their factual basis.<sup>161</sup> The end of the Cold War marked a revitalization, indeed the awakening, of the Security Council and the system of collective security.<sup>162</sup> This revitalization materialized with the adoption of sanctions and the authorization to use force against Iraq after its invasion of Kuwait in August 1990.<sup>163</sup>

The military actions of the ECOWAS states, primarily Nigeria, fall within the scope of the prohibition on the use of force of Article 2(4), regardless of the purpose pursued. This does not necessarily render the military action illegal under international law. To justify the use of armed force by ECOMOG, however, it is necessary to examine the possible legal basis of ECOWAS's intervention.

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159. See JOHN MURPHY, *THE UNITED NATIONS AND THE CONTROL OF VIOLENCE* 125 (1982).

160. See Schachter, *supra* note 108, at 1632. *But see* David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERM. Y.B. INT'L L. 198, 202 (1996) (discussing the "words versus action" problem in this context).

161. See JENNINGS & WATTS, *supra* note 88, at 423-27 (providing ten Cold War examples of various countries invoking the right of self-defense); PETER MALANCZUK, *HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE* 25, 26 (1993) (recognizing the argument against authorizing the use of force in response to human rights violations confined to the territory of violating state); Nolte, *supra* note 74, at 620; TESÓN, *supra* note 98, at 158 n.81 (conceding the growing weakness of this argument).

162. See Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 453-54 (1991) (asserting that the end of the Cold War freed the United Nations to enforce the United Nations Charter prohibition on the use of force). The Security Council enforced this prohibition against Iraq. *See id.* at 454.

163. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990) (requesting that member states provide support for political action against Iraq); *see also* Tono Eitel, *The Escape and Parole of the Imprisoned God of War—An Overview of the Second Gulf War from the Perspective of International Law*, 35 GERM. Y.B. INT'L L. 170, 180 (1992) (noting that the United Nations Security Council announced that all necessary means would be used to restore peace should Iraq fail to withdraw from Kuwait).

## B. THE LEGAL BASIS FOR ECOWAS INTERVENTION IN SIERRA LEONE

Although the military intervention of ECOWAS in Sierra Leone falls within the scope of Article 2(4) of the United Nations Charter, the action nevertheless may be justifiable under accepted norms of international law permitting the use of armed force by states. ECOWAS presented a number of reasons to justify the intervention. The most prominent justifications include: the right to self-defense,<sup>164</sup> the appeal by President Kabbah seeking ECOWAS assistance,<sup>165</sup> the atrocities committed by junta troops against Sierra Leonean citizens,<sup>166</sup> the threat to international peace and security in the region caused by the flow of

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164. See Ibrahim Gambari, *Press Conference by Nigeria, Mar. 19, 1998* (visited Sept. 19, 1998) <<http://www.un.org/>> (“ECOMOG had eventually used force, as a last resort and only in self-defense”); James Jonah, *Press Conference by Permanent Representatives of Sierra Leone, Feb. 18, 1998* (visited Sept. 19, 1998) <<http://www.un.org/>> [hereinafter Jonah, *Feb. 18 Press Conference*] (asserting that Article 51 of the ECOWAS Charter provides for self-defense and the principle of collective security); James Jonah, *Press Conference by Permanent Representative of Sierra Leone, June 9, 1997* (visited Sept. 19, 1998) <<http://www.un.org/>> [hereinafter Jonah, *June 9 Press Conference*] (arguing that ECOWAS did not require a United Nations Security Resolution to intervene in Sierra Leone because the self-defense provisions of Article 51 of the United Nations Charter authorized the military action); James Jonah, *Press Conference by Permanent Representative of Sierra Leone, May 27, 1997* (visited Sept. 19, 1998) <<http://www.un.org/>> [hereinafter Jonah, *May 27 Press Conference*] (maintaining that a sovereign state may seek assistance of any legitimate government under United Nations Charter self-defense principles).

165. See Jonah, *May 27 Press Conference*, *supra* note 164 (reporting that President Kabbah appealed to ECOWAS for immediate assistance to restore civilian rule to Sierra Leone); Jonah, *Feb. 18 Press Conference*, *supra* note 164 (stating President Kabbah’s sentiments that the ECOMOG would probably remain in Sierra Leone for a considerable period of time).

166. See *Final Communiqué of the Meeting of the Foreign Ministers of ECOWAS in Conakry, Guinea*, U.N. SCOR, 52d Sess., at 3, U.N. Doc. S/1997/499 (declaring that the ECOWAS Minister for Foreign Affairs deplored the bloodshed and other human losses which followed the *coup d’état* in Sierra Leone); James Jonah, *Press Conference by Sierra Leone, Sept. 11, 1997* (visited Sept. 19, 1998) <<http://www.un.org/>> [hereinafter Jonah, *Sept. 11 Press Conference*] (describing the manner in which the military junta carried out atrocities against the Sierra Leonean populace). For example, the junta killed seven students demonstrating against the military regime. See *id.* In addition, junta plans included civilian detention, landmines, poison gas, and use of human shields. See *id.*

Sierra Leonean refugees to neighboring countries,<sup>167</sup> and the prevention of the execution of a "genocide plan" by the junta.<sup>168</sup>

Some of the justifications for use of armed forces, which lack basis in international law, can be dealt with briefly.<sup>169</sup> A general interest in the political stability and security of the region is understandable from a political point of view, but cannot provide a basis under international law for a military intervention.<sup>170</sup> The recent practice of the Security Council in connection with Iraq,<sup>171</sup> Haiti,<sup>172</sup> Rwanda,<sup>173</sup> Burundi,<sup>174</sup> and

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167. See *Final Communiqué of the ECOWAS Summit in Abuja*, U.N. SCOR, 52d Sess., Annex II, at 19, U.N. Doc. S/1997/695/Annex II (1997) [hereinafter *Abuja Final Communiqué*] (reaffirming the ECOWAS Member States' collective commitment to restore constitutional order to Sierra Leone). This commitment is required because of the potential influx by Sierra Leonean refugees in neighboring states, which, in turn, threatens international peace and security in the region. See *id.*

168. See Jonah, *June 9 Press Conference*, *supra* note 164 (describing how the military junta targeted supporters of the Kabbah government); Jonah, *Sept. 11 Press Conference*, *supra* note 166 (affirming that the military junta planned to direct the genocide plan against Sierra Leoneans).

169. For example, intervention based on humanitarian concerns, particularly for the "restoration of democracy," is not accepted in international law given the explicit provisions of the United Nations Charter. See SHAW, *supra* note 88, at 803; see also Anthony Chukwukaa Ofofiele, *The Legality of ECOWAS Intervention in Liberia*, 32 COLUM. J. TRANSNAT'L L. 381, 413 (1994) (arguing that ECOWAS acted illegally because such actions ventured beyond general peacekeeping and attempted to influence the outcome of the civil war in Liberia).

170. See Nolte, *supra* note 74, at 619 (emphasizing that although "security interests" may be invoked to justify military intervention from a political standpoint, such interests are too general and imprecise to provide justification under international law).

171. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1, U.N. Doc. S/RES/688 (1991) (expressing concern for the repression of Iraqi civilians, which led to a massive flow of refugees from Kurdish populated areas).

172. See S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg. at 1-2, U.N. Doc. S/RES/841 (1993) (expressing concern that the Haitian humanitarian crisis, manifesting through a climate of persecution and economic dislocation, could increase the number of Haitians seeking refuge in neighboring nations); see also S.C. Res. 875, U.N. SCOR, 48th Sess., 3293d mtg. at 1, U.N. Doc. S/RES/875 (1993) (reaffirming the commitment expressed in Resolution 841 supporting the leadership of the United Nations and the Organization of American States, as well as the international community, to reach a political solution to the Haitian crisis).

173. See S.C. Res. 918, U.N. SCOR, 49th Sess., 3377th mtg. at 1-2, U.N. Doc. S/RES/918 (1994) (expressing concern about the death of innocent civilians, sig-

Zaire<sup>175</sup> seems to suggest that massive flows of refugees across borders constitute a threat to international peace and security capable of activating the enforcement powers of the Security Council under Chapter VII of the United Nations Charter.<sup>176</sup> Such a situation in itself, however, does not justify unilateral use of force by the affected states.<sup>177</sup> Furthermore, President Kabbah's accusations that the junta was executing a "genocide plan" in Sierra Leone, or at least planned to in case of a foreign intervention, are not substantiated by any objective proof.<sup>178</sup>

Other possible justifications, however, deserve a more careful analysis. In the following sections, possible justifications for the mili-

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nificant internal displacement of the Rwandan population, and massive exodus of Rwandan refugees to neighboring countries). The United Nations Security Council also stressed the need for coordinated international action to alleviate the suffering of the Rwandan people. *See id.* at 2; *see also* S.C. Res. 1161, U.N. SCOR, 53d Sess., 3870th mtg. at 1, U.N. Doc. S/RES/1161 (1998) (re-emphasizing the need for a solution to the refugee problem in the Great Lakes region of sub-Saharan Africa).

174. *See* S.C. Res. 1040, U.N. SCOR, 51st Sess., 3623d mtg. at 1, U.N. Doc. S/RES/1040 (1996) (lamenting the deteriorating situation in Burundi and its potential to destabilize the neighboring region). The Security Council stressed the need for the continuation and intensification of efforts by the international community to avert further deterioration of the situation in Burundi. *See id.*

175. *See* S.C. Res. 1078, U.N. SCOR, 51st Sess., 3710th mtg. at 1-3, U.N. Doc. S/RES/1078 (1996) (expressing grave concern at the deteriorating humanitarian situation in Eastern Zaire and supporting refugees voluntary repatriation to secure regional security); *see also* S.C. Res. 1097, 52d Sess., 3741st mtg. at 1, U.N. Doc. S/RES/1097 (1997) (endorsing a five-point peace plan for Eastern Zaire, including protection and security for all refugees and displaced persons).

176. *See, e.g.,* Lois E. Fielding, *Taking a Closer Look at Threats to Peace: The Power of the Security Council to Address Humanitarian Crises*, 73 U. DET. MERCY L. REV. 551, 566 (1996) (noting that Security Council Resolution 688 indicates that refugee flow can constitute a threat to peace and security).

177. *Compare* Nolte, *supra* note 74, at 619 (arguing that nations may not resort to the use of force, for general security reasons, despite the United Nations enforcement provision in Chapter VII), *with* Brian K. McCalmon, *States, Refugees, and Self-Defense*, 10 GEO. IMMIGR. L.J. 215, 238 (1996) (arguing that a state has a right to use force to defend itself against massive influxes of refugees).

178. *See* Jonah, *June 9 Press Conference*, *supra* note 164 (stating that, although the permanent representative of Sierra Leone to the United Nations claimed evidence of a junta-planned genocide, the Secretary-General indicated no such planned undertaking).



tary intervention will be evaluated to determine whether there is a legal basis for the use of armed force in Sierra Leone.

*1. Legitimization by the Security Council as a Justification for the Intervention*

In searching for a justification for ECOMOG's use of force in Sierra Leone, the initial inquiry is whether the Security Council of the United Nations authorized the intervention.<sup>179</sup> Pursuant to the powers of the Security Council under Chapters VII and VIII of the United Nations Charter, such an authorization would turn the ECOWAS intervention into a legalized "enforcement action," thus constituting a permissible exception to the prohibition of the use of force of Article 2(4) of the United Nations Charter.<sup>180</sup>

*a. Resolution 1132—Security Council Authorization to Restore Democracy by Force?*

The situation in Sierra Leone may qualify as an exception to the Security Council's prohibition on the use of force.<sup>181</sup> In contrast to ECOWAS intervention in Liberia seven years earlier,<sup>182</sup> the Security Council reacted in a number of ways to the *coup d'état* in Sierra Leone.<sup>183</sup> After the President of the Security Council repeatedly con-

179. See Ulrich Beyerlin, *Regional Arrangements*, in 2 UNITED NATIONS LAW, POLICIES AND PRACTICE 1040, 1042 (Ruediger Wolfrum & Christiane Philipp, eds. 1995) (suggesting that there is no clear distinction between regional enforcement, which may or may not require prior authorization).

180. See Randelzhofer, *supra* note 92, at 119.

181. See generally Jochen A. Frowein, *Article 39*, in THE UNITED NATIONS CHARTER—A COMMENTARY 612 (Bruno Simma et al. eds., 1994) (highlighting the mandate that the Security Council find, at a minimum, a threat to international peace and security before adopting economic and military sanctions).

182. See Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia*, 32 HARV. HUM. RTS. J. 129, 134 (1995) (stating that ECOWAS unexpectedly intervened in an attempt to prevent an impending bloodbath in the Liberian capital of Monrovia); Ofodile, *supra* note 168, at 382 (commenting on ECOWAS's active role in the Liberian conflict). ECOWAS not only demanded that all parties refrain from hostilities, but also declared it would enforce a cease-fire without the parties consent. See *id.* See Nolte, *supra* note 74, at 618 (describing the official justification for ECOWAS's Liberian intervention).

183. See *Statement by the President of the Security Council from May 27, 1997*,

demned the overthrow of the democratically elected government of Sierra Leone and called for an immediate restoration of President Kabbah,<sup>184</sup> the Security Council adopted Resolution 1132 on October 8, 1997.<sup>185</sup> The Resolution determined that the situation in Sierra Leone constituted a threat to international peace and security under Article 39 of the United Nations Charter,<sup>186</sup> thus opening the door for the adoption of mandatory economic and military sanctions.<sup>187</sup> The resolution also expressed the Security Council's grave concerns about the "continued violence and loss of life in Sierra Leone following the military coup of 25 May 1997, the deteriorating humanitarian conditions in that country, and the consequences for neighboring countries."<sup>188</sup> Nearly all state representatives, however, made clear in their statements prior to the adoption of the resolution that the reason for adopting the sanctions was to condemn the military coup.<sup>189</sup> These

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U.N. Doc. S/PRST/1997/29, at 1 (stressing the need to implement the Abdijan Agreement as a viable framework for peace in Sierra Leone).

184. See *id.* (calling for an immediate restoration of Sierra Leone's democratically elected government); *Statement by the President of the Security Council from July 11, 1997*, U.N. Doc. S/PRST/1997/36, at 1 (declaring the attempt to overthrow President Kabbah to be unacceptable); *Statement by the President of the Security Council from Aug. 6, 1997*, U.N. Doc. S/PRST/1997/42 (calling on the military junta that overthrew President Kabbah to immediately and unconditionally restore the Kabbah regime).

185. See S.C. Res. 1132, *supra* note 37, at 2 (demanding that the military junta relinquish power in Sierra Leone).

186. See *id.* (declaring that the military junta takeover satisfies the official threshold as a threat to international peace and security).

187. At a minimum, the Security Council must find a threat to international peace and security in accordance with Article 39 of the United Nations Charter as a prerequisite for the adoption of economic as well as military sanctions under Chapter VII of the United Nations Charter. See Frowein, *supra* note 181, at 612-13. The fact that the Security Council does not expressly mention Article 39 in adopting Resolution 1132 has no further legal implications. It is sufficient if the Security Council implicitly refers to this provision by stating the existence of a threat to the peace. See Helmut Freudenthuß, *Article 39 of the U.N. Charter Revisited: Threats to the Peace and the Recent Practice of the U.N. Security Council*, 46 AUST. J. PUB. & INT'L L. 1, 31 (1993); Ruth Lapidoth, *Some Reflections on the Law and Practice Concerning the Imposition of Sanctions by the Security Council*, 30 ARCHIV DES VOLKERRECHTS 114, 115 (1992) (supporting the idea that it is possible for the Security Council to proceed directly to a resolution without prior determination of a threat or breach of peace).

188. S.C. Res. 1132, *supra* note 37, at 2.

189. See generally U.N. SCOR, 52d Sess., 3822d mtg., U.N. Doc. S/PV.3822

statements demonstrate the Resolution sought to reinstate Sierra Leone's elected government.<sup>190</sup>

A military coup is generally not the kind of "aggressive use of force across a boundary" traditionally understood to constitute a threat to international peace;<sup>191</sup> however, the violent overthrow of a democratically elected government as a threat to international peace and security under Article 39 of the United Nations Charter is not without precedence.<sup>192</sup> In 1994, the Security Council determined that the overthrow of the democratically elected government of President Aristide in Haiti constituted a threat to international peace and security. Furthermore,

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(1997) (memorializing the Security Council members' statements). For example, the representative of France stated that sanctions would promote a peaceful resolution of the Sierra Leonean crisis. *See id.* at 6. In addition, the representative of Kenya maintained that the imposition of sanctions would reaffirm the international commitment to democracy. *See id.* at 5. The representative of China, however, expressed concern for the effect sanctions might have for the people of Sierra Leone. *See id.* at 14.

190. *See, e.g.*, U.N. Doc. S/PV.3822, *supra* note 189 (demonstrating the strong, widespread support for the resolution to reinstate the elected government of Sierra Leone). The representative of the United States, for instance, stated "The international community cannot afford to acquiesce in the arbitrary and unconstitutional overthrow of a democratic government." *Id.* at 7. The United States representative added that, "(t)he United States strongly supports this draft resolution, which makes clear that the illegal military regime in Sierra Leone must step down." *Id.* at 16. Similarly, the Russian Federation representative stated, "(t)he Russian Federation, given that its unacceptable to forcibly overthrow democratically elected Governments, decisively condemned the perpetrators of the coup . . ." *Id.* at 9. The Chilean representative declared: "We hope that the members of the illegitimate junta realize that the international community is not prepared to accept coups." *Id.* at 18.

191. *See* Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 342 n.3 (1995) (noting that the United Nations Security Council limits "enforcement measures" to situations involving a threat to international peace and security, specifically, an "aggressive use of force across a boundary"); *see also* David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659, 672 (1997) (declaring that recent interventions authorized by the Security Council did not entail the kind of "aggressive use of force across a boundary" traditionally understood to constitute a threat to international peace). Significantly, the Security Council authorized military intervention to curb famine in Somalia and to end the repression of Kurds in Iraq. *See id.*

192. *See* S.C. Res. 770, U.N. SCOR, 47th Sess., 3106th mtg. at 2, U.N. Doc. S/RES/770 (1992) (authorizing states to take all measures necessary to facilitate the delivery of humanitarian assistance due to the war in Bosnia).

the Security Council authorized enforcement measures to remove the military leaders from power under Chapter VII of the United Nations Charter.<sup>193</sup>

While the Security Council remained cautious in the Haitian situation by stressing the unique circumstances that led to the adoption of the resolution, Resolution 1132 fails to note any such special circumstances.<sup>194</sup> Furthermore, while the Haitian resolution may have been adopted because of the political interests of the United States in reducing the flow of refugees to its country, the situation in Sierra Leone did not directly effect the national interest of one of the permanent members of the Security Council.<sup>195</sup> Thus, Resolution 1132 may be regarded as a further step by the Security Council towards extending its powers under Chapter VII to a certain variety of crisis within a state.<sup>196</sup> The collapse of a government followed by civil war, massive state-sponsored violations of fundamental human rights, and the violent overthrow of a democratically elected government may no longer be regarded as matters essentially within the domestic jurisdiction of a state.<sup>197</sup> Recent United Nations practice suggests that these situations are now issues of international concern.<sup>198</sup>

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193. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) (authorizing the United Nations member states to form a multinational force and use all necessary means to facilitate the departure of military leadership and restore legitimate authority).

194. See *id.* (recognizing that the unique character of the situation in Haiti and its complex and extraordinary nature requires "an exceptional response").

195. See S.C. Res. 1132, *supra* note 37, para. 15 (expressing concern with the military coup's consequences on Sierra Leone's neighboring countries).

196. See MALANCZUK, *supra* note 161, at 24 (asserting that the special circumstances prompting United Nations Security Council 794 to authorize humanitarian intervention in Somalia). The combination of chaotic and endless civil war, mass starvation, and threats to humanitarian assistance prompted the United Nations to intervention. See *id.*

197. See *id.* (determining that the magnitude of human tragedy caused by the internal Somalian conflict constituted a "threat to international peace and security").

198. See *id.* (declaring that, given the Somalian situation, a Security Council Resolution stated that internal aspects of a humanitarian problem may require military enforcement measures).

The Security Council apparently enjoys wide discretion—although in light of the relevant Charter provisions not unlimited<sup>199</sup>—in determining a threat to international peace under Article 39 of the United Nations Charter. This discretion correlates with the notion of peace in the Charter that is not merely restricted to the absence of interstate military conflicts, but is positively defined as a process of growing justice, democratization, and respect for human rights.<sup>200</sup>

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199. See, e.g., Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 269-70 (1994 VI) (arguing that Article 39 provides the Security Council with a wide margin of appreciation, with respect to both the assessment of factual situations and the legal significance of the events); Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 382 (1994 IV) (questioning the extent to which a Security Council recommendation under Article 39 creates a presumption for the lawfulness of the behavior recommended to the member states of the United Nations).

200. See U.N. SCOR, 47th Sess., 3046th mtg. at 143, U.N. Doc. S/PV.3046 (1992) ("The absence of war and military conflicts amongst states does not in itself ensure international peace and security . . . [N]on-military sources of instability [include] the economic, social, humanitarian, and ecological fields"); see also Jost Delbrück, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 898 (1992) (asserting that the Security Council may authorize forcible intervention aimed at ending or preventing actions by individual states other than acts of aggression or threats or breaches to peace so long as the actions are a threat to international peace and security); David P. Fidler, *Caught between Traditions: The Security Council in Philosophical Conundrum*, 17 MICH. J. INT'L L. 411, 431-32 (1996) ("The Security Council's backing of the use of military force to restore Haitian democracy illustrates the Security Council's potential to include democracy as an element of maintaining international peace and security"); Christian Tomuschat, *Obligations Arising for States Without or against Their Will*, 241 RECUEIL DES COURS 195, 341 (1993 IV) (stating that international peace requires the lack of uncontrolled inter-state violence and minimally orderly in-state conditions). Tomuschat adds that the "(e)njoyment of basic human rights pertains to those core elements of a situation which truly deserve a characterization as peace." *Id.* But see Falk, *supra* note 191, at 356 (questioning the United Nations; authorization of the use of force in Haiti where the only threat to international peace and security resulted from the outflow of refugees); Ruth E. Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 559 (1994) (supporting United Nations' Secretary General Dag Hammarskjöld's warning against employing United Nations elements in internally-based situations); Mary Ellen O'Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT'L L. 473, 487 (1997) (discussing the Security Council's rejection of an expansive interpretation of the United Nations Charter where the interests of a single state is involved, even in cases of massive human rights abuses); Oscar Schachter, *The Decline of the Nation-State and Its Implications for International*

In Resolution 1132, the Security Council again demanded that the military junta relinquish power to the democratically elected government and adopted a variety of sanctions against Sierra Leone pursuant to its powers under Article 41 of the United Nations Charter. The Council requested, with binding force, that all states prevent members of the military junta and adult members of their families from entering into or traversing through their territory.<sup>201</sup> The Council also requested states to adopt a petroleum and arms embargo against Sierra Leone, subject to exceptions on a case-by-case basis for humanitarian purposes approved by a Committee of the Security Council.<sup>202</sup>

The Security Council invoked Chapter VIII of the United Nations Charter to authorize ECOWAS, in cooperation with the legitimate government of Sierra Leone, "to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum . . . and arms . . . including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations . . ." <sup>203</sup> Thus, the Security Council employed its powers to authorize regional arrangements and agencies to enforce economic sanctions pursuant to its authority under Article 53(1), Clause 1 of the United Nations Charter.<sup>204</sup>

In the absence of a definition in the Charter itself, some dispute exists about the elements that constitute regional arrangements in accordance with Article 52 of the United Nations Charter.<sup>205</sup> Generally,

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*Law*, 36 COLUM. J. TRANSNAT'L L. 7, 20 (1997) (noting that many governments expressed reservations about the Security Council's demand to oust the military regime in Haiti).

201. See S.C. Res. 1132, *supra* note 37, at 2 (deciding that states shall prevent such persons from moving through their territories except as authorized by ECOWAS for verified humanitarian purposes or as part of the process of relinquishing power).

202. See *id.* (prohibiting states from selling or supplying Sierra Leone with petroleum, arms, ammunition, and military equipment).

203. *Id.* at 3.

204. See Georg Ress, *Article 53*, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 722, 730 (Bruno Simma et al. eds., 1994) ("The [Security Council] may initiate its own enforcement measures and utilize the regional arrangements or agencies to carry them out").

205. See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian*

regional arrangements may be defined as a union of states closely linked in territorial terms or an international organization based upon a collective treaty, whose primary task is the maintenance of peace and security within the framework of the United Nations.<sup>206</sup> Originally, ECOWAS was designed to function as an economic union.<sup>207</sup> Eventually, however, ECOWAS became a regional system of collective security through the Protocol of Non-Aggression of April 22, 1978, particularly the Protocol Relating to the Mutual Assistance on Defense of May 29, 1981.<sup>208</sup> Accordingly, ECOWAS maybe regarded as a regional organization under Chapter VIII of the United Nations Charter.<sup>209</sup> This view is consistent with the fact that the Security Council, under an apparently broad understanding of Article 52 re-

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*Civil War, in ENFORCING RESTRAINT—COLLECTIVE INTERVENTIONS IN INTERNAL CONFLICTS* 157, 183 (Lori Fisler Damroseh ed., 1993) (identifying the lack of consensus as to the definition of a Chapter VIII regional organization).

206. See Waldemar Hummer & Michael Schweitzer, *Article 52, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 679, 699 (Bruno Simma et al. eds., 1994) (defining regional arrangement or agency as a union of states or an international organization based on a collective treaty or a constitution with the primary task of maintaining peace and security); see also Joachim Wolf, *Regional Arrangements and the U.N. Charter, in 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 289 (Rudolf Bernhardt ed., 1984) (characterizing regional arrangements as comprising all those arrangements whereby states of a particular region regulate political, economic, or other relations).

207. See Edward Kannyo, *Civil Strife and Humanitarian Intervention in Africa: A Preliminary Assessment*, 4 AFR. Y.B. INT'L L. 51, 60 (1996) (stating that ECOWAS was established primarily to coordinate the economic development of the African region West of Cameroon and Chad, and South of Algeria and Morocco); see also Ofodile, *supra* note 168, at 410-11 (noting that ECOWAS was initially an economic union).

208. See Ofodile, *supra* note 168, at 411 (commenting on the 1978 modification of the ECOWAS Charter by ECOWAS heads of state so as to adopt the Protocol on Non-Aggression, thereby committing members to the duty of non-intervention). The 1981 Protocol provided for mutual assistance and defense in cases of, *inter alia*, external aggression and internal armed conflict engineered and actively supported externally so as to endanger regional security and peace. See *id.*

209. See Hummer & Schweitzer, *supra* note 206, at 708 (claiming that Articles 16 through 18 of the Protocol Relating to the Mutual Assistance on Defense contains all of the rules necessary to make ECOWAS both a defensive alliance and a regional system of collective security under Chapter VII of the United Nations Charter). But see Wippman, *supra* note 205, at 183 (questioning whether sub-regional organizations such as ECOWAS qualify as a Chapter VII regional organization).

gional arrangements,<sup>210</sup> acknowledged ECOWAS by citing Chapter VIII of the United Nations Charter in context of the Liberian civil war.<sup>211</sup>

In previous cases, the Security Council authorized individual states or regional organizations to ensure the observance of economic sanctions by halting inward maritime shipping.<sup>212</sup> These resolutions either explicitly legitimized the use of military force, or might at least be interpreted as permitting military measures to ensure the implementation of the embargo.<sup>213</sup> In 1966, for example, the Security Council authorized the United Kingdom to ensure "by use of force if necessary" the enforcement of an economic embargo imposed upon Rhodesia.<sup>214</sup> Although the Security Council rarely acted with such decisiveness during the Cold War, authorization to ensure the observance of economic sanctions became frequent in the 1990s.<sup>215</sup> Resolution 665 of 1990, for

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210. See Beyerlin, *supra* note 179, at 1047 (stating that the United Nations Security Council retroactively "authorized" ECOWAS's intervention in Liberia).

211. See S.C. Res. 913, U.N. SCOR, 48th Sess., 3187th mtg. at 1, U.N. Doc. S/RES/913 (1993) (welcoming ECOWAS's continued commitment to reaching a peaceful resolution of the Liberian conflict); see also S.C. Res. 788, U.N. SCOR, 49th Sess., 1277th mtg. at 1, U.N. Doc. S/RES/788 (1992) (seeking ECOWAS's continued commitment towards achieving peace in Liberia).

212. See S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg. at 1, U.N. Doc. S/RES/221 (1966) (calling upon the United Kingdom to prevent vessels reasonably believed to be carrying oil from reaching Rhodesia); see also Beyerlin *supra* note 210, at 108 (stating that the Security Council, for the first time under Chapters VII and VIII of the United Nations Charter, called upon states acting nationally or through regional agencies, to use such measures as necessary to halt maritime shipping to and from the former Yugoslavia).

213. See *id.* (allowing the United Kingdom to use necessary force to intercept Rhodesia-bound vessels).

214. See S.C. Res. 221, *supra* note 212, at 1 (authorizing the use of force against vessels carrying oil to Rhodesia); see also Frowein, *supra* note 199, at 377-78 (describing how the Security Council empowered the United Kingdom to arrest and detain the *Joanna VI* tanker); see generally Tomuschat, *supra* note 200, at 337 (arguing that the denial of rights of the people of Southern Rhodesia prompted measures such as the oil embargo).

215. See Kelly-Kate Pease & David P. Forsythe, *Humanitarian Intervention and International Law*, 35 *AUS. J. PUB. & INT'L L.* 1, 11-14 (1993) (contrasting the pre- and post-Cold War Security Council usage of Article 39 authorization to use force for threats or breaches of peace). The Cold War and other divisions among the permanent members of the Security Council made it politically impossible to utilize this authority, with the exception of South Africa's apartheid issues. See *id.*



instance, authorized Member States to use all necessary measures to hold all inward shipping to or from Iraq, with the Resolution often interpreted as authorization for the use of force.<sup>216</sup> Similarly, the Security Council called upon Member States and regional organizations, such as NATO and the West European Union ("WEU"), to enforce an embargo against the former Yugoslavia during Operation Sharp Guard,<sup>217</sup> and to ensure compliance with a ban on flights in the Bosnian and Herzegovinian airspace under Operation Deny Flight.<sup>218</sup>

The Security Council authorization of ECOWAS to ensure the strict implementation of the economic embargo by halting inward maritime shipping may also be interpreted as authorizing the use of military force to stop ships where necessary to ensure the observance of the embargo.<sup>219</sup> In contrast to Resolution 940 passed in 1994 concerning

at 11-12. By the 1990s, however, the Security Council imposed mandatory economic embargoes, for example in Rhodesia, in light of humanitarian violations. *See id.* at 13-14. *See* Howard French, *U.N. Approves Ban on Shipments of Oil to Haiti Military*, N.Y. TIMES, June 17, 1993, at A1 (reporting that the United Nations Security Council voted to impose a worldwide ban on oil shipments to Haiti while stopping short of authorizing a naval blockade).

216. *See* S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. at 1, U.N. Doc. S/RES/665 (1990) (calling upon Member States to halt all Iraq shipping in order to inspect and verify cargoes and destinations); *see also* Jochen A. Frowein, *Article 42*, in *THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 628, 634 (Bruno Simma et al. eds., 1994) (mandating that Member States deploy maritime forces to use measures commensurate with specific circumstances as may be necessary to prevent maritime shipping from entering or leaving Iraq).

217. *See* S.C. Res. 787, U.N. SCOR, 47th Sess., 3137th mtg. at 2-3, U.N. Doc. S/RES/787 (1992) (prohibiting shipment of products such as crude oil, coal, iron, steel, and vehicles through Yugoslavia).

218. *See* S.C. Res. 816, U.N. SCOR, 47th Sess., 3191st mtg. at 1, U.N. Doc. S/RES/816 (1993) (deploring the failure of parties to cooperate with United Nations airfield monitors); *see also* Antonia Handler Chayes & Richard Weitz, *The Military Perspective on Conflict Prevention: NATO*, in *PREVENTING CONFLICT IN THE POST-COMMUNIST WORLD—MOBILIZING INTERNATIONAL AND REGIONAL ORGANIZATIONS* 381, 392 (Abram Chayes & Antonia Handler Chayes eds., 1996) (stating that NATO aircraft initially monitored and later enforced the "no-fly zone" established by Resolution 816); Beyerlin, *supra* note 210, at 1048-49 (noting the Security Council authorization to take all necessary measures to ensure compliance with the ban on flights established pursuant to Resolution 795).

219. *See* Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions*, in *ENFORCING RESTRAINT—COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 274, 301 (Lori Fisler Damrosch ed., 1993) (arguing that collective forcible measures may be justifiable when collective non-forcible sanctions impair the ability of

Haiti, however, Resolution 1132 does not generally authorize ECOWAS to take military measures to remove the junta in Sierra Leone.<sup>220</sup> The legitimization of the use of force in the Resolution is expressly limited to ensuring the strict implementation of the economic embargo.<sup>221</sup> Although the Security Council's request that "all those concerned, including ECOWAS,"<sup>222</sup> ensure the safe delivery of humanitarian assistance may also be interpreted as a limited mandate to use military protection measures, such a request does not provide a legal basis for an intervention aimed at restoring democracy.<sup>223</sup> The Security Council's Resolution takes note of the communiqué issued at the meeting of the Foreign Ministers of ECOWAS on Sierra Leone from June 26, 1997.<sup>224</sup> In the communiqué, the ministers called for the reinstatement of the legitimate government of Sierra Leone by use of force,<sup>225</sup> however, this does not signify implicit authorization of ECOWAS military intervention in Sierra Leone.<sup>226</sup> A reference in the preamble of a Resolution does not imply an authorization of military intervention, particularly if contradicted by the text of the Resolution<sup>227</sup> and the explicit statements of Member States of the Security Coun-

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a territory or population to defend itself against forcible attacks).

220. See S.C. Res. 1132, *supra* note 37, at 3 (authorizing ECOWAS to halt maritime shipping to search for petroleum, petroleum products, arms and related materials).

221. See *id.* (instructing ECOWAS to ensure strict implementation of the embargo and halt maritime shipping in conformity with international standards).

222. *Id.* at 4.

223. See Stephan Hobe, *New Perspectives for International Law Enforcement, "The Future of International Law Enforcement." New Scenarios—New Law?*, 45 *AUS. J. PUB. & INT'L L.* 53, 61 (1993) (raising the question of limiting the Security Council's authority to act given the increasing scope of its mandate).

224. See S.C. Res. 1132, *supra* note 37, at 1 (referring to the communiqué issued at the meeting of foreign ministers of ECOWAS on Sierra Leone).

225. See *Letter Dated 27 June 1997 from the Permanent Representative of Nigeria to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 52d Sess., Annex, at 3, U.N. Doc. S/1997/499 (1997) (stressing that countries should work towards restoring the legitimate government of Sierra Leone through a combination of dialogue, imposition of sanctions and embargoes, and the use of force).

226. See S.C. Res. 1132, *supra* note 37, para. 8 (limiting ECOWAS enforcement capacities to enforcement of the maritime embargo).

227. See *id.* para. 4 (supporting ECOWAS efforts toward reaching a peaceful resolution).

cil.<sup>228</sup> Consequently, Resolution 1132 does not provide a legal basis for the ECOWAS intervention in Sierra Leone in February 1998, leaving aside ECOMOG attempts in June and July of 1997 to overthrow the military junta following the *coup d'état*.<sup>229</sup>

b. The Relevance of the Presidential Statement of  
February 26, 1998

Although the Security Council did not initially authorize the military actions undertaken by ECOWAS, a possible *ex post* justification for the intervention may be found in the later statement made by the President of the Security Council on February 26, 1998.<sup>230</sup> In this statement, the Council "welcomes the fact that the rule of the military junta has been brought to an end."<sup>231</sup>

Statements by the President of the Security Council are far from being legally insignificant.<sup>232</sup> By expressing consensus among the Member States, presidential statements can have the same legal effect as a formal resolution.<sup>233</sup> The question remains, however, whether

228. See, e.g., U.N. Doc. S/PV.3822, *supra* note 189, at 6 (documenting France's encouragement of a peaceful resolution in Sierra Leone). The French representative stated that "[t]he draft expresses the support of the United Nations for the efforts of the members of the Economic Community of West African States (ECOWAS) to bring about, *through negotiations, the peaceful restoration of constitutional order and the return of the democratically elected Government.*" *Id.* (emphasis added). The Swedish representative also encouraged a peaceful resolution stating that, "[b]y voting in favor of this draft resolution, Sweden wants to contribute to a solution *by peaceful means, without the use of armed violence . . .*" *Id.* at 11 (emphasis added).

229. See Beyerlin, *supra* note 210, at 1042 (questioning regional organization acts without prior authorization for the Security Council).

230. See *Statement by the President of the Security Council*, *supra* note 58, at 2 (commending ECOMOG for liberating hostages held by former members of the deposed junta).

231. *Id.* at 1.

232. See RENATA SONNENFELD, RESOLUTIONS OF THE SECURITY COUNCIL 57 (1988) (discussing the importance of presidential statements during the Middle East conflict in 1973).

233. See S.D. BAILEY, VOTING IN THE SECURITY COUNCIL 83 (1971) (marking on the importance of the United Nations President in increasing the number of United Nations observers in the Suez Canal area in 1967); see also SONNENFELD, *supra* note 232, at 57-58 (equating the substance and significance of a presidential statement to a formal United Nations Resolution).

military measures by regional organizations like ECOWAS require *prior* authorization under Article 53(1) of the United Nations Charter; or whether this provision allows for later "approvals," which justify military interventions *ex post facto*.<sup>234</sup>

Some authors argue that the Security Council is not required to authorize Article 53 enforcement actions before such actions are actually carried out.<sup>235</sup> Rather, an authorization by the Security Council at any stage should be regarded as an implicit authorization of the prior actions undertaken by the regional organization.<sup>236</sup> Such a broad understanding of "authorization" under Article 53, however, is incompatible with the requirement that the Security Council exercise effective control over regional enforcement actions.<sup>237</sup> As control necessarily includes power to prevent enforcement actions, the Security Council will only maintain effective control through prior authorizations.<sup>238</sup> Any other interpretation of Article 53 results in legal uncertainty at the time of the action.<sup>239</sup> The use of *ex post facto* authorization may also encourage regional arrangements to initiate military actions

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234. See Beyerlin, *supra* note 210, at 1042 (discussing the measures regional organizations may undertake under Article 52(1)). In this regard, the possibilities for a regional organization depend on the interpretation of "enforcement action." *Id.*

235. See Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 520 (1963) ("It should not be assumed that authorization of the Security Council automatically and necessarily means *prior* authorization.").

236. Unless the Security Council states otherwise, authorization implicitly authorizes earlier stages of the regional action. See Ress, *supra* note 204, at 724 (citing John N. Moore, *The Role of Regional Arrangements in the Maintenance of World Order*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 122, 159 (Richard Falk et al. eds., 1971)); see generally Nolte, *supra* note 74, at 623 (explaining the importance of presidential statements).

237. See Ress, *supra* note 204, at 724 (maintaining that the Security Council exercises effective control only with clear, prior authorizations).

238. See *id.* at 734 (averring that implicitly authorizing prior regional actions contravenes the general principle that legislation should not be interpreted to permit retroactive decisions to the detriment of another party); see also Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 8, 159 (1982 V) (contending that a regional organization does not have a right to use armed force coercively against another state without the Security Council's prior authorization).

239. See Schachter, *supra* note 238, at 159 (asserting that authorization of the prior acts of regional organizations would encourage illegal acts).

with the expectation or hope that the Security Council would give its authorization afterwards.<sup>240</sup>

Even if such a broad interpretation of Article 53 is considered legal, Security Council authorization to use force can only be assumed if such an intention can be derived from the circumstances and the wording of the statement.<sup>241</sup> The Presidential Statement of February 26, 1998, although welcoming the fact "that the rule of the military junta has been brought to an end," also expressed that the Security Council "remains gravely concerned at the continued violence in the country and calls for an urgent end to the fighting."<sup>242</sup> Furthermore, the Council commended the important role of ECOWAS "towards the peaceful resolution of the crisis,"<sup>243</sup> and encouraged ECOMOG "to proceed in its efforts . . . in accordance with relevant provisions of the Charter of the United Nations."<sup>244</sup> The careful wording of the statement indicates the Security Council did not wish to give the impression that it welcomes the use of armed force by ECOMOG in ousting the military junta from power.<sup>245</sup> From the wording of the statement, it

240. See Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175, 214 (1967) (claiming that the Security Council might find it politically awkward to withhold information for what has already been carried out); Ress, *supra* note 204, at 734 (asserting that such an interpretation of Article 53 would create situations where regional organizations would engage in an act with the intent of seeking approval after such act has been carried out).

241. See Nolte, *supra* note 74, at 632 (noting the limitation on the Security Council's authorization to use force); see also Rosalyn Higgins, *The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding Under Article 25 of the Charter?*, 21 INT'L & COMP. L.Q. 270, 281-82 (1972) (claiming that the binding or non-binding nature of United Nations Resolutions depends on whether the parties intended the Resolutions as "decisions" or "recommendations").

242. *Statement by the President of the Security Council*, *supra* note 58, at 1.

243. *Id.* at 1 (emphasis added).

244. *Id.* at 1-2 (emphasis added).

245. For the analysis of a similar statement made by the President of the Security Council following ECOWAS intervention in Liberia in 1990, see Nolte, *supra* note 74, at 632. See also Ofodile, *supra* note 168, at 414 ("The carefully chosen words indicate that the Security Council was taking a neutral stand by not explicitly approving or condemning ECOWAS action.").

is difficult to argue that the Security Council intended to authorize ECOWAS's action *ex post facto*.<sup>246</sup>

Resolution 1156 of March 16, 1998, in which the Council terminated the petroleum embargo, supports the conclusion that the Security Council never extended *ex post* authorization to ECOWAS actions in Sierra Leone.<sup>247</sup> The Council welcomed "the return to Sierra Leone of its democratically elected President,"<sup>248</sup> but did not mention the role of ECOWAS in restoring the president. Thus, a prospective authorization by the Security Council cannot provide a legal basis for ECOWAS military intervention in Sierra Leone.<sup>249</sup>

## 2. Did the ECOMOG Troops Act in Self-Defense?

Nigeria justified ECOMOG's use of armed force in its final major military attack, which ultimately led to the overthrow of the junta regime within a week of the attack, primarily on the right to self-defense.<sup>250</sup> Although the right of self-defense is generally recognized

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246. See *Statement by the President of the Security Council*, *supra* note 58, at 1-2 (encouraging ECOMOG to seek peace and stability and specifically condemning reprisal killings and related violence).

247. See S.C. Res. 1156, U.N. SCOR, 53d Sess., 3681st mtg. at 1, U.N. Doc. S/RES/1156 (1998). (deciding to review other prohibitions referenced in Resolution 1132).

248. *Id.*

249. See *id.* (maintaining the right to make authorizations with respect to continuing developments in Sierra Leone at a later date).

250. See Gambari, *supra* note 164 ("ECOMOG had eventually used force, as a last resort and only in self-defense"); Jonah, *Feb. 18 Press Conference*, *supra* note 164 (invoking United Nations Charter Article 51 as justification for foreign military intervention to restore democracy in Sierra Leone). It is unclear, however, whether Jonah based this assessment on an alleged support of the military junta by Liberia. See *id.* Jonah may also regard the military junta's forceful government takeover as an armed attack within contemplation of Article 51 of the United Nations Charter. See *id.*; SHAW, *supra* note 88, at 794 (stating that organizations such as NATO and the Warsaw Pact, specifically based on the Article 51 right of collective self-defense, considers an attack upon one party as an attack on all); W.Q. Beardslee, *The United States' Haiti Intervention: The Dangers of "Redefined" National Security Interests*, 25 DENV. J. INT'L L. & POL'Y 189, 195-96 (1996) (arguing that the 1994 intervention in Haiti should have been based on Article 51 of the Charter, in order to avoid "the ambiguous and unclear reasoning" of the Security Council); Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63

under Article 51 of the United Nations Charter, as well as under customary international law,<sup>251</sup> it is doubtful whether the ECOMOG action can be based on this justification.<sup>252</sup> The requirement of an “armed attack” appears to be fulfilled with evidence that the military action started as a response to an attack by junta forces on an ECOMOG military camp at Lungi.<sup>253</sup> The fact that the attacked ECOMOG forces were on Sierra Leonean territory does not necessarily deprive them of the right to exercise self-defense.<sup>254</sup> Military units of a state or regional organization abroad may use self-defense when attacked by forces of the territorial state, provided their presence does not itself constitute an armed attack, which would trigger the right of the territorial state to respond pursuant to Article 51.<sup>255</sup> Whether the presence of ECOMOG troops in Sierra Leone constituted an “armed attack” is open to debate because the troops were originally based in Sierra Leone as a result of a defense pact with President Kabbah’s government.<sup>256</sup> Alternatively, the ECOMOG presence may have evolved into “armed attack” status

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WASH. L. REV. 43, 49 (1988) (stating that the United States justified aid to Nicaraguan contras based on the idea of collective self-defense).

251. See *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27) (commenting that Article 51 mentions the “inherent right” of individual or collective self-defense); see also DINSTEN, *supra* note 110, at 182 (asserting that Article 51 permits self-defense exclusively where an “armed attack” occurs and that many commentators believe that international law permits the same).

252. See Beyerlin, *supra* note 179, at 108 (noting that Article 51 limits acts of collective self-defense to external armed attacks).

253. See *Fourth Report of the Secretary General on the Situation in Sierra Leone of March 18, 1998*, U.N. Doc. S/1998/249, at 1-2 [hereinafter *Fourth Report*] (discussing fulfillment of the “armed attack” requirement).

254. See *id.* (discussing self-defense rights of military forces attacked on foreign soil).

255. See Albrecht Randelzhofer, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS—A COMMENTARY* 661, 670 (Bruno Simma et al. eds., 1994) (discussing authorization of the use of self-defense in response to an armed attack on foreign soil provided the attack is not induced by foreign military presence).

256. See James Rupert, *Sierra Leone Junta Leader Refuses to Abdicate Power; Denial of Civilian Rule Stalls Regional Talks*, WASH. POST, Aug. 1, 1997, at A23 (reporting that ECOMOG troop presence in Sierra Leone may not necessarily equate to an “armed attack” given the basis for the troops initial presence).

when Nigeria launched air and naval attacks following the *coup d'état* and commenced massive troop deployments in Sierra Leone.<sup>257</sup>

In any event, the extent and consequences of ECOMOG's response to the attack of junta forces on one of their military camps is incompatible with the principle of proportionality. The principle of proportionality serves as a limitation on actions in self-defense, requiring that defensive measures be reasonably related to the seriousness and scope of the attack.<sup>258</sup> Because retaliation and punitive actions are prohibited, military actions must be restricted to those necessary to repulse the attack.<sup>259</sup> From the beginning, ECOMOG's large-scale use of counter-force was not simply aimed at repulsing the attack on its military camps.<sup>260</sup> After four days of continued counter-strikes, ECOMOG's Nigerian chief of staff, General Adul One Mohammed, made clear that the troops sought a major military victory to weaken or oust the military government, and considered the situation "an opportunity to bring sanity to the system."<sup>261</sup> Military measures taken in defense can, under certain circumstances, justify a counterattack against the "source" of the attack to deter future aggression.<sup>262</sup> It is doubtful, however, that a

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257. *See id.*

258. *See* Jost Delbrück, *Proportionality*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1140, 1140-42 (Rudolf Bernhardt ed., 2d ed. 1991) (discussing the principle of proportionality); *see also* Schachter, *supra* note 108, at 1367; Randelzhofer, *supra* note 255, at 677 (explaining logic underlying principle of proportionality); *see generally* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 *AM. J. INT'L L.* 391, 391-413 (commenting on the importance of proportionality in laws governing the use of force and armed conflict).

259. *See* *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 *I.C.J.* 14, 94 (June 27) (recognizing that a customary rule of international law requires military action only to the extent necessary to prevent attack); *see also* Kevin C. Kenny, *Self-Defense*, in 2 *UNITED NATIONS: LAW, POLICIES AND PRACTICE* 1162, 1168 (Rüdiger Wolfrum & Christiane Philipp eds., 1995) (asserting use of self-defense with military action is necessary to prevent further attack).

260. *See generally*, James Rupert, *Forces Press Sierra Leone Government; Nigerians, Rebels Attack for 6th Day*, *WASH. POST*, Feb. 11, 1998, at A27 (noting Nigerian ECOMOG troops, under the pretext of peacekeeping, have avoided diplomatic efforts in favor of assaults on military junta forces).

261. *Id.*

262. *See* STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 167 (1996) (describing the use of self-defense as a preventive measure); *see also* Schachter, *supra* note 108, at 1638 (suggesting that



broad understanding of proportionality applied to military units in the territory of another state grants a right to at least temporarily occupy the country and oust the regime from power.<sup>263</sup> Leaving aside earlier ECOMOG military actions that were not responses to prior attacks, the capture of the capital and removal of the junta from power cannot be justified as an exercise of the right to self-defense.<sup>264</sup>

### 3. Humanitarian Intervention

Another possible justification of the ECOWAS actions in Sierra Leone is rooted in the notion of humanitarian intervention.<sup>265</sup> The humanitarian situation in Sierra Leone certainly deteriorated during the nine months of Koromah's illegitimate rule.<sup>266</sup> Indeed, in passing Resolution 1132, the Security Council expressly noted its concern over "the continuing violence and loss of life in Sierra Leone [and

counter-attacks against military aggression constitutes justifiable self-defense); DINSTEIN, *supra* note 110, at 231 (discussing self-defense by counter-attack as a justifiable method of deterrence).

263. See, e.g., H.R. DOC. NO. 101-127 (1990) (setting forth President Bush's notification to Congress of deployment of United States troops to Panama as a justifiable large-scale intervention in the "exercise of the right of self-defense"); Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 306 (1991) (arguing that the favorable interpretation of the use of force in self-defense authorizes use of such force only when responding to an armed attack); Tom J. Farer & Christopher C. Joyner, *The United States and the Use of Force: Looking Back to See Ahead*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 15, 37 (1991) (analyzing the appropriateness of various situations in which the United States used force); John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT'L L. 276, 294 (1990) (questioning the right of the United States in its use of force to invade Panama); see generally Jeffrey C. Tuomala, *Just Cause: The Tread that Runs so True*, 13 DICK. J. INT'L L. 1, 20 (1994) (analyzing the use of force).

264. Cf. generally Quigley, *supra* note 263, at 276-94 (criticizing the use of force as employed by the United States against Panama).

265. See *Sierra Leone: Putting a Country Together*, *supra* note 7, at 44 (referring to ECOWAS actions in Sierra Leone as humanitarian given the efforts to bring food into the economically crippled region). Notably, food scarcity and lack of medical provisions were major issues in Sierra Leone's rural areas. See *id.* (reporting 500,000 Sierra Leoneans were in desperate need of food prior to the ECOMOG intervention).

266. See *id.* (noting that persistent clashes between rural based civil defense forces, known as the *Kamajors*, and Koromah's military forces, left unknown numbers dead, particularly around the heavily populated areas of Kenema and Bo).

the] deteriorating humanitarian conditions in the country.”<sup>267</sup> Even a humanitarian crisis within Sierra Leone, however, may not be enough to justify intervention.<sup>268</sup> The issue of whether and when humanitarian intervention is permissible under international law is hotly disputed.<sup>269</sup> The fact that Nigeria’s actions were unauthorized by the United Nations Security Council renders a claim of justified humanitarian intervention all the more precarious. To evaluate whether the Nigerian intervention qualifies as a justifiable humanitarian intervention, it is first necessary to define what actions qualify as “humanitarian intervention.”<sup>270</sup> Having defined the term, the question remains when, if ever, is humanitarian intervention acceptable under international law.<sup>271</sup>

#### a. Humanitarian Intervention: Defining the Term

Traditionally, the term “humanitarian intervention” describes the threat or use of force by a state or group of states, designed to compel a sovereign to respect fundamental human rights in the exercise of its sovereign powers.<sup>272</sup> According to this classic definition, to qualify as “humanitarian,” the sole objective of the intervention must be to either end or prevent human rights violations.<sup>273</sup> Recently, the

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267. S.C. Res. 1132, *supra* note 37, at 2.

268. See Michael Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS 95, 111 (Hedley Bull ed., 1984) (asserting that international law does not provide a right of humanitarian intervention).

269. Compare Akehurst, *supra* note 268, at 111 (finding no right of humanitarian intervention in international law), with David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 264 (1992) (advocating an expanded scope for humanitarian intervention, including intervention to repatriate refugees and to support anti-totalitarian rebellions).

270. See Akehurst, *supra* note 268, at 111.

271. See *id.* (considering when humanitarian intervention is acceptable under international law).

272. See, e.g., Scheffer, *supra* note 269, at 264 (defining the term “humanitarian intervention”); B. De Schutter, *Humanitarian Intervention: A United Nations Task*, 3 CAL. W. INT’L L. REV. 21, 24 (1972) (describing the elements of humanitarian intervention); OLIVER RAMSBOTHAM & TOM WOODHOUSE, HUMANITARIAN INTERVENTION IN CONTEMPORARY CRISIS 3 (1996) (discussing actions that constitute humanitarian intervention).

273. See Farer, *supra* note 130, at 122 (describing the narrow set of circumstances which qualify as humanitarian intervention).

idea of humanitarian intervention has expanded to cover interventions designed to ensure the safe delivery of humanitarian assistance to populations in dire need, as in the case of Somalia in 1992.<sup>274</sup> Some scholars suggest that a comprehensive definition of humanitarian assistance must account for situations similar to Somalia, where humanitarian assistance is needed to avert mass starvation or other immediate threats to life.<sup>275</sup> Whether restricted to protecting human rights against violations committed by a sovereign or expanded to cover the provision of assistance, the classical definition of humanitarian intervention limits intervention to situations of pure humanitarian concern.<sup>276</sup>

In tension with the traditional conception is what some scholars claim is a newly emerging right of humanitarian intervention to restore democracy.<sup>277</sup> Under this analysis, the emerging right to democracy is a fundamental human right, the defense of which supports a claim that intervention in a country's political affairs may be a form of humanitarian intervention.<sup>278</sup> Thus, the United States' intervention in Panama, although overtly political, is defended by some as a form of humanitarian intervention designed, among other things, to protect a fundamental right to democratic governance.<sup>279</sup> There is some force to this argument, particularly in light of the Security Council's

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274. See Ruth E. Gordon, *Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti*, 31 TEX. INT'L L.J. 43, 44 (1996) (commenting on the expanding definition of humanitarian intervention).

275. See *id.* at 44-45 (asserting that the definition of "humanitarian intervention" should be expanded to include termination of gross human rights violations, such as that which occurred in Somalia); see also W. Michael Reisman, *Conference Proceedings, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 18 (Richard B. Lillich et al. eds., 1973) (advocating for a "pro futuro" definition of humanitarian intervention which responds to the changing nature of humanitarian crises).

276. See Gordon, *supra* note 274, at 44-45.

277. See Fielding, *supra* note 101, at 329 (arguing for expansion of definition of humanitarian intervention to include efforts designed to restore democracy); Reisman, *supra* note 103, at 642 (suggesting that military efforts to restore democracy be considered under an expanded definition of humanitarian intervention).

278. See Fielding, *supra* note 101, at 329.

279. See D'Amato, *supra* note 99, at 516 (arguing the United States' intervention in Panama could be considered humanitarian under an expanded definition that includes protection of fundamental human right in democracy).

authorization of U.S. intervention in Haiti, which arguably "extended humanitarian intervention to include measures against the usurpation of the sovereign prerogative of a population to be governed by those it has democratically elected."<sup>280</sup> The legal history of humanitarian intervention, however, resists collapsing democratic intervention and humanitarian intervention into one another.<sup>281</sup> International law has traditionally recognized an intervention to be humanitarian in nature when the sole motivation is to terminate fundamental human rights abuses or provide purely humanitarian aid including food and medicine.<sup>282</sup> The right to democracy is not universally accepted, and it is particularly doubtful whether it has gained the status of a fundamental human right capable of triggering a possible right of humanitarian intervention.<sup>283</sup> Consequently, intervention aimed at vindicating democratic political ends is best understood as a "pro-democratic intervention," not as humanitarian intervention.<sup>284</sup> For this reason, the United Nations' authorized intervention in Haiti is more accurately described as an intervention to restore democracy than as a humanitarian mission.<sup>285</sup>

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280. Fielding, *supra* note 101, at 329.

281. See generally Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203 (1974) (surveying the history of humanitarian interventions in international law).

282. See Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 366 (1995) (establishing that the traditional notion of humanitarian intervention recognizes interventions motivated by the termination of gross human rights violations).

283. See Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, 86 AM. SOC'Y INT'L PROC. 261 (1992) (recognizing the lack of universal acceptance of a right of democracy as a fundamental human right).

284. See discussion *infra* Part III.B.4 (questioning the idea of democratic intervention as humanitarian given the fact that democracy is not uniformly understood as a fundamental human right).

285. See generally Carothers, *supra* note 283, at 261 (utilizing the term "democratic intervention" rather than "humanitarian intervention" to describe efforts to restore democracy).

b. When is Humanitarian Intervention Permitted  
under International Law?

Even if the international community of states once accepted a customary doctrine of humanitarian intervention, it is not at all clear that the doctrine survived the United Nations Charter.<sup>286</sup> Given the recent United Nations authorized humanitarian interventions in Somalia, Iraq, and the former Yugoslavia, however, it is possible to conclude that humanitarian intervention may be legally authorized by the Security Council.<sup>287</sup> The legal status of unauthorized interventions, however, is tenuous.<sup>288</sup>

Prior to the adoption of the United Nations Charter, a number of international military missions were undertaken for humanitarian reasons.<sup>289</sup> From 1860 to 1861, France intervened with the deployment of 6,000 French troops when Turkish rule in Syria led to the massacre of thousands of Maronite Christians.<sup>290</sup> In the 1870s, Russia intervened to protect Christians in Bulgaria, Turkey, Bosnia, and Herzegovina.<sup>291</sup> International jurists accepted this practice as legitimate.<sup>292</sup>

286. See Fonteyne, *supra* note 281, at 203 (asserting that the adoption of the United Nations Charter ended any previously existing customary doctrine of humanitarian intervention).

287. See Douglas Eisner, Note, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L.J. 195, 222 (1993) (suggesting that the events in Iraq, Somalia, and Yugoslavia may influence the Security Council to authorize humanitarian intervention).

288. See *generally id.* at 223-24 (discussing the continuing tension between the historic respect for non-intervention and the emerging principle of the subordination of state interest on humanitarian grounds). "China's Premier, Li Peng, . . . stress[ed] the importance of sovereignty [stating]: '[S]overeign equality of Member States and non-interference in their internal affairs should be observed by all Members without exception . . . . The core of these principles was non-interference in each others affairs.'" *Id.* at 223 (*quoting* U.N. Press Release (PM Summary), 3046th mtg. at Take 2, U.N. Doc. SC/5361 (1992)).

289. See Krylov, *supra* note 282, at 369 (observing that humanitarian interventions occurred prior to the adoption of the United Nations Charter without the need for a written legal source authorizing such interventions).

290. See Scheffer, *supra* note 269, at 254 n.4 (describing France's 1860 invasion of Turkish-ruled Syria as an example of humanitarian intervention occurring prior to the adoption of the United Nations Charter).

291. See Krylov, *supra* note 282, at 369 (discussing Russian intervention in sev-

The ratification of the United Nations Charter in 1945 severely curtailed the legality of unilateral military actions, including humanitarian interventions.<sup>293</sup> Article 2(4) clearly prohibits “the threat or use of force against the territorial integrity or political independence of any state . . . .”<sup>294</sup> This basic principle of non-intervention, grounded in the norm of state sovereignty, regulates international interventions in the post-Charter era.<sup>295</sup> A limitation on the principle of non-intervention recognized in the United Nations Charter is found in Chapter VII, which permits the Security Council to authorize the use of force upon a finding of a threat or breach of international peace or when necessary for self-defense. It appears that with the ratification of the United Nations Charter, humanitarian intervention is only justified when there is a clear finding that the humanitarian situation implicates international peace.<sup>296</sup> Consequently, the possibility of unilateral or unauthorized intervention appears completely precluded by the United Nations Charter.<sup>297</sup>

Despite the almost universal adoption of the United Nations Charter, unilateral humanitarian interventions have not disappeared from the international scene.<sup>298</sup> Prominent examples of unauthorized

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eral countries throughout the nineteenth and early twentieth century as evidence of accepted pre-United Nations Charter acts of humanitarian intervention).

292. *See id.* (noting acceptance of humanitarian intervention as a legitimate practice). Lassa Oppenheim, for example, noted that when a state treats its nationals with cruelty “as would stagger humanity,” the international community is called upon to intervene and compel the offending state to establish legal order “sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilization.” LASSA OPPENHEIM, *INTERNATIONAL LAW* 347 (1905).

293. *See* Krylov, *supra* note 282, at 371 (observing that the United Nations Charter is focused on peaceful resolution of problems and is against the use of force to resolve such problems).

294. U.N. CHARTER art. 2, para. 4.

295. *See* *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 100 (June 27) (confirming the prohibition of the use of force by one state against another).

296. *See* Krylov, *supra* note 282, at 377 (justifying humanitarian intervention only when international peace is implicated).

297. *See* Tuomala, *supra* note 263, at 15 (asserting that the United Nations Charter changed traditional international law by denying the right of nations to use unilateral intervention).

298. *See generally* RAMSBOTHAM & WOODHOUSE, *supra* note 272, at 4 (pro-

actions include the intervention by Tanzania in Uganda in 1979<sup>299</sup> and the Indian intervention in East Pakistan in 1971.<sup>300</sup> Despite credible claims of a threat to international peace caused by the regional instability and flights of refugees, the General Assembly criticized both these actions as unauthorized interference with state sovereignty.<sup>301</sup> There is little doubt, however, that both actions prevented further loss of life.<sup>302</sup>

Some commentators suggest that such unilateral actions should not be judged in terms of the prohibition contained in the United Nations Charter because the Security Council deadlocked during the 1970s and did not reach any decision concerning humanitarian intervention.<sup>303</sup> When the Security Council is unable to authorize intervention due to internal political squabbles, it is legitimate for a state to act unilaterally to end gross violation of human rights in another state, particularly when international peace is threatened.<sup>304</sup>

If inaction by the Security Council in the 1970s and early 1980s justified unilateral humanitarian interventions, the same is not true of

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viding examples of unilateral humanitarian interventions that occurred since the adoption of the United Nations Charter).

299. *See id.* Amin's regime engaged in extreme, widespread human rights abuses in Uganda from 1971-79. *See id.* It is estimated that 300,000 Ugandans were executed and thousands more were expelled until Tanzania invaded Uganda and overthrew Amin's government in 1979. *See id.* Amin fled into exile in Malawi and Tanzania withdrew. *See id.*

300. *See Scheffer, supra* note 269, at 254 n.4 (outlining the West Pakistan army's engagement in mass killings, rape, and pillage in East Pakistan subsequent to its demand for independence). In response, India invaded and defeated the West Pakistan forces, ultimately allowing for the birth of the nation of Bangladesh. *See id.*

301. *See Michael J. Bazylar, Re-examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 588 (1987).

302. *See RAMSBOTHAM & WOODHOUSE, supra* note 272, at 4 (asserting Tanzania's intervention in Uganda prevented further loss of life); Scheffer, *supra* note 269, at 254 n.4 (arguing that India's unauthorized intervention in Pakistan prevented loss of lives).

303. *See sources cited supra* notes 147-48 (providing the arguments presented by various scholars).

304. *See generally Tuomala, supra* note 263, at 15-17 (stating that the Security Council's role in the authorization of intervention is to promote international peace).

the 1990s.<sup>305</sup> With the end of the Cold War, the Security Council repeatedly proved itself able and willing to authorize humanitarian intervention.<sup>306</sup> The United Nations authorized humanitarian interventions in Iraq, Rwanda, Somalia, and the former Yugoslavia.<sup>307</sup> The situations in Iraq and Yugoslavia had sufficiently clear repercussions in neighboring countries to create a threat to international peace.<sup>308</sup> The situation in Somalia, however, was an internal crisis and the fact that the Security Council authorized intervention suggests an expansion of the concept of a threat to international peace.<sup>309</sup> Somalia's internal humanitarian crisis was considered so severe that it constituted a threat to internal peace in and of itself.<sup>310</sup> Given the Security Council's willingness to authorize intervention when a humanitarian crisis demands, it is possible to argue that there is no longer a justification for unilateral humanitarian interventions. Accordingly, the customary doctrine of humanitarian intervention did not survive the broad prohibition of intervention found in Article 2(4).<sup>311</sup>

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305. See Eisner, *supra* note 287, at 213 (describing authorized interventions occurring in the 1990s).

306. See *supra* note 215 and accompanying text (discussing the Security Council imposition of economic embargoes).

307. See S.C. Res. 688, U.N. SCOR, 2982d mtg., U.N. Doc. S/RES/688 (1991) (concerning intervention in Iraq); see also S.C. Res. 794, U.N. SCOR, 3145th mtg. at 3, U.N. Doc. S/RES/794 (1992) (addressing intervention in Somalia); G.A. Res. 713, 3009th mtg. at 45, U.N. Doc. S/PV.3009 (1991) (regarding the intervention in former Yugoslavia); S.C. Res. 929, 49th Sess., 3392d mtg. at 2, U.N. Doc. S/RES/929 (1994) (concerning intervention in Rwanda); see generally SEAN D. MURPHY, HUMANITARIAN INTERVENTION—THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 165 (1996) (discussing authorized interventions).

308. See Eisner, *supra* note 287, at 214-18 (discussing the situations in Iraq and Somalia and the ensuing effects on neighboring countries).

309. See Gordon, *supra* note 274, at 51.

310. See *id.* (reasoning that Somalia's internal crisis created a per se threat to peace).

311. See, e.g., Louis Henkin, *Conceptualizing Violence: Present and Future Developments in International Law*, 60 ALB. L. REV. 571, 573 (1997) (arguing that the Security Council's apparent willingness to authorize humanitarian interventions should eliminate the need for justifiable unilateral humanitarian interventions); BROWNIE, *supra* note 135, at 342 (suggesting that there is less need for unilateral humanitarian interventions); DINSTEIN, *supra* note 110, at 91 (commenting on the new conceptual approach to humanitarian interventions); M.J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621, 652 (1986) (describing the



c. Application of The Law on Humanitarian Intervention to Sierra Leone

From a definitional perspective, the Nigerian intervention in Sierra Leone does not qualify as a humanitarian intervention. The classic definition of "humanitarian intervention" applies only to situations where fundamental human rights are at stake or in situations requiring emergency provisions.<sup>312</sup> In Sierra Leone, the intervention's manifest objective was to restore the government of exiled President Kabbah.<sup>313</sup> Nigeria immediately made this position clear by announcing that it would not withdraw from Sierra Leone until Kabbah's restoration to power.<sup>314</sup> Furthermore, even assuming that Sierra Leone faced humanitarian crisis due to dwindling food supplies, the crisis was largely the creation of ECOWAS and United Nations imposed sanctions.<sup>315</sup> Consequently, a strange twist on traditional notions of state sovereignty would have to exist, allowing one state to invade another in order to rectify a humanitarian crisis that the intervening state created.<sup>316</sup> The Nigerian intervention, thus, cannot in good faith be called a humanitarian intervention.<sup>317</sup>

Even if the traditional definition of humanitarian intervention were expanded to include political actions to restore democracy, the Nigerian action still fails to pass the test for the legality of humanitarian

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expanded approach to humanitarian intervention).

312. See Krylov, *supra* note 282, at 366 (defining traditional notion of humanitarian intervention); see also Rupert, *supra* note 256, at A23 (reporting that the original reason for Nigeria's placement of troops in Sierra Leone did not qualify as humanitarian intervention).

313. See Rupert, *supra* note 260, at A27 (articulating the purpose of Nigerian intervention in Sierra Leone).

314. See Alec Russell, *Nigeria Pledges to Oust Freetown Coup Leader*, DAILY TELEGRAPH, June 13, 1997, at 17 (reaffirming Nigeria's goal in the Sierra Leone intervention).

315. See *Sierra Leone: Putting a Country Together*, *supra* note 7, at 44.

316. See Krylov, *supra* note 282, at 369 (commenting that humanitarian intervention trumps state sovereignty where a state frequently disregards the inherent rights of its own citizens).

317. See *Sierra Leone: Putting a Country Together*, *supra* note 7, at 44 (concluding that Nigerian troops induced the economically depressed situation in Sierra Leone).

intervention.<sup>318</sup> Article 2(4) of the United Nations Charter represents a broad prohibition on forceful, unilateral interventions in the territory or politics of another state.<sup>319</sup> Although some scholars find unilateral actions acceptable in Uganda<sup>320</sup> and Panama,<sup>321</sup> such interventions occurred at a time when the Security Council was unable to take effective action.<sup>322</sup> Recent interventions in Somalia and Iraq indicate that the Security Council is able to act when it finds a credible threat to international peace, thus closing the door on the only justification of unilateral humanitarian intervention.<sup>323</sup> Even if the definition of humanitarian intervention were expanded beyond that which is currently accepted by the international legal community, without the authorization of the Security Council, the actions of Nigeria are not a legitimate form of humanitarian intervention.<sup>324</sup> Although the Security Council did find both a threat to regional peace and a grave humanitarian situation in Sierra Leone, it only authorized economic sanctions.<sup>325</sup> Stopping short of authorizing military intervention, the Security Council deprived Nigeria of any means of characterizing its actions as a legal humanitarian intervention.<sup>326</sup>

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318. See U.N. CHARTER art. 2, para. 4 (prohibiting the use of force "against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations").

319. See *id.*

320. See TESÓN, *supra* note 9, at 195 (arguing that the unilateral attack in Uganda qualifies as a permissible intervention).

321. See D'Amato, *supra* note 99, at 516 (supporting the Panamanian intervention despite the United States unilateral act).

322. See generally Tuomala, *supra* note 263 (suggesting that interventions in the 1970s should not be considered violations against the prohibition of unilateral action due to the existing Security Council's indecision).

323. See generally Eisner, *supra* note 287, at 215, 219-20 (describing situations where the Security Council took action in conflicts deemed detrimental to international peace).

324. See Rupert, *supra* note 256, at A23 (discussing the reasons for the Nigerian presence in Sierra Leone and the lack of proper Security Council authorization for such presence).

325. See S.C. Res. 1132, *supra* note 37, paras. 8-10 (outlining the Security Council's authorization of economic, not humanitarian, sanctions in Sierra Leone).

326. See *id.* (describing the lack of proper authorization for humanitarian intervention).

#### 4. *The Right of Pro-Democratic Intervention*

The primary justification offered by Nigeria and ECOWAS for the military intervention in Sierra Leone was the overthrow of the military junta and the restoration of the democratically elected government of President Kabbah.<sup>327</sup> This attempt to justify the use of force raises questions concerning the existence of a general right of pro-democratic intervention under international law in the absence of prior Security Council authorization similar to that of the Haitian intervention.<sup>328</sup>

Pro-democratic intervention, like the doctrine of humanitarian intervention, is difficult to reconcile with the prohibition on the use of force of Article 2(4).<sup>329</sup> The relatively recent concept of interventions to restore democracy can be distinguished from the classical theory of humanitarian intervention, which concerns the use of force to protect those in imminent danger of death or grave injury.<sup>330</sup> Pro-democratic intervention differs from humanitarian intervention in that dictators, as the targets of such force, were engaged in oppressive acts against the populace rather than perpetrating fundamental human rights violations.<sup>331</sup> Generally, the doctrine of pro-democratic intervention concerns the use of force to assist oppressed populations in attaining the right of democratic self-government.<sup>332</sup> In particular, however, the concept of pro-democratic intervention comprises

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327. See Russell, *supra* note 314, at 17 (describing Nigeria's commitment to overthrowing the military junta in Sierra Leone).

328. See Scheffer, *supra* note 269, at 264 (questioning unauthorized intervention for pro-democratic reasons instead of intervention for humanitarian purposes).

329. See U.N. CHARTER art. 2, para. 4 (prohibiting use of force generally with the narrow exception of humanitarian intervention with Security Council approval).

330. See Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 7-8 (1995) (describing distinction between pro-democratic intervention and classical humanitarian intervention).

331. See Lori Fisler Damrosch, *Changing Conceptions of Intervention in International Law*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 91, 97 (Laura W. Reed & Carl Kaysen eds., 1993) (distinguishing humanitarian intervention from pro-democratic intervention).

332. See *id.* (defining the purposes of pro-democratic intervention broadly).

military interventions by third states to restore a democratic government overthrown by a *coup d'état*.<sup>333</sup>

The majority of international legal scholars consider pro-democratic intervention in the absence of Security Council authorization incompatible with the prohibition on the use of force and the principle of nonintervention and, thus, illegal under contemporary international law.<sup>334</sup> The overwhelmingly positive international reaction following restoration of the democratically elected government in Sierra Leone suggests a need to review the legality of the doctrine of pro-democratic intervention.<sup>335</sup> In light of international reactions and the military intervention, it appears appropriate to seek a legal construction reconciling the right of pro-democratic intervention with the prohibition on the use of force of Article 2(4) and with recent state practice.<sup>336</sup> This search is justified by the need to keep international law in conformity with the realities of international relations.<sup>337</sup> Such confor-

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333. See generally Tuomala, *supra* note 263, at 26-27 (offering various definitions of humanitarian intervention that would include intervention to overthrow a military government).

334. See, e.g., Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT—INTERNATIONAL LAW AND THE USE OF FORCE 37, 44 (Louis Henkin et al. eds., 1991) (asserting the illegality of pro-democratic intervention under modern international law); Oscar Schachter, *The Legality of Pro-Democratic Intervention*, 78 AM. J. INT'L L. 645, 649 (1984) (arguing that intervention based on pro-democratic initiatives cannot be reconciled with current international law); Franck, *supra* note 102, at 85 (opposing notion of pro-democratic intervention); DINSTEIN, *supra* note 110, at 89 (citing the United Nations Charter's prohibition on the use of force to support argument that pro-democratic intervention does not justify intervention in political affairs of another country); SHAW, *supra* note 88, at 803 (opposing pro-democratic intervention); Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 498 (1990) (criticizing the United States' pro-democratic intervention in Panama); cf. Tuomala, *supra* note 263, at 26 (specifying the narrow exceptions to humanitarian intervention under which pro-democracy efforts might be included).

335. See French, *supra* note 6, at A3 (hailing Nigerians for freeing Sierra Leone from military rule); cf. Claudia McElroy, *Nigeria's Intervention Puzzle West Africans*, GUARDIAN, June 28, 1997, at 17 (observing that criticisms of Nigeria's presence in Sierra Leone are aimed at Nigeria rather than the intervention itself).

336. See Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1146, 1155 (1962) (suggesting necessity for flexible interpretations of international law to accommodate changing times).

337. See *id.* (describing shifting nature of international relations as justification for revisions to international law).

mity ensures the effectiveness of the international legal order by providing stability to the inherently fragile international system.<sup>338</sup>

a. Restoring Democracy as a Justification for Military Interventions—Inconclusive State Practice Prior to the End of the Cold War

The most notable examples of military interventions prior to the end of the Cold War in which the right of pro-democratic intervention was invoked are the Dominican Republic, Grenada, and Panama—all of them involving armed interventions by the United States.<sup>339</sup> In 1963, a civilian junta overthrew the freely elected government of President Bosch of the Dominican Republic. Three years later, the junta suffered the same destiny and was overthrown by a military revolt, leading to the immediate outbreak of civil war between rival military factions. On April 28, 1965 United States troops landed in the country, primarily to secure the evacuation of foreign nationals.<sup>340</sup> During the Security Council debates, however, the representative of the United States also justified the military intervention on grounds closely related to the doctrine of pro-democratic intervention.<sup>341</sup>

338. See *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 173, 178 (Apr. 11) (“Throughout its history, the development of international law has been influenced by the requirements of international life . . .”).

339. See generally Eisner, *supra* note 287, at 206-08 (analyzing interventions of Grenada and Panama by the United States); Ved. P. Nanda, *The United States Action in the 1965 Dominican Crisis: Impact in World Order—Part II*, 44 DENV. L.J. 225, 273 (1967) (describing the United States intervention in the Dominican Republic).

340. See Nanda, *supra* note 339, at 273 (describing the events surrounding the United States military intervention in the Dominican Republic).

341. The United States representative stated:

We believe that the Dominican people, under the established principle of self-determination, should select their own government through free elections . . . Our interest lies in the re-establishment of constitutional government and, to that end, to assist in maintaining the stability essential to the expression of the free choice of the Dominican people.

Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 227 (1985).

The reaction of other states to the intervention was, with very few exceptions, overwhelmingly negative. Although the protest did not amount to an official condemnation through the United Nations, states generally viewed the military action as a violation of the principle of non-intervention in the internal affairs of other states.<sup>342</sup>

Grenada provides a second example of pro-democratic intervention.<sup>343</sup> The New Jewel Movement, under the leadership of Maurice Bishop, ousted the elected Prime Minister, Sir Eric Gairy, in 1979.<sup>344</sup> After increasing disagreement among the members of the new "People's Revolutionary Government," a military revolt ousted Bishop from power in October 1983.<sup>345</sup> Members of the Grenadian People's Revolutionary Army formed a Revolutionary Military Council as the new government of the island.<sup>346</sup> On October 25, 1983, the United States, supported by Jamaica, Barbados, and member states of the Organization of East Caribbean States ("OECS"), launched Operation Urgent Fury.<sup>347</sup> The participating states justified the military intervention by pointing to, *inter alia*, the need to restore the constitutional order as a prerequisite for democracy in Grenada.<sup>348</sup> President Reagan

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342. For an overview of the diplomatic reactions, see Doswald-Beck, *supra* note 341, at 228. For a critical evaluation of the intervention, see Nanda, *supra* note 339.

343. See generally, Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective*, 33 VA. J. INT'L L. 765, 768-71 (describing three justifications for United States intervention in Grenada).

344. See Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of the Invasion*, 78 AM. J. INT'L L. 131, 132 (detailing the events leading to anti-democracy sentiment in Grenada).

345. See *id.*

346. See *id.* at 131-32 (discussing the formation of the Revolutionary Military Council).

347. See *id.* at 132 (attributing the purpose of the organization on rescuing foreign nationals and increasing regional security).

348. As Prime Minister Seaga of Jamaica noted, "[i]f we ignore the occurrence of brutal military takeovers or political overthrows of Governments, we would immediately give heart to every subversive group within the region to engineer disorders and instability as a means of overthrows. *Address to the Jamaican House of Representatives of 25 October 1983, reprinted in WILLIAM C. GILMORE, THE GRENADA INTERVENTION—ANALYSIS AND DOCUMENTATION* 98, 101 (1984); see also *Address to the Barbadian People by Prime Minister Adams of 26 October 1983, reprinted in id.* at 102; *Press release of the Organization of Eastern Caribbean States of 31 October 1983, reprinted in id.* at 106.

justified the use of force as necessary "to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada, where a brutal group of leftist thugs violently seized power . . . ."<sup>349</sup>

The vast majority of states, including close allies of the United States, again characterized the intervention as illegal and found the justifications offered unconvincing and without legal basis in international law.<sup>350</sup> This general sentiment is echoed in the legal literature addressing the intervention in Grenada.<sup>351</sup> The United Nations General Assembly, in Resolution 38/7, condemned the military intervention as a "flagrant violation of international law and the independence, sovereignty and territorial integrity" of Grenada, and called for an "immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops."<sup>352</sup>

A final case worth noting in the history of pro-democratic intervention is Operation Just Cause, the U.S. military invasion of Panama in December 1989.<sup>353</sup> Tensions grew between the United States and the

349. Brad R. Roth, *Governmental Illegitimacy Revisited: 'Pro-Democratic' Armed Intervention in the Post-Bipolar World*, 3 TRANSNAT'L L. & CONTEMP. PROB. 481, 488 (1993).

350. For the overwhelmingly negative reactions of the international community, see SCOTT DAVIDSON, *GRENADA - A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW* 138 (1987). See also Laura Wheeler, *The Grenada Invasion: Expanding the Scope of Humanitarian Intervention*, 8 B.C. INT'L & COMP. L. REV. 413, 414-15 (1985) (contending that the United States was unjustified in their intervention in Grenada).

351. See, e.g., Francis A. Boyle, *International Lawlessness in Grenada*, 78 AM. J. INT'L L. 172 (1984) (expressing negative reaction to United States' intervention in Grenada); Richard Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263, 265 (1985) (characterizing United States intervention in Grenada as inappropriate); Joyner, *supra* note 344; John Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 U. MIAMI INTER.-AM. L. REV. 271, 351 (1986-87); William C. Plouffe, *Sovereignty in the "New World Order": The Once and Future Position of the United States, a Merlinesque Task of Quasi-Legal Definition* 4 TULSA J. COMP. & INT'L L. 49, 65 (1996); cf. Beck, *supra* note 343, at 817 (questioning the political underpinning in international law of United States' Grenada invasion).

352. G.A. Res. 38/7, U.N. GAOR, 38th Sess., Supp. No. 47, at 19, U.N. Doc. A/38/47 (1983).

353. See David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in RIGHT V. MIGHT—INTERNATIONAL LAW AND THE USE OF

authoritarian Panamanian government after General Noriega nullified the election of the opposition candidate Guillermo Endara in May 1989.<sup>354</sup> Noriega's alleged participation in drug trafficking and Panamanian sponsored violence against U.S. soldiers further intensified the situation.<sup>355</sup> On December 20, 1989, the United States sent 14,000 troops to join troops already stationed in Panama under the terms of the Panama Canal treaties, invaded Panama, and arrested General Noriega.<sup>356</sup>

One of the United States' justifications for the military intervention was to restore the democratic process in the country. Before the Organization of American States ("OAS"), the United States representative stated:

Today we are once again living in historic times: A time when a great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that the people—not governments—are sovereign . . . [This principle] has in this decade—and especially in this historic year 1989—acquired the force of historic necessity . . . Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.<sup>357</sup>

President Bush expressly justified United States action on the ground of restoring democracy to Panama.<sup>358</sup>

The intervention was overwhelmingly condemned as a clear violation of international law by the international community<sup>359</sup> and by in-

FORCE 109, 118 (Louis Henkin et al. eds., 2d ed. 1991).

354. *See id.* at 112-13.

355. *See id.* at 112.

356. *See id.* at 118.

357. Statement of Luigi R. Einaudi, U.S. Permanent Representative to the OAS, on 21 December 1989, *reprinted in* Scheffer, *supra* note 353, at 119.

358. *See* Address to the Nation Announcing United States Military Action in Panama, 25 WEEKLY COMP. PRES. DOC. 1974-75 (Dec. 20, 1989).

359. For an overview of the reactions of the international community, see ALEXANDROV, *supra* note 262, at 201. *See also* David W. Alberts, *The United States Invasion of Panama: Unilateral Military Intervention to Effectuate a Change in Government—A Continuum of Lawfulness*, 1 TRANSNAT'L L. & CONTEMP. PROB. 261, 286 (1991) (stating the international community condemned "Operation Just Cause" as a violation of international law).



ternational legal scholars.<sup>360</sup> The United Nations General Assembly and the OAS strongly condemned the invasion as a violation of international law and demanded the withdrawal of all invasion forces.<sup>361</sup> The attempt to justify the military action as an attempt to restore the democratic process in Panama was widely criticized as incompatible with existing international rules governing the use of force.<sup>362</sup>

State practice concerning the right of pro-democratic interventions before the 1990s is far from conclusive and does not provide strong support for the existence of such a right under international law.<sup>363</sup> The international community reacted with hostility against the interventions in the Dominican Republic, Grenada and Panama.<sup>364</sup> This in itself limits their potential precedential value.<sup>365</sup> There are, however, also

360. See, e.g., Henkin, *supra* note 263, at 312; Schachter, *supra* note 112, at 428; Brownlie, *supra* note 117, at 207; Franck, *supra* note 102, at 84; Nanda, *supra* note 339, at 502; Scheffer, *supra* note 353, at 119; Rumage, *supra* note 112, at 74.

361. See G.A. Res. 240/44, UN GAOR, 44th Sess., Supp. No. 21, at 52, U.N. Doc. A/RES/44/240 (1989) (reaffirming Panama's right to develop its political system without foreign interference); *Serious Events in the Republic of Panama*, OEA/Ser.G, CP/RES.534 (800/89) corr. 1, O.A.S., Wash., D.C. (prov. ed. Dec. 22, 1989); see also Tuomala, *supra* note 263, at 9 (noting that the United Nations General Assembly condemned the invasion by a vote of 75 to 20 and the OAS censured the United States by a vote of 20 to 1).

362. See Henkin, *supra* note 263, at 297; Nanda, *supra* note 334, at 498; Rumage, *supra* note 112, at 57; Scheffer, *supra* note 353, at 119; Tuomala, *supra* note 263, at 27; also Francis A. Boyle, *The U.S. Invasion of Panama: Implications for International Law and Politics*, 1 EAST AFR. J. PEACE & HUM. RTS. 80, 83 (1993); Plouffe, *supra* note 351, at 71.

363. See Nanda, *supra* note 334, at 489 (noting state practice does not support an expansive reading of the United Nations Charter advocating use of force to restore freedom and democracy).

364. See Alberts, *supra* 359, at 277, 287 (condemning invasions as violations of international law).

365. For a discussion concerning the legal effect of protests by states in inhibiting the formation of new norms of customary international law, see CHARLES G. FENWICK, *INTERNATIONAL LAW* 88 (4th ed. 1965); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 38 (1974-75) (emphasizing that rules originating in the voluntary practice of a small group of states and gradually adopted by others until becoming accepted law are inherently uncertain). *But see* ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 98 (1971) (stating that states cannot block the formation of customary law merely by protesting against them); Fidler, *supra* note 160, at 202 (contrasting the differences between generality and uniformity in state practices).

other reasons why these cases cannot serve as a basis for a right to restore democracy through military intervention.

First, although the above mentioned interventions were arguably designed, at least in part, to establish a democratic government,<sup>366</sup> the concept of pro-democratic intervention has never been used as the primary legal justification for the use of force.<sup>367</sup> The prominent justifications in all cases, with some slight modifications, have been, *inter alia*, the right to protect nationals abroad, self-defense, invitation by the lawful authorities, and, in the case of Panama, a treaty right of intervention, based on the Panama Canal treaties.<sup>368</sup> Thus, there has never been a claim, other than the case of Sierra Leone, that the right to restore democracy alone, or at least as used as the primary basis, justified armed intervention by a foreign state.<sup>369</sup>

Second, the interventions in the Dominican Republic and Grenada, following the communist revolution in Cuba and the Cuban missile crisis in 1962, must be viewed as advancing American foreign policy goals. These interventions are consistent with U.S. supported interventions in Guatemala in 1954, Cuba in 1960, and the support of the "Contras" in Nicaragua in the early 1980s.<sup>370</sup> The motivation for all of these interventions included the policy goal "to prevent interference in Western Hemisphere affairs by the international communist movement."<sup>371</sup> Thus, the value of these interventions as state practices sup-

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366. Cf. David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 457 (1996) (discussing criticisms of United States military intervention in foreign countries).

367. See Schachter, *supra* note 149, at 143 (labeling this justification as "oratorical flourishes"); cf. Roth, *supra* note 349, at 487 (comparing the incident in Panama to the situation in Grenada).

368. See Ramage, *supra* note 112, at 43.

369. Cf. Franck, *supra* note 102, at 71 (illustrating the United States rationales of humanitarian concerns along with restoration of democracy as reasons for the intervention).

370. See generally, Roth, *supra* note 349, at 513 (justifying American intervention in foreign states).

371. See S. CON. RES. 91, 83d Cong., 68 Stat. 1351 (1954) (citing the congressional resolution following the invasion of Guatemala by a United States-supported army for the purpose of ousting the leftist government of President Jacobo Arbenz Guzman); see generally Isaak I. Dore, *The United States, Self-Defense and the U.N. Charter: A Comment on Principles and Expediency in Legal Reasoning*, 24

porting the right to pro-democratic intervention must be judged in light of the special circumstances governing the bipolar power struggle during the Cold War and the "backyard" security interests of the United States.

Finally, all three interventions took place in a limited regional area, namely Central America and the Caribbean. In effect, all were undertaken by a single power, the United States, with the exception of Grenada, which involved limited participation by a regional organization.<sup>372</sup> Thus, even assuming the legality of pro-democratic interventions based on these cases, the recognition of such a right would be limited to Central America and would carry no substantial implications for the validity of pro-democratic interventions in other parts of the world.

b. Consent of the Legitimate Government as the Decisive Factor

The analyzed state practice does not provide substantive support for a general right of pro-democratic intervention in the absence of an authorization by the Security Council. Accordingly, it is still necessary to find a legal construction capable of explaining the changed reactions of the international community from condemnation in the earlier cases to acceptance in the 1990s, following the military interventions to restore democracy in Haiti and Sierra Leone.<sup>373</sup> In searching for a legal basis, the legal significance of the fact that immediately following the *coup d'état*, President Kabbah appealed to ECOWAS Chairman, General Sani Abacha of Nigeria, for immediate assistance to restore civilian rule in Sierra Leone, must be evaluated.<sup>374</sup>

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STAN. J. INT'L L. 1, 4 (1987) (developing "U.S. hemisphere interventions from 1954 to present").

372. See Joyner, *supra* note 344, at 149 (characterizing United States activity as an affirmative response to appeals from the OECS and Governor-General of Grenada).

373. See Michael J. Glennon, *Sovereignty and Community After Haiti: Rethinking the Collective Use of Force*, 89 AM. J. INT'L L. 70, 72 (1984) (urging the reconceptualization of traditional rules).

374. See Jonah, *May 27 Press Conference*, *supra* note 164; see also Goldman, *supra* note 34, at 3 (describing a situation where a nation's government seeks foreign military intervention to restore order); Tran & McElroy, *supra* note 24, at 4 (citing U.N failure to act as one of the causes of unrest in Sierra Leone).

The concept of "intervention by invitation of the government" is widely recognized,<sup>375</sup> though disputed, in state practice and the literature as an exception to the prohibition on the use of force and the principle of non-intervention.<sup>376</sup> Although the United Nations Charter does not expressly mention intervention with the consent or upon the request of the government as an exception to the prohibition on the use of force, international law recognizes that a state can consent to activities of other states on its territory.<sup>377</sup> The principle of consent may be regarded as operating as an independent principle under international law, compatible with the provisions of the United Nations Charter.<sup>378</sup> Thus, a military intervention by a state based on the request or consent of the government does not amount to a violation of Article 2(4) of the United Nations Charter, while aid to rebel groups by third states is generally regarded as illegal under international law.<sup>379</sup> The International Court of Justice expressed this view in the Nicaraguan case when it stated that "intervention is allowable at the request of the gov-

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375. See U.N. SCOR, 31st Sess., 1906th mtg. at 1, U.N. Doc. S/RES/387 (1976) (stating that it is "the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other state or group of states"); see also JENNINGS & WATTS, *supra* note 88, at 435 (acknowledging the use of requests for assistance); BROWNIE, *supra* note 135, at 317; Schachter, *supra* note 108, at 1645; Joyner, *supra* note 344, at 137-38; ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 241 (1986); SHAW, *supra* note 88, at 801; Skubiszewski, *supra* note 126, at 749.

376. See WILLIAM E. HALL, *A TREATISE ON INTERNATIONAL LAW* 286 (6th ed. 1909) (discussing the uncertainty over the legality of intervention by invitation). Compare Michael Akehurst, *Civil War*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 597, 599 (Rudolf Bernhardt ed., 1992) (questioning the competence of a state government which is in the process of being overthrown), with Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 *MICH. J. INT'L L.* 491, 502 (1996) (contending that consent by the target country legitimizes the intervention).

377. See Joyner, *supra* note 344, at 138 (arguing that the legality of intervention based on invitation for assistance is "well grounded in international law").

378. See Brownlie, *supra* note 117, at 208-09. *But see* Henkin, *supra* note 263, at 299 n.25 (condemning state invasion of another even where the target state approves).

379. See Stephen M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 *RECUEIL DES COURS* 411, 483-86 (1972 II); SHAW, *supra* note 88, at 795-97; Randelzhofer, *supra* note 92, at 121 (citing possible exception to the general rule in connection with "wars of national liberation").

ernment.”<sup>380</sup> Consequently, an armed intervention that is consistent with the will of the government of the state concerned does not constitute an enforcement action under Article 53(2) of the United Nations Charter and does not require an authorization by the Security Council.<sup>381</sup> Although the doctrine of intervention by invitation is generally regarded as part of international law, the question remains whether President Kabbah’s request for foreign military assistance constituted a valid “invitation” by the lawful government.<sup>382</sup>

c. Did President Kabbah Remain the Legitimate Government of Sierra Leone After the Coup d’État?

The legality of a military intervention, under the doctrine of intervention by invitation, turns on the existence of a valid consent by a legitimate government. As Louise Doswald-Beck points out, the primary task in this inquiry is the “identification of the ‘government’ of a State as the State’s valid representative in international law.”<sup>383</sup> There are serious doubts as to whether to consider President Kabbah the head of the government of Sierra Leone with authority to invite foreign intervention because Kabbah was already in exile in Guinea when he appealed to ECOWAS for assistance.<sup>384</sup>

Under the traditional and prevailing international legal doctrine, the government of a state is determined according to who maintains effective control of the state territory and the people therein.<sup>385</sup> Effectiveness as the sole criterion in recognizing a government of a state has

380. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27).

381. Jochen A. Frowein, *Legal Consequences for International Law Enforcement in Case of Security Council Inaction*, in THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS—NEW LAW 111, 120 (Jost Delbrück ed., 1993); Nolte, *supra* note 74, at 622.

382. See generally HALL, *supra* note 376, at 286; Doswald-Beck, *supra* note 341, at 190 (discussing the importance of state representation in legitimizing intervention).

383. Doswald-Beck, *supra* note 341, at 192; see Schachter, *supra* note 238, at 114.

384. See generally Goldman, *supra* note 34, at 3 (describing President Kabbah’s appeal for help while in exile).

385. See JENNINGS & WATTS, *supra* note 88, at 150; Schachter, *supra* note 112, at 424; SHAW, *supra* note 88, at 800.

been widely recognized in state practice, as well as the judgments of international tribunals and among international legal scholars.<sup>386</sup> Whether a group of nationals obtained power by overthrowing the former government in a *coup d'état* is legally irrelevant and does not affect the legitimacy of the government in representing the state and acting on its behalf.<sup>387</sup>

Reliance on de facto control rather than constitutionality is based on practical considerations.<sup>388</sup> To cooperate effectively in the international system, states cannot ignore the existence of an effective government or deny its capacity to represent the state in the international realm.<sup>389</sup>

According to traditional international law, an effective government may legitimately request foreign military assistance only to suppress limited civil strife.<sup>390</sup> As soon as an internal conflict becomes widespread and rebel forces control parts of the state territory, it is doubtful that a third state may still come to the aid of the challenged incumbent government without violating the principle of non-intervention.<sup>391</sup> This restriction is grounded in the belief that increased internal challenges lead to the decline of the government's ability to effectively control the territory and to speak for the state.<sup>392</sup> In these situations, the effec-

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386. See, e.g., Tinoco Concession Case (U.K. v. Costa Rica), 1 R.I.A.A. 369, 381-82 (1923); SATYAVRATA RAMDAS PATEL, RECOGNITION IN THE LAW OF NATIONS 83 (1959); GERHARD VON GLAHN, LAW AMONG NATIONS 75 (7th ed. 1996); SHAW, *supra* note 88, at 304.

387. See David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 212 (1996) (stressing effective control as the test for determining the existence of government).

388. See *id.* (stating that "effective control serves as a rough proxy for the existence of some degree of congruity between the government and the larger political community of the state, which supports the government's claim to represent the state as a whole").

389. See TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION 129 (1951) (recognizing the general acceptance that state can maintain international relations even with a decentralized system). Furthermore, as David Wippman notes, the criterion of effective control offers a "reasonably objective and externally verifiable basis for determining governmental authority, thus 'inhibiting intervention' by outside states." Wippman, *supra* note 387, at 212.

390. See JENNINGS & WATTS, *supra* note 88, at 437.

391. See Doswald-Beck, *supra* note 341, at 251; JENNINGS & WATTS, *supra* note 88, at 437-38; Skubiszewski, *supra* note 126, at 750.

392. See Wippman, *supra* note 366, at 440; see also Joseph H. Weiler, *Armed*

tive control doctrine undermines the ability of the individual, or group of nationals, to remain the lawful government of the state.<sup>393</sup> The former government may merely be one contender, among many, for power and thus lose its right to request help from outside in the name of the state.<sup>394</sup>

State practice appears to support a broader principle regarding the violent overthrow of a *de jure* government. Foreign states may intervene in support of the *de jure* government, as long as there is only a brief discontinuity in the *de jure* government's effective control of the state territory and the restoration is realizable with very limited military action.<sup>395</sup> The United Kingdom and France have frequently assisted governments in their former colonies threatened by mutinous troops without condemnation from the international community.<sup>396</sup> These actions, however, involved limited military measures and little resistance from the mutineers.<sup>397</sup>

The situation in Sierra Leone following the *coup d'état*, however, does not fall into this category. President Kabbah was already in exile in Guinea when he made his plea to ECOWAS for assistance. Kabbah's government had lost complete control over the territory of Sierra Leone at the time of his request for assistance. Furthermore, the early attempts to oust the junta from power, undertaken primarily by Nigeria in the week following the coup, completely failed despite the use of

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*Intervention in a Dichotomized World: The Case of Grenada*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 241, 254 (Antonio Cassese ed., 1986); ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 23 (1993).

393. See TANCA, *supra* note 392, at 23 (doubting whether a government plagued by internal strife has the authority to ask for foreign assistance).

394. See Nolte, *supra* note 74, at 622.

395. See Wippman, *supra* note 387, at 216-17 (finding most state treat the disruptions as limited and not indicative of the *de jure* government's ability to represent the state).

396. See, e.g., Reisman, *supra* note 106, at 796; Wippman, *supra* note 387, at 216.

397. For a description of the British suppression of the army mutiny in Tanganyika in January 1964, see Reisman, *supra* note 106, at 796. "Julius Nyerere, the President, turned to Britain for aid and a small contingent of Royal Marines flew in and suppressed the mutiny in one day. The death toll amounted to three mutinous soldiers killed. There were no civilian injuries and no marine casualties." *Id.*

considerable military power.<sup>398</sup> The military junta had effective control over large parts of Sierra Leone's territory, including the state capital, despite the continued presence of Nigerian troops in the country. Under traditional international law, the military junta must therefore be considered the government of Sierra Leone, at least from the time it successfully resisted its overthrow by Nigerian troops. Consequently, any request for assistance by President Kabbah is invalid and any military aid, particularly foreign military interventions, is illegal under traditional international law.<sup>399</sup>

The traditional doctrine of "effective control" faces new challenges and is open to critical reexamination in light of current developments in the practice of states since the beginning of the 1990s.<sup>400</sup> The overthrow and restoration of the Haitian President, Aristide, marks the first example in what may cautiously be viewed as a turning point in the determination of the legitimate government of a state under international law.<sup>401</sup>

Aristide became President of Haiti in 1990 after winning internationally monitored and supervised elections.<sup>402</sup> Months later, a military *coup d'état* overthrew Aristide and forcing him to flee the country. Although the junta effectively controlled the territory of Haiti and thus fulfilled the traditional criteria of a government, the international community did not recognize the junta as the government of Haiti.<sup>403</sup>

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398. See Goldman, *supra* note 34, at 3.

399. See Wippman, *supra* note 387, at 212-13 (confirming general state policy that aiding rebel forces or the government violates the non-intervention principle).

400. See Roth, *supra* note 349, at 483 (highlighting the strengthening of international human rights norms and the spirit of cooperation as reasons for the changing climate).

401. See Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Government-In-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT'L L. & PRAC. 199, 238 (1996); Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. L. 117, 140 (1997).

402. See Collins & Cole, *supra* note 401, at 219 (citing President Aristide's failure to disavow mob violence as one of the reasons for his eventual overthrow).

403. See, e.g., Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT—COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 132 (Lori Fisler Damrosch ed., 1993) (discussing the reactions of the international community); SEAN D. MURPHY, HUMANITARIAN INTERVENTION—THE UNITED NATIONS IN AN



The United Nations and the OAS continued to regard Aristide as the legitimate head of state, labeled the military junta as an "illegal *de facto* regime,"<sup>404</sup> and repeatedly demanded the democratically elected President's return to power.<sup>405</sup>

Burundi represents the next notable case in what may be the beginning of a paradigmatic shift in the concept of government legitimacy.<sup>406</sup> The Secretary-General and the Security Council strongly condemned the violent overthrow of the democratically elected government by a military *coup d'état* in July 1996.<sup>407</sup> Furthermore, Burundi's neighbors in the Lake region of East Africa immediately announced a total trade embargo against the country.<sup>408</sup> Under the pressure of the embargo and the Security Council, the military junta was eventually forced to restore the Parliament.<sup>409</sup>

In Sierra Leone, the military junta faced the same hostile reaction from the international community. No state recognized the junta as

EVOLVING WORLD ORDER 260 (1996). For discussion concerning the effect of collective legitimization of governments through in particular the United Nations, see David D. Caron, *Governance and Collective Legitimization in the New World Order*, 6 HAGUE Y.B. INT'L L. 29 (1993); Inis Claude, Jr., *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

404. U.N. SCOR, 49th Sess., 3413th mtg. at 1, U.N. Doc. S/RES/940 (1994).

405. See *id.* For discussion concerning the reaction of the OAS, see *Support for the Democratic Government of Haiti*, MRE/RES. 1, Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.1 (1991).

406. See generally James C. McKinsley, Jr., *As the West Hesitates on Burundi, Leaders in Africa Make a Stand*, N.Y. TIMES, Aug. 24, 1996, at A1 (providing an overview of the situation in Africa).

407. See U.N. SCOR, 51st Sess., 3682d mtg. at 2, U.N. Doc. S/PRST/1996/31 (1996) (articulating support for President Nyere); see also U.N. SCOR, 51st Sess., 3695th mtg. at 1, U.N. Doc. S/RES/1072 (1996) (condemning "the overthrow of the legitimate government and constitutional order in Burundi"); see also Donald G. McNeil, Jr., *Burundi Army Stages Coup, and New Fighting is Feared*, N.Y. TIMES, July 26, 1996, at A3; see generally Patricia Y. Reyhan, *Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 ALB. L. REV. 771 (1997).

408. See James C. McKinsley, Jr., *As the West Hesitates on Burundi, Leaders in Africa Make a Stand*, N.Y. TIMES, Aug. 24, 1996, at A1. The countries in question were Tanzania, Kenya, Uganda, Rwanda, and Zaire. See Reyhan, *supra* note 407, at 772.

409. James C. McKinsley, Jr., *East African Countries Keep Burundi Sanctions in Place*, N.Y. TIMES, Oct. 13, 1996, at A12.

the legitimate government of Sierra Leone. Furthermore, the United Nations, as well as regional organizations, strongly condemned the *coup d'état* as illegal under international law and demanded the return of the democratically elected government.

The international community's reaction following the *coup* in Sierra Leone thus demonstrates that Haiti can no longer be considered an exceptional case under unique circumstances,<sup>410</sup> but rather it is considered the beginning of a change in the international legal doctrine of governmental legitimacy. State practice in Sierra Leone, Haiti, and other cases of states and international organizations condemning military coups against democratic governments, suggests a tentative rejection of the "effective control" doctrine.<sup>411</sup> This is further evidenced by the fact that since the end of the Cold War states have adopted declarations obliging them to intervene on behalf of democratic governments which are in danger of being overthrown by *coup d'états*.<sup>412</sup> Examples of such documents are the Santiago Commitment to Democracy, adopted by the General Assembly of the OAS in June 1991<sup>413</sup> and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-

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410. See U.N. SCOR, 49th Sess., 3413th mtg. at 2, U.N. Doc. S/RES/940 (1994) (stating that the Security Council "recognizes the unique character of the present situation in Haiti . . ."). The unique circumstances were also stressed by international legal scholars. See Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT'L L.J. 329, 376 (1996); Wippman, *supra* note 191, at 677.

411. See Acevedo, *supra* note 403, at 141. *But see* Wippman, *supra* note 366, at 219 (noting that the United Nations has only authorized military intervention against a sitting government in Haiti). Haiti was a unique case because the U.N. authorized intervention was directed against a government that had overthrown a democratically elected government, and was supported by both the United States and the *de jure* government itself. See *id.* Neither of these circumstances are likely to be repeated in any other nation in the near future. See *id.*

412. For discussion on the legal implications of international treaties authorizing external interventions in cases of the violent overthrow of a government, see David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607 (1995).

413. See Domingo E. Acevedo & Claudio Grossman, *The Organization of American States and the Protection of Democracy*, in BEYOND SOVEREIGNTY—COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 132, 137 (Tom Farer ed., 1996); Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393 (1994).

operation in Europe ("CSCE" recently renamed "OSCE") in June 1990.<sup>414</sup> An argument can be made, albeit cautiously, that at least in the case of the violent overthrow of a sitting, democratically elected government, the criterion of "effective control" no longer serves as the decisive factor in determining the legitimacy of a government.<sup>415</sup>

The doctrine of legitimacy in determining the lawfulness of a government is not new in the history of international law. It is found in the writings of early international legal scholars such as Hugo Grotius, and only with Vattel did the contrary doctrine of de facto control take hold in legal literature.<sup>416</sup> The doctrine of legitimacy holds that the legality of every government rests not upon mere de facto control of the state, but upon compliance with the established legal order of that country.<sup>417</sup> Historically, however, the doctrine is not connected with democratic governance, but rather stressed the notion of dynastic legitimization. Not surprisingly, the doctrine was most popular in the end of the eighteenth and into the nineteenth centuries as a reaction of the principle European Monarchs, later united in the Holy Alliance, towards the French Revolution of 1789.<sup>418</sup> The doctrine of legitimacy in the form of democratic constitutionalism only applied to state practice at the beginning of the twentieth century in the foreign policy of the United States and the states of Central America. During this time the doctrine was embodied in the Tobar doctrine as well as the policies of President Wilson.<sup>419</sup> These developments, although noteworthy, had limited global impact and remained restricted to the area of the above mentioned states. Even within that limited geographical area, some states rejected the doctrine, favoring de facto considerations when rec-

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414. See 29 I.L.M. 1305 (1990). See generally Halberstam, *supra* note 99, at 163.

415. See Collins & Cole, *supra* note 401, at 238.

416. For a historical overview on this subject, see JULIUS GOEBEL, *THE RECOGNITION POLICY OF THE UNITED STATES* 15 (1915).

417. See CHEN, *supra* note 389, at 105.

418. See ROLAND HALL SHARP, *NONRECOGNITION AS A LEGAL OBLIGATION* 13 (1934); Stephen D. Krasner, *Sovereignty and Intervention*, in *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 228, 243 (Gene M. Lyons & Michael Mastanduno eds., 1995); CHEN, *supra* note 389, at 105.

419. See JENNINGS & WATTS, *supra* note 88, at 152; TESÓN, *supra* note 9, at 82; SHARP, *supra* note 418, at 34.

ognizing new governments.<sup>420</sup> Particularly during the Cold War period, the criterion of effective control was generally applied for the reasons outlined above. The ideological confrontation between the United States and the Soviet Union, accompanied by contradictory understandings of the legitimacy of a government in general and the meaning of democracy in particular, would have rendered attempts to determine the lawfulness of a government by general normative criteria based on popular sovereignty impossible. Despite the frequency of foreign interventions during this period, based on a variety of justifications,<sup>421</sup> the criterion of effective control must be seen as a legal means to prevent the internationalization of internal conflicts through interventions, which always entailed the danger of a large scale confrontation between the two main antagonists.

Even during the Cold War, however, the doctrine of effective control was not consistently applied. In South Africa, for example, the apartheid government clearly possessed effective control over the territory, but was denied credentials in the United Nations General Assembly because "the South African regime has no right to represent the people of South Africa."<sup>422</sup>

Haiti and Sierra Leone demonstrate that in the post-Cold War era, practical considerations that supported a reliance on the effective control doctrine have lost most of their factual basis.<sup>423</sup> Although considerable ideological differences obstruct a universal understanding and uniform application of the concept of democracy<sup>424</sup> and other international legal norms,<sup>425</sup> the international community's reaction to the

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420. See Philip C. Jessup, *The Estrada Doctrine*, 25 AM. J. INT'L L. 719 (1931); also SHARP, *supra* note 418, at 61-62.

421. For an overview of the justifications for numerous foreign interventions in Africa, see Wippman, *supra* note 366, at 444.

422. G.A. Res. 3151(G), U.N. GAOR, 28th Sess., Supp. No. 30, at 35, U.N. Doc. A/9030 (1973); see TESÓN, *supra* note 9, at 86; Roth, *supra* note 349, at 498.

423. See Perez, *supra* note 154, at 440.

424. See Anne Orford, *Locating the International: Military and Monetary Interventions after the Cold War*, 38 HARV. INT'L L.J. 443, 460 et seq. (1997); see also Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 601 (1996); Obiora Chinedu Okafor, *The Concept of Legitimate Governance in the Contemporary International Legal System*, 44 NETH. INT'L L. REV. 33, 48-49 (1997).

425. For an overview of the recent discussion concerning the relativity of human

coups in Haiti and Sierra Leone indicate there are now “clear cases” where the lawfulness of a government is measured by its democratic legitimization rather than its effective control in the form of brutal oppression.<sup>426</sup>

In view of these recent changes in the concept of government legitimacy, one may conclude that, despite his loss of control over the state territory, but in accordance with the reaction of the international community, President Kabbah remained the legitimate and thus lawful government of Sierra Leone after the *coup*. His request for outside military assistance was therefore a legitimate request for assistance from a head of state.

d. Was President Kabbah Entitled to Ask for Foreign Military Assistance?

Because President Kabbah remained the lawful government of Sierra Leone in exile, it would seem obvious that he maintained the right to ask for military assistance from other states to restore government. His request was not void under international law simply because he was in exile and no longer the head of an “effective government.” Restrictions on asking for outside assistance, in cases of widespread conflict, placed on governments by the “effective control” doctrine do not apply to democratically elected governments overthrown by an illegal *coup d'état*.<sup>427</sup> Rather they are a logical consequence of the traditional doctrine measuring the “legitimacy” or lawfulness of a government in accordance with its ability to control effectively the country on its own. In contrast to that view, a democratically elected government is legitimized on a normative basis and neither gains nor loses this legitimacy through effective territorial control or lack thereof.

This consequence seems logically derived from the concept of intervention by invitation as viewed together with the new doctrine of governmental legitimacy, which admittedly does not necessarily make

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rights, see Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM HUM. RTS. REV. 1 (1997); Stephen J. Toope, *Cultural Diversity and Human Rights*, 42 MCGILL L.J. 169 (1997).

426. See Roth, *supra* note 349, at 513 (discussing the conditions in Haiti).

427. Cf. *id.* at 511 (stating that before the intervention in Haiti occurred, “in all likelihood, fulfillment of request for armed assistance would not in this case be deemed a violation of international law”).

it a rule of international law.<sup>428</sup> There are suggestions, however, that the Haitian precedent indicates that in the absence of authorization by the Security Council, consent of the legitimate government alone does not give a right of pro-democratic intervention.<sup>429</sup> Although the Security Council took note of President Aristide's consent expressed in two letters,<sup>430</sup> the Council relied mainly on its authority to maintain international peace and security under Chapter VII of the United Nations Charter in authorizing military intervention in Haiti. It has been stated that the Security Council was "evidently unwilling to treat that consent as sufficient in and of itself to permit military action."<sup>431</sup>

Merely because the Security Council considered the situation in Haiti a threat to international peace and security under Article 39 of the United Nations Charter and relied on its powers under Chapter VII of the Charter to authorize the use of force, however, does not mean that Haiti serves as a precedent against the existence of a right of pro-democratic intervention based on the consent of the legitimate government. When authorizing military intervention by Member States involving the use of force, Article 24(2) requires the Security Council to act in accordance with the specific powers granted to this organ under the Charter.<sup>432</sup> The Security Council may only authorize coercive military sanctions under Article 42 in connection with Article 48.<sup>433</sup>

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428. This is demonstrated by the fact that although under international law, "any breach of an engagement involves an obligation to make reparations . . ." See Case Concerning the Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13). It is highly disputed and, in the light of the practice of states, doubtful whether this is *also* true for state obligations under international environmental law. See Oscar Schachter, *The Greening of International Law*, in MELANGES RENE-JEAN DUPUY 272 (1991).

429. See Wippman, *supra* note 366, at 473.

430. See U.N. SCOR, 49th Sess., Supp., July 30, 1994, at 1, U.N. Doc. S/1994/910 (1994) (consenting to agreement of draft Resolution S/1994/04).

431. Wippman, *supra* note 387, at 218.

432. "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, XII." U.N. CHARTER art. 24, para. 2.

433. There is some debate among international legal scholars concerning the specific legal basis for the authorization of military enforcement actions by member states in the absence of special agreements under Article 43 of the United Nations Charter. However, the apparently prevailing view considers authorizations of

Or, in the case of enforcement actions by regional arrangements, the Security Council may authorize military sanctions under Article 53 of the Charter.<sup>434</sup> Both methods require a determination by the Council under Article 39 that a threat to international peace and security exists.<sup>435</sup> Thus, the Security Council cannot authorize an enforcement action based solely on the consent of a state.<sup>436</sup> The Security Council must act in accordance with the powers conferred under the United Nations Charter. It follows that the Security Council, by basing its authorization on Chapter VII of the Charter, did not demonstrate re-

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the use of force like Resolution 678 (1990) in connection with the Iraqi Invasion of Kuwait as being based on Article 42 in connection with Article 48 of the United Nations Charter. See Jost Delbrück, *The Impact of the Allocation of International Law Enforcement Authority on the International Legal Order*, in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 135, 153 (Jost Delbrück ed., 1995) (arguing that when the Security Council called on United Nations members to carry out a decision under Articles 42 and 48, it is binding on the members); Christopher J. Sabec, *The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait*, 21 GA. J. INT'L & COMP. L. 63, 100 (1991) (stating that a unified armed force under the Security Council command is not necessary to the exercise of Article 42); T.D. Gill, *Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 33, 58 (1995) (arguing that Article 52 authorizes deployment of troops and military action).

434. See Ress, *supra* note 204, at 733.

435. For a discussion concerning the requirement of a determination under Article 39 prior to the adoption of measures under Article 42 United Nations Charter, see Frowein, *supra* note 216, at 631; SHAW, *supra* note 88, at 855. For a discussion of measures under Article 53, see Ress, *supra* note 204, at 733.

436. This is the difference between enforcement actions, also called "peacemaking" operations, under Chapter VII or VIII of the United Nations Charter and the traditional peace-keeping, or "Blue Helmet" operations, which are based primarily on the consent of all the parties to the conflict. See, e.g., Michael Bothe, *Peace-Keeping*, in THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 565, 573 (Bruno Simma et al. eds., 1994); Perez, *supra* note 154, at 413. In the situation of Haiti, the deployment of "Blue Helmets" would not have been possible due to the lack of consent on the side of the military junta. Thus, the possible necessity to use military means to restore democracy in Haiti, which distinguished this situation from classical peace-keeping operations, was also the reason why the Secretary General in his report on the United Nations mission in Haiti advised the Security Council to act under Chapter VII of the Charter. See *Report of the Secretary-General on the United Nations Mission in Haiti*, U.N. SCOR, 49th Sess. at 6, U.N. Doc. S/1994/828.

luctance to treat Aristide's consent as sufficient to permit military action, but acted in accordance with its Charter powers.

Furthermore, President Aristide's appeal for assistance was not addressed to individual states or a regional organization as in the case of Sierra Leone, but was exclusively directed to the United Nations.<sup>437</sup> In response, the United Nations activated the mechanisms for authorizing military interventions as prescribed in the Charter.<sup>438</sup> The argument that Aristide's consent was not a necessary prerequisite for the adoption of Resolution 940 does not contradict the foregoing argument.<sup>439</sup> This merely supports the fact that under Chapter VII, the Security Council has the power to adopt economic and military sanctions without the consent of the parties to the dispute in order to maintain or restore international peace and security. This does not, however, foreclose on the possibility that a foreign military intervention can be independently based on two legal justifications, namely, an authorization by the Security Council and the consent of the legitimate government of a state.<sup>440</sup>

Because the Security Council authorized intervention in Haiti, the Haitian intervention does not represent a strong precedent for the existence of a right of pro-democratic intervention by regional organizations or individual states based solely on the consent of the legitimate government. It does, however, lead to the conclusion that Haiti cannot be invoked as evidence of the unlawfulness of such interventions to restore democracy.

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437. See *Letter to the Secretary-General of July 29, 1994*, U.N. SCOR, 49th Sess., Supp., at 5, U.N. Doc. S/1994/905 (1994) ("Therefore, I feel that the time has come for the international community . . . to take prompt and effective action, under the authority of the United Nations . . .") (emphasis added).

438. Several international legal scholars have pointed out the possible significance of Aristide's request to the United Nations for the actions taken by the Security Council. See Richard B. Lillich, *The Role of the U.N. Security Council in Protecting Human Rights in Crisis Situations: U.N. Humanitarian Intervention in the Post Cold War World*, 3 TUL. J. INT'L & COMP. L. 1, 10 n.45 (1995) (noting Aristide's agreement with the text of Resolution 940); Perez, *supra* note 154, at 431 (stating that the Security Council found the support of Aristide's United Nations representative critical); Tomuschat, *supra* note 200, at 340 (noting the Security Council's finding of unique circumstances in Haiti, including the support of the legitimate government for United Nations action).

439. See TESÓN, *supra* note 9, at 256.

440. See *id.*



Furthermore, the fact that invitation by a democratically elected government was invoked as a justification in previous interventions such as Panama,<sup>441</sup> but was overwhelmingly rejected by the international community, does not necessarily speak against the validity of President Kabbah's request as a legal basis for ECOMOG intervention. First, in contrast to the situation of Panama, the present case of Sierra Leone, like Haiti, concerns a sitting, democratically elected government that was recognized by virtually all other states before the *coup d'etat*.<sup>442</sup> The international community's unanimous condemnation of coups against sitting democratic governments in the recent post-Cold War cases and the welcoming of their restoration to power through military interventions clearly demonstrate that a democratically elected government, even if temporarily forced into exile, has the right to request foreign military assistance.<sup>443</sup>

Second, the fact that the ECOMOG action in Sierra Leone was undertaken under the authority of ECOWAS as a regional organization and with the approval of other regional actors like the OAU further strengthens the legitimacy of the military intervention. The collective character, at least on a regional level, of the intervention provides a higher degree of impartiality and prevents, at least to a certain degree, abuses of the right to intervene.<sup>444</sup> Although Nigeria, the most powerful country in West Africa, played the dominant role this action, as did the United States in Haiti, this does not deprive the action of its collective and thus more acceptable character. This demonstrates that in

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441. See Letter to the Speaker of the House and the President Pro Tempore of Senate on United States Military Action in Panama, 25 WEEKLY COMP. PRES. DOC. 1985 (Dec. 25, 1989) (claiming the United States action is welcomed by the democratically elected government of Panama); see also Henkin, *supra* note 263, at 299.

442. See SHAW, *supra* note 88, at 800 (arguing that the democratically elected government of Panama never exercised any authority over the country).

443. See Sir Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 9, 86-87 (1994 III) (stating that an exiled head of state may represent his own state and call for foreign military assistance to restore lawful government).

444. See Tom Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT—COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 316, 331 (Lore Fisler Damrosch ed., 1993); see also Edward Kwakwa, *Internal Conflict in Africa: Is There A Right of Humanitarian Action?*, 2 AFR. Y.B. INT'L L. 9, 42 (1994); Nolte, *supra* note 74, at 624.

the absence of a standing military force under the command of the United Nations<sup>445</sup> “military intervention usually requires the lead of a committed and powerful state, one that is willing to invest the necessary resources and to stay long enough to accomplish the goals of intervention.”<sup>446</sup>

In an international system still predominantly characterized by a decentralized enforcement of international law through individual states<sup>447</sup> the most notable obstacle to successful interventions is the difficulty in generating necessary resources and political will.<sup>448</sup> Military actions will often only take place if the interests of a major world or regional power are at stake. As a consequence, military interventions to restore democracy and to protect human rights will remain selective and depend on political considerations of the major powers.<sup>449</sup>

This fact does not deprive foreign military interventions based on the consent of the democratically elected government-in-exile of their legality under international law. Thus, the ECOWAS intervention in Sierra Leone can be regarded as a lawful exercise of the use of force in

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445. For a discussion concerning a standing United Nations army, see Shibley Telhami, *Is a Standing United Nations Army Possible? Or Desirable?*, 28 CORNELL INT'L L.J. 673 (1995). See also Laurence I. Rothstein, *Protecting the New World Order: It is Time to Create a United Nations Army*, 14 N.Y. L. SCH. J. INT'L & COMP. L. 107 (1993).

446. Wippman, *supra* note 191, at 682.

447. See JESSUP, *supra* note 95, at 17; see also Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent*, in ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 107, 126 (Jost Delbrück ed., 1995) (concluding that states enjoy a wide degree of freedom whether to engage in international law enforcement). In contemporary international law, however, there are developments towards a more centralized concept of enforcement. See Jost Delbrueck, *A More Effective International Law or a New "World Law"?*—Some Aspects of the Development of International Law in a Changing International System, 68 IND. L.J. 705, 720 et seq. (1993) (discussing the decentralization of law enforcement authority in international law); JENNINGS & WATTS, *supra* note 88, at 11 (labeling international law as an imperfect order).

448. See Wippman, *supra* note 191, at 681.

449. See generally Stanley Hoffmann, *The Crisis of Liberal Internationalism*, 98 FOREIGN POL'Y 159, 172 (1995); John C. Pierce, *The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance*, 27 LAW & POL'Y INT'L BUS. 477, 511 (1996); Lea Brilmayer, *What's the Matter With Selective Intervention?*, 37 ARIZ. L. REV. 955 (1995).

light of the changing concept of government legitimacy and the resulting modified doctrine of intervention by invitation under contemporary international law.

### 5. *The Conakry Agreement*

A final issue that must be addressed in evaluating the legality of the ECOWAS intervention in Sierra Leone is the effect of the Conakry Agreement, which set forth a peace plan for Sierra Leone. When Nigerian troops ousted the Koromah junta in February 1998, the Conakry Agreement of October 1997 was still in force. The Agreement set out a six-month timetable for a return to democracy in Sierra Leone. The reinstatement of Kabbah's government by April 1998 would mark the culmination of the transition back to democracy. The Nigerian military intervention cut short the timetable agreed to by the parties to the Conakry Agreement. Although the Nigerian actions facilitated Kabbah's reinstatement and are thus consistent with the broadest goals of the Conakry Agreement, the means employed to achieve this end are clearly at odds with the Agreement's vision of a cooperative, negotiated transition. Nigeria's disregard for the express provisions of the Conakry Agreement, to which ECOWAS was a party, again calls into question the legality of its actions.

In reality, if not on paper, the Conakry Agreement was breached long before the Nigerian intervention. The Agreement rested on the achievement of six goals within six months: the reinstatement of the legitimate government of President Tejan Kabbah; the immediate cessation of hostilities; cooperation of the junta with ECOMOG to peacefully impose sanctions; disarmament, demobilization, and reintegration of combatants; provisions of humanitarian assistance; return of refugees and displaced persons; immunities and guarantees to the leaders of the May 25, 1997 coup; and modalities for broadening the power base in Sierra Leone.<sup>450</sup> The immediate cessation of hostilities and the disarmament of troops never materialized, thus

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450. See *Letter Dated 28 October 1997 From the Permanent Representative of Nigeria to the United Nations Addressed to the President of the Security Council*, U.N. SCOR, 52d Sess., Annex I, at para. 7, U.N. Doc. S/1997/824 (1997) (describing the ECOWAS peace plan for Sierra Leone contained in the Communiqué issued at Conakry on October 23, 1997).

crippling the Agreement almost from birth.<sup>451</sup> Within six weeks of the signing of the Conakry Agreement, the United Nations Secretary-General reported renewed military activity around the country.<sup>452</sup> The junta forces, primarily the RUF, continued to engage in heavy fighting against the Kamajors in the southeast of the country, particularly around diamond-producing areas.<sup>453</sup> Junta forces were reported recruiting, training, and arming new combatants.<sup>454</sup> In February 1998, five days before the Nigerians ousted Koromah, the United Nations Secretary-General reported on the situation in Sierra Leone, again recording the continued warring throughout the country.<sup>455</sup> The report notes that Koromah acknowledged to the United Nations Special Envoy that the Conakry Agreement was not being implemented.<sup>456</sup>

Although the Conakry Agreement on its face bound the parties, including ECOWAS, to an agreed timeline for the transition back to Kabbah's government, the junta breached the agreement from the beginning. The Conakry Agreement was treated as little more than a formality to be ignored by the all the factions, including the junta, RUF forces, the Kamajors, and the Civil Defense Unit ("CDU"). If the Agreement was not stillborn, it certainly died before it ever left the nursery. The Conakry Agreement in and of itself did not represent a prohibition against the Nigerian intervention.

#### IV. THE USE OF REGIONAL ARRANGEMENTS IN AFRICA

The ECOWAS action in Sierra Leone is illustrative of the organization's increasingly powerful position in West Africa. As noted

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451. See *Second Report of the Secretary General on the Situation in Sierra Leone*, *supra* note 41, para. 14.

452. See *id.* para. 16 (describing fighting in Sierra Leone despite the supposed ceasefire between ECOMOG and junta troops).

453. See *id.* (noting the failure of junta forces to adhere to the ceasefire).

454. See *id.* (explaining junta efforts to strengthen its forces).

455. See *Third Report of the Secretary-General on the Situation on Sierra Leone*, *supra* note 46, para. 10 (describing the security situation in the countryside as highly volatile).

456. See *id.* Koromah listed the "dominant role played by the Nigerian contingent in ECOMOG" as one of the primary reasons why the junta failed to fully adhere to the terms of the Conakry Agreement. See *id.*

above, ECOWAS played a crucial role in the Liberian civil war, from the early days of the war through the monitoring of the post-war elections in July 1997.<sup>457</sup> Although ECOWAS was originally created by the community of West African states as an economic organization,<sup>458</sup> the interventions in Liberia and Sierra Leone suggest that ECOWAS's self-assigned function is evolving not only toward regional peacekeeping, but to regional peace-creator.<sup>459</sup> A review of the ECOWAS actions in Liberia and Sierra Leone forces one to ask whether the development of regional organizations such as ECOWAS is something that the international community should embrace and encourage, or whether these developments should be treated with caution and skepticism. To answer this question it is important to understand how regional organizations function within in the United Nations.

#### A. OVERVIEW OF THE ROLE OF REGIONAL ORGANIZATIONS UNDER THE UNITED NATIONS CHARTER

Chapter VIII of the United Nations Charter addresses the issue of regional organizations. Article 52(1) provides that "[n]othing in the present Charter precludes the existence of regional arrangements 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 Purpose and Principles of the United Nations."<sup>460</sup> Article 53(1) supports the right of these regional organizations to exist with the United Nations framework by allowing the Security Council, to use such arrangements or agencies for its enforcement actions.<sup>461</sup> Ar-

457. See Howe, *supra* note 69, at 146; see also *Statement by the President of the Security Council*, UN Doc. S/PRST/1997/41 (1997) (commending ECOMOG for its contribution to the holding of elections in Liberia).

458. See Kannyo, *supra* note 207, at 60; Ofodile, *supra* note 168, at 410.

459. See Tran & McElroy, *supra* note 24.

460. U.N. CHARTER art. 52, para.1.

461. See U.N. CHARTER art. 53, para 1. The text reads:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement actions under its authority. But no enforcement action shall be taken under regional arrangements without the authorization of the Security Council, with the exception of measures against an enemy state, as defined in paragraph 2

article 53, however, clearly prohibits regional actions without the consent of the Security Council. Regional organizations are thus recognized and accepted as legitimate actors in the Charter, but are denied any right of action independent of Security Council authorizations.

Some commentators note that the United Nations Charter fails to define the relationship between regional organizations and the United Nations.<sup>462</sup> This ambiguity is likely the result of disagreement between states during the initial negotiations and deliberations leading up to the 1945 United Nations Conference on International Organization ("San Francisco Conference"), which resulted in the final United Nations Charter.<sup>463</sup> The disagreement among states at the San Francisco Conference is best illustrated in the conflicting vision of British Prime Minister Winston Churchill and United States Secretary of State Cordell Hull. While Churchill believed that primary responsibility for maintenance of the post-war order should rest with regional councils under the leadership of regional powers, Hull advocated the maintenance of peace by strong centralized global organization.<sup>464</sup> The result is the disagreement found in the United Nations Charter, which both recognizes regional organizations and provides for the supremacy of the Security Council.

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of the Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

*Id.* Paragraph 2 defines enemy state as a state that during was an enemy of the signatory state in question during World War II. See U.N. CHARTER art. 53, para. 2.

462. See, e.g., Anthony Clark Arend, *The United Nations, Regional Organizations, and Military Operations: The Past and Present*, 7 DUKE J. COMP. & INT'L L. 3, 18 (1996) (stating that rather than unambiguously defining the relationship between regional arrangements and the United Nations, the United Nations Charter provided language that satisfied all of the parties in 1945); Bjorn Hettne, *The United Nations and Conflict Management: The Role of the "New Regionalism,"* 4 TRANSNAT'L L. & CONTEMP. PROBS. 643, 652 (1994) (noting that the role of regions is only vaguely acknowledged in the United Nations Charter).

463. See Arend, *supra* note 462, at 5; Christopher J. Borgen, Note, *The Theory and Practice of Regional Organizations Intervention in Civil Wars*, 26 N.Y.U. J. INT'L L. & POL. 797, 798 (1994) (stating that there were debates concerning the relationship between global and regional arrangements at the San Francisco conference).

464. For a detailed analysis of this debate, see Inis L. Claude, *The OAS, the U.N., and the United States*, 547 INT'L COUNCILIATION 3 (1964).

The tension between regionalism and globalism embodied in Chapter VIII has led, on occasion, to jurisdictional tensions between the United Nations and regional organizations.<sup>465</sup> Following the Iraqi invasion of Kuwait in August 1990, for example, the Security Council issued a series of resolutions condemning the invasions and imposing harsh economic sanctions.<sup>466</sup> The Arab League's representative to the United Nations, Clovis Maksoud, criticized the international community for failing to first take the issue to the Arab League, the relevant regional organization.<sup>467</sup> Although the United Nations Charter did not require that the Arab League consider the problem before it reached United Nations consideration, the Arab League's criticism indicates the degree of confusion surrounding the issue of regional organizations within the United Nations. A variation of the jurisdictional problem also arose in the Balkans, where the possible jurisdiction of the United Nations, NATO, the European Community, and the West European Union led the various organizations to inaction while each deferred to another.<sup>468</sup> Thus there may be no clear consensus between Member States of the United Nations and regional organizations concerning the appropriate forum to address regional disputes.

#### B. THE CONTRIBUTION OF REGIONAL ORGANIZATIONS TO PEACE AND SECURITY IN AFRICA

In a recent report entitled "The Causes of Conflict and Promotion of Durable Peace and Sustainable Development in Africa," United Nation Secretary-General Kofi Annan highlighted the contributions that regional and sub-regional organizations can make to peace in

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465. See Alan K. Henrikson, *The United Nations and Regional Organizations: "King-Links" of a "Global Chain"*, 7 DUKE J. COMP. & INT'L L. 35, 44 (1996) (citing the vagueness of the responsibility between the global organization and regional groupings).

466. See S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 1, U.N. Doc. S/RES/660 (1990) (condemning Iraq's invasion of Kuwait); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg. paras. 3-4, U.N. Doc. S/RES/661 (1990) (imposing diplomatic and economic sanctions on Iraq).

467. See Arend, *supra* note 462, at 19 (stating that Clovis Maksoud believed the Arab League should have attempted to resolve the dispute between Kuwait and Iraq before the United Nations took action).

468. See *id.* at 20.

Africa.<sup>469</sup> Highlighting the need for regional and subregional initiatives to operate within the context of the United Nations, Annan noted that support to regional organizations is necessary and desirable for matters of international peace and security.<sup>470</sup> In particular, he notes the United Nations' overall lack of "capacity, resources, and expertise" to deal with the sundry problems arising on the African continent.<sup>471</sup> The report finds that strengthening Africa's capacity for peacekeeping must be a key priority for United Nations and supports a proposal for training and material assistance for regional peacekeeping in Africa.<sup>472</sup> Annan concludes his discussion of regional initiatives with a call for increased cooperation between the United Nations and the OAU, as well as strongly encouraging all Member States to contribute to United Nations and OAU trust funds established to improve preparedness for conflict prevention and peacekeeping in Africa.<sup>473</sup> The position of the Secretary-General is clear: the future of peace and security in Africa is at least partially dependent on the operation of regional organizations with the capacity and expertise to resolve conflict and maintain peace in their region.

Many international legal scholars agree that the growth in regional organizations represents a net gain to the international community, particularly when intervening in internal conflicts or civil wars.<sup>474</sup>

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469. See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, *supra* note 1, paras. 41-45 (1998).

470. See *id.* para. 41 (stating that the international community should "strive to complement rather supplant African efforts to solve Africa's problems").

471. *Id.*

472. See *id.* para. 45 (suggesting these peacekeeping missions can take place in the framework of a United Nations peacekeeping mission or one conducted by a regional organization).

473. See *id.* (emphasizing that these efforts are not in any way intended to relieve the international community of its obligations under the Charter of the United Nations).

474. See Richard Falk, *Regionalism and World Order after the Cold War*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 71, 73 (1995); see also Captain Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F.L. REV. 235, 236 (1997) (observing that regional organizations have begun to assert a new role in collective security by stopping civil wars and enabling combatants to achieve peace); Hettne, *supra* note 462, at 647; GARETH EVANS, COOPERATING FOR PEACE: THE GLOBAL AGENDA FOR THE 1990S AND BEYOND 41 (1993) (noting



Potential benefits of regional organizations include military and political advantages, including familiarity with the conflict and a strong commitment to and interest in regional peace. Furthermore, as the Secretary-General of the United Nations notes in his report, the use of regional organization in military conflicts may strengthen the institutional capacity of the regional actors to mediate regional crises.<sup>475</sup>

The use of regional forces may also, however, create problems in Africa. Although Annan points to the ECOMOG intervention in Liberia as illustrative of the potential for successful regional operations, it may be disputed whether that initiative was indeed a success. Regional forces tend to reflect existing political tensions in the region. In Africa, a continent of fifty-two countries and hundreds of ethnic groups that cross borders, regional organizations may reflect the divisions in the countries from which they draw their membership. Some observers note that the ECOMOG action in Liberia may have aggravated tensions in the civil war for this reason.<sup>476</sup> Serious Anglophone-Francophone divisions occurring within ECOMOG were reported during the Liberia action.<sup>477</sup> For example, as Anglophone countries pushed a major offensive against a rebel group in Liberia, Francophone countries resisted increased ECOMOG involvement.<sup>478</sup>

Furthermore, particular states may have a vested interest in capturing power in the regional organization. Since 1990, only Nigerians have commanded ECOMOG.<sup>479</sup> This has led to a situation in which ECOMOG is equated with Nigeria, and its credibility tied to Nigerian credibility.<sup>480</sup>

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that international legal regimes can offer security benefits to the international community, in addition to the parties in general).

475. See *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, *supra* note 1, para. 41.

476. See Howe, *supra* note 69, at 161; see also, Binaifer Nowrojee, *Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia*, 8 HARV. HUM. RTS. J. 129, 137 (1995) (explaining that peacekeepers have helped prolong the conflict).

477. See Howe, *supra* note 69, at 161.

478. See *id.*

479. See *id.*

480. See A. Bolaji Akinyemi, *End the Military Meddling*, GUARDIAN, June 5, 1997, at 21.

Finally, the existence of regional organizations within the framework of the United Nations carries with it the risk that the regional organization will ignore its place in the international system and act without the Security Council's approval. It is precisely this dynamic that has occurred in West Africa, first in the case of Liberia and again in Sierra Leone. As noted above, ECOWAS may rightfully be regarded as a regional organization under Chapter VIII of the United Nations Charter.<sup>481</sup> The Security Council itself confirmed this interpretation when it evoked Chapter VIII of the Charter to authorize ECOWAS to enforce sanctions against Sierra Leone.<sup>482</sup> Under Chapter VIII of the United Nations Charter, ECOWAS action in Sierra Leone required authorization by the Security Council that was absent at the time of the action. Although the ultimate result of the ECOWAS action in Sierra Leone may be applauded, the long-term stability of the international legal system requires regional organizations to act within the framework set out in Chapter VIII of the United Nations Charter.

With the end of the Cold War, Africa no longer attracts the attention of superpowers seeking to influence regional politics.<sup>483</sup> While the United States once rushed to the aid of pro-democratic movements in countries such as Angola and Mozambique, the end of a bipolar international system has led to a loss of urgency in the international community's approach to Africa. When Burundi imploded in 1996 and the United Nations called upon sixty non-African countries to form a standby peacekeeping force, only one state, Bangladesh, agreed.<sup>484</sup> As the failure of the international community to react to the genocide in Rwanda indicates, Africa can not rely on the international community to provide forces when necessary to support peace and political stability. For this reason it is necessary that African

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481. See *supra* notes 203-11 and accompanying text (analyzing whether ECOWAS is a United Nations Article VIII organization).

482. See S.C. Res. 1132, *supra* note 37, para. 8.

483. See A. Peter Mutharika, *The Role of the United Nations Security Council in African Peace Management: Some Proposals*, 17 MICH. J. INT'L L. 537, 539 (1996) (explaining that the Security Council is likely to take a greater peace management role in Africa, as superpowers continue to lose interest in Africa).

484. See Howe, *supra* note 69, at 163.

states develop organizations with the capacity to intervene when authorized by the Security Council.

## CONCLUSION

The international community's increasing acceptance of the use of force to restore democratically elected governments overthrown by *coup d'états* does not necessarily mean that such actions will prove successful in the long run. Even a democratically elected government cannot be successful if it is permanently dependent on a foreign military power to guarantee its security. Democracy must be the autochthonous expression of the political will of a country's populace to survive.<sup>485</sup> In newly democratic states confronted with serious economic problems and the heritage of a long civil war, democracy will often prevail only if the international community—most critically the United Nations<sup>486</sup>—supports the evolution from a fragile peace to stable and prosperous democracy. In Sierra Leone, the restoration of the democratically elected government may be regarded as a first step in this evolution process. To take root, this first step must be followed by the development of a civil society comprising democratic values. Sadly, recent outbreaks of renewed fighting in Sierra Leone suggest that the country will continue to struggle in its transformation to a full democracy. Ultimately this transformation may require the assistance of the international community of states.

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485. See E.K. Quashigah, *Legitimacy of Governments and the Resolution of Intra-National Conflicts in Africa*, 7 AFR. J. INT'L & COMP. L. 284, 296 (1995) (addressing specifically the situation in Africa); Gwendolyn Mikell, *Ethnic Particularism and the Creation of State Legitimacy in West Africa*, 4 TULSA J. COMP. & INT'L L. 99 (1996); see generally Nicholas O. Berry, *The Conflict Between United States Intervention and Promoting Democracy in the Third World*, 60 TEMP. L.Q. 1015 (1987) (explaining that the United States must not dominate democracy in the Third World—a democracy must be under the domination of its own people).

486. On the role of the United Nations in the Promotion and Assistance of Democratization, see *Agenda for Democratization: Report by the UN Secretary-General of December 20, 1996*, 51st Sess., Agenda Item 41, at 4, U.N. Doc. A/51/761 (1996) (defining the role of the United Nations in the promotion and assistance of the process of democratization). See also Ibrahim J. Gassama, *Safe-guarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT'L L.J. 287 (1997) (declaring that the United Nations has begun to develop a tenuous consensus on its new role in legitimizing governance in the Third World).

It is ironic that in the case of Sierra Leone a democratically elected government was restored primarily through the efforts of one of Africa's most notorious military regimes. Nigeria's struggles with repressive governance have long occupied the United Nations. In November 1995, following the hanging of nine Nigerian human rights activists, the General Assembly adopted a resolution condemning the arbitrary executions and expressing deep concern about the human rights situation in the country.<sup>487</sup> In 1996, the Commission on Human Rights noted the continuing deterioration of the human rights situation in Nigeria and called upon the military government of General Sani Abacha to ensure observance of human rights, specifically by restoring habeas corpus; by releasing all political prisoners, trade unionists, human rights advocates, and journalists in detention; by guaranteeing freedom of the press; and by insuring the respect for the rights of all people, particularly members of minorities.<sup>488</sup> In 1997, the United Nations General Assembly again expressed concern about the on-going human rights violations in Nigeria.<sup>489</sup> Clearly the military regime had everything to gain and nothing to lose by intervening in the affairs of its West African neighbors. The intervention in Sierra Leone provided Nigeria with the opportunity to redeem its own failings in the eyes of the international community, allowed it to gain a foothold in a country with significant diamond reserves, and provided an excuse to keep its own potentially menacing military engaged abroad.

Given the international community's increasing acceptance of pro-democratic interventions and the promising role of regional organizations in carrying out those interventions, it cannot escape notice that the Nigerian government, ECOWAS's greatest supporter, nullified the results of that country's democratic elections in 1993.<sup>490</sup>

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487. *See Situation of Human Rights in Nigeria*, U.N. GAOR, 50th Sess., Agenda Item 112(c), at paras. 2 & 3, U.N. Doc. A/RES/50/199 (1996) (suggesting that the absence of representative government in Nigeria led to human rights violations).

488. *See* U.N. GAOR, Hum. Rts. Comm., 57th Sess., 1499th mtg. at 4-6, U.N. Doc. CCPR/C/79/Add.65 (1996).

489. *See Human Rights Questions: Report of the Third Committee*, U.N. GAOR, 52d. Sess., Agenda Item 112, at 3, U.N. Doc. A/52/644/Add. 3 (1997) (describing the on-going problem of human rights violations in Nigeria).

490. *See* AMNESTY INT'L, NIGERIA: TIME TO END CONTEMPT FOR HUMAN RIGHTS, DOC. NO. AFR44/14/96, Nov. 6, 1996, at 1.

While the international community welcomes the ECOWAS action in restoring democracy to Sierra Leone, the ultimate challenge for ECOWAS may be to facilitate the peaceful transition to democracy in Nigeria. Recent developments in Nigeria signal tentative movement toward such a transition. Following the death of General Sani Abacha, Nigeria's new leader, General Abdulsalami Abubakar, began to release political prisoners in August of this year, and on December 5, 1998, Nigerians voted in democratic local elections.<sup>491</sup> The elections, generally recognized as "credible," are the first in a series of scheduled elections designed to bring democracy to the highest and lowest levels of governance in Nigeria.<sup>492</sup> Not until this process is complete will Nigeria's self-appointed role as regional defender of democracy be legitimized.

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491. See James Rupert, *Democracy Activists Applaud Nigerian Vote*, WASH. POST, Dec. 8, 1998, at A23.

492. See *Nigeria's Long Road Back to Democracy*, ECONOMIST, Dec. 12, 1998, at 45.