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The Law on Intervention: Africa's Pathbreaking Model

JEREMY LEVITT

In the past twenty years the people of the African continent have experienced human suffering on a scale unparalleled in human history. Millions of Africans, including women and children, have been killed by deadly conflict in the Democratic Republic of Congo (3 million), Sudan (2.5 million), Rwanda (1 million), Burundi (300,000) and Liberia (250,000). Besides these huge fatalities, there have also been the harsh effects of warfare on human, social and economic development, the breakdown of the rule of law, and most important, the catastrophic impacts of the HIV/AIDS pandemic on Africa's human architecture.

The international system of peace and security, including the scheme provided under the United Nations Charter framework, has not offered a viable strategy to reduce armed conflict and human suffering in Africa. The UN Security Council has been uninterested in or slow to react to conflict in Africa. Consequently, African states and their organisations have sought to fashion African solutions to African problems by creating innovative and robust regional security mechanisms. These structures are evolving the law of intervention, and in my view have been the most credible examples and single greatest driving force in the development of the doctrine of humanitarian intervention.

For the purposes of this article, humanitarian intervention can be taken to mean an intervention taken initially outside the UN Charter schemata and involving the use or threat of force against a state. Attempting to alleviate conditions in which a substantial part of the state's population is threatened with death or suffering on a grand scale, the intervener deploys armed forces in the state and, at the least, makes clear that it is willing to use force if its operation is resisted.

This article seeks to examine the sum and substance of the evolving intervention regime in Africa. I employ a structural approach to highlight the normative framework governing humanitarian intervention in Africa at the sub-regional and regional levels. The article is meant to be a snapshot rather than a comprehensive treatment of the law of intervention in Africa. Space constraints preclude examination of the legality of the various post–Cold War, unilateral African interventions (i.e., those that took place without prior Security Council authorisation or valid state consent). These include the interventions by the Economic Community of West African States (ECOWAS) in Liberia, Sierra Leone, Guinea-Bissau, Guinea and Côte d' Ivoire; that in the Central African Republic by the Mission for the Implementation of the Bangui Agreement;

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and the Southern African Development Community (SADC) operation in Lesotho.[1] I will nonetheless discuss the efficacy of the regional practice, law and frameworks that gave these interventions impetus. The discussion that follows will also include an analysis of the peace and security framework of the new African Union that replaced the Organisation of African Unity as the premier continental organisation in Africa in March 2001.

Historically among the most conservative subscribers to the international law principles of state sovereignty, non-intervention, and territorial integrity, African states and regional organisations today have adopted, operationalised and acted under norm-creating mechanisms that are chiselling away traditional prohibitions on the use of force enshrined in the UN Charter.

The evolution of the intervention regime in Africa reveals that it is the first region to advance a comprehensive collective security and intervention regime. From a normative standpoint, Africa's collective security regime is more advanced than any other, including the North Atlantic Treaty Organisation (NATO).

Western Myopia

In international studies, Africa is viewed as a pariah—a basket case, not a market place. Most policymakers and legal academics consider African states to be objects rather than subjects of international law. This explains why a significant portion of the wide body of literature on the law of the use of force, and more generally peacekeeping and humanitarian intervention, is heavily biased and flawed. The geopolitical, Eurocentric, and linear bias in Western legal academia is astounding when it is applied to Africa. This bias is in part due to a lack of Western intellectual interest in the continent; however, international lawyers typically lack multidisciplinary training and regional expertise, particularly on the developing world.

As a result, topical discussions on, for example, peacekeeping, peace enforcement, humanitarian intervention, and other peacemaking developments in Africa are either uninformed or inadequately analysed. More often than not, when analysts assess African security issues, they do so with a voice reminiscent of the British Colonial Office in the eighteenth century—paternalistic and unaware. This phenomenon is unfortunate. It creates an environment enabling the production of analytically weak scholarship. The academy can do better. It is time to pay closer attention to international law developments and influences from the world's second-largest continent, the one with the highest density of states: Africa.

The sections that follow assess the evolution of the law of intervention in Africa by analysing African state practice, treaty-law developments, and Security Council responses, or lack thereof, to them. Again, primary attention will be given to the evolving regional collective security and human rights structures of ECOWAS, SADC, and the newly formed African Union.

ECOWAS

In 1975, ECOWAS was founded by treaty. Its main aim at the time was to spur economic integration and development in west Africa.

1. For an analysis of the legality of most of the aforementioned interventions, see Jeremy Levitt, "African Interventionist States and International Law", in *African Interventionist States*, ed. Oliver Furley and Roy May (Aldershot: Ashgate Publishing, 2001).

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Regional security was an important but not vital concern. ECOWAS later adopted a Protocol on Non-Aggression (1978), and a Protocol Relating to Mutual Assistance on Defence (1981). Neither the treaty nor the protocols empowered ECOWAS to launch peacekeeping missions (although the 1981 protocol did empower it to intervene in conflicts that were "externally engineered"). In 1989, ECOWAS was tested with the eruption of the Liberian civil war (1989–97), in which, owing to international inaction, it was forced to intervene unilaterally (i.e., without Security Council authorisation) to halt the conflict.

Liberia

In November 1992, two full years after ECOWAS intervened in Liberia, the Security Council adopted Resolution 788, which placed an arms and petroleum embargo on the country and empowered ECOWAS to enforce its terms. The following year, in September 1993, it adopted Resolution 866, which established the UN Observer Group in Liberia (UNOMIL). This, for the first time in UN history, co-deployed forces with another mission (i.e., ECOMOG, the armed monitoring group of ECOWAS) that was already under way. Needless to say, ECOMOG continued to serve as primary keeper of the peace.

Moreover, between January 1991 and November 1996, the Security Council adopted fifteen resolutions relating to the situation in Liberia, and the president of the Security Council issued nine presidential statements in this connection. Almost every resolution and statement commended ECOWAS for its efforts, asked UN member states to support it financially, requested African states to contribute troops to its mission, and condemned attacks against it by rebel factions—not once condemning ECOWAS for unlawful action or inappropriate conduct.

The Security Council's stance affirmed the legality of the ECOWAS action and placed a retroactive *de jure* seal on its Liberia operation, confirming the existence of a right of humanitarian intervention. At the very least, the Security Council's approach in this case confirmed that an intervention taken outside the authority of the UN Charter could indeed be legal. The Liberian case was a watershed in international peace enforcement and should be considered as the first authentic case of humanitarian intervention in the post–Cold War era.

Article 58

In July 1993, three years into its "peace creation" mission in Liberia, ECOWAS adopted the Revised Treaty of 1993. The Revised Treaty was adopted to provide a treaty basis for peacekeeping in the future. Article 4(e) states that the contracting parties of ECOWAS affirm and declare their adherence to the "maintenance of regional peace, stability, and security through the promotion and strengthening of good neighbourliness". Article 58 deals with regional security matters and maintains that peace and security are key objectives of ECOWAS, in pursuit of which it may "establish a regional peace and security observation system and peace-keeping forces where appropriate". Section 3 of Article 58 also provides for the adoption of protocols detailing provisions governing political cooperation and regional peace and stability.

Sierra Leone

In May and August 1997, ECOWAS intervened in Sierra Leone in order to reverse the coup d' etat against the democratically elected government of President Ahmed Tijan Kabbah and forestall intense civil conflict.

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ECOWAS relied on Article 58 and an arguably invalid request by Kabbah to justify its interventions. Kabbah's request was dubious because when it was made he was not in *de facto* control of Sierra Leone. Nonetheless, there were other legal bases as well for these interventions. In October 1997, the Security Council supported the ECOWAS intervention in Sierra Leone by adopting Resolution 1132, which imposed an arms and petroleum embargo and travel restrictions against the junta. It also empowered ECOWAS to enforce the terms of the resolution. Similarly to Security Council Resolution 788 on Liberia, Resolution 1132 seems to have placed a retroactive *de jure* seal on the first internationally supported case of pro-democratic intervention.

The ECOWAS Framework

In October 1998, some fourteen months after the intervention in Sierra Leone, ECOWAS adopted a binding mechanism to allow for interstate collaboration in the collective management of regional security: the Framework for the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. The framework sets out an elaborate scheme for ECOWAS–ECOMOG enforcement operations, including a coherent command and control structure. It calls for the creation of an ECOWAS Mediation and Security Council to authorise all forms of intervention, including military.

Regarding internal conflicts that are sustained from within, Paragraph 46 of the framework provides for military intervention by ECOWAS when crises: (1) threaten to trigger a humanitarian disaster; (2) pose a serious threat to peace and security in the sub-region; and (3) erupt following the overthrow or attempted overthrow of a democratically elected government. Except for the new African Union, no other regional organisation has laid down a normative framework for unilateral military intervention. Furthermore, Paragraph 52 of the framework provides that ECOMOG may undertake military operations for peacekeeping; humanitarian intervention in support of humanitarian actions; and the enforcement of sanctions and embargos. ECOWAS is thus the first regional arrangement to codify both humanitarian and pro-democratic rights of intervention.

Guinea-Bissau

Ironically, the framework, which had been in ECOWAS's bureaucratic pipeline for quite some time, was adopted approximately one month before ECOWAS dispatched ECOMOG to Guinea-Bissau in December 1998. ECOMOG replaced Senegalese and Guinean troops who had intervened in June 1998 to save the sitting government from a mutiny by high-ranking military officers and to avert mass civil conflict between loyalist and opposition forces. ECOMOG was deployed for the following four reasons: (1) to monitor the peace and the imposition of a government of national unity; (2) to guarantee security along the Senegalese/Guinea-Bissau border; (3) to keep the warring parties apart; and (4) to guarantee free access to humanitarian agencies. What is interesting here is that on 26 December 1998, less than one week before ECOMOG deployed in Guinea-Bissau, the Security Council adopted Resolution 1216, which approved of the ECOMOG mission and recognised that it might need to employ force to fulfil its mandate.

The ECOWAS Protocol

In December 1999, approximately one year after the introduction of the framework

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and the launch of the Guinea-Bissau operation, ECOWAS adopted the Protocol Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, which aims to implement further Article 58 of the Revised Treaty. A key objective of the protocol is to prevent, manage and resolve internal and interstate conflict—and here it states that Paragraph 46 of the framework governs these matters. Like the framework, Article 22 of the protocol states that peacekeeping and the restoration of peace, humanitarian intervention during humanitarian disasters, and the enforcement of sanctions, including embargoes, are key responsibilities of ECOMOG. Article 22 does not recognise the authority of the Security Council in either adjudicating or maintaining international peace and security. Perhaps this is a positive development, given the United Nations' dismal record on managing the crises in Liberia, Somalia, Rwanda, the Central African Republic, Guinea-Bissau, Sierra Leone and Sudan—to mention just a few operations.

Article 25 of the protocol complements Paragraph 46 of the framework, stating that ECOWAS may take enforcement action in internal conflicts (1) that threaten to trigger a humanitarian disaster or pose a serious threat to peace and security in the sub-region; (2) where there has been a serious and massive violation of human rights and the rule of law; and (3) when there has been an overthrow or attempted overthrow of a democratically elected government. Invoking these considerations, ECOWAS sought to establish an ECOMOG force along the border areas of Guinea and Liberia in December 2000 in order to prevent skirmishes between the two countries from escalating into full-blown conflict.

This is the background to the development of ECOWAS law, which has evolved over the past twelve years to meet the growing security challenges in west Africa. ECOWAS law not only lays down an unambiguous framework for the protection of human rights, democracy, and the rule of law, it also codifies both humanitarian and pro-democratic rights of intervention. The revolutionary evolution of ECOWAS law comes at the behest of west African nations, which have consistently demonstrated their willingness to forfeit sovereignty for peace and security.

Côte d'Ivoire

In October 2000, Côte d' Ivoire's current president, Laurent Gbagbo, was declared the winner of a bitterly contested national election that was decided in his favour by the country's supreme court. He has not been able to bring peace to the embattled nation.

The root of the current crisis in Côte d'Ivoire dates back to September 2002, when approximately eight hundred discontented soldiers attacked military installations in the commercial, administrative and diplomatic centre, Abidjan, and in the second-largest city, Bouaké, launching a rebellion that divided the country between the rebel-controlled north and the loyalist south. Gbagbo lost *de facto* control of the country.

In October 2002, at the request of President Gbagbo, ECOWAS, acting under the authority of its protocol, instituted a peacekeeping force to monitor the cease-fire agreement in Côte d'Ivoire. Efforts by ECOWAS, the United Nations, France and the African Union culminated in the Linas-Marcoussis peace agreement of January 2003. In early February 2004, the UN Security Council adopted Resolution 1527, which fully supported efforts by ECOWAS and France to "promote a peaceful settlement of the conflict" and empowered the ECOWAS mission

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in Côte d'Ivoire to stabilise the nation. The resolution authorised France to support ECOWAS. In late February, the Security Council adopted Resolution 1528 establishing the UN Operation in Côte d'Ivoire (UNOCI) to guarantee the terms of the peace agreement. ECOWAS forces were integrated into UNOCI and French peacekeeping forces were authorised to "use all necessary means" to support the UNOCI mission.

Legalising Intervention

ECOWAS has evolved from an organisation created to spur regional economic integration and development into a viable regional collective security arrangement. The harsh consequences of warfare for peace, security, democratisation and economic development in west Africa have forced ECOWAS to proffer normative frameworks to manage conflict. The codification of African regional customary law allowing for pro-humanitarian and pro-democratic intervention has influenced the wider corpus of the law on intervention and likewise been influenced by it.

SADC

ECOWAS is not wholly unique in this respect. SADC has established similar regional security mechanisms.

The SADC Treaty and Organ

SADC emerged in January 1992 as the successor organisation to the Southern African Development Co-ordination Conference, which had been founded by the then "front-line" states in order to reduce regional dependence on apartheid South Africa. The succession appears to have been partly inspired by the changing political environment in South Africa following Nelson Mandela's release from prison in 1990 and the ongoing efforts to dismantle fully the country's apartheid system. In October 1993, the new SADC treaty entered into force. One of its primary objectives is to "promote and defend peace and security" in the southern African region.

In June 1996, SADC adopted the "Organ for Politics, Defence and Security" (OPDS). Key aims of OPDS are to protect the people and development of the region against the breakdown of law and order and interstate and intrastate conflict. OPDS supports co-operation on regional security through conflict management and co-ordination of the participation of member states in international and regional peacekeeping.

Objective (g) of OPDS states that where diplomatic efforts fail, OPDS is responsible for recommending punitive measures to the summit of the heads of state of SADC members. It also states that measures to be taken in this regard will be further elaborated in a protocol on peace, security and conflict resolution.

The SADC Protocol

In 1997, the SADC summit adopted a Protocol on Politics, Defence and Security in the SADC Region. Under the protocol, core functions of SADC are protecting people from instability arising from the breakdown of law and order; conflict prevention, management, and resolution; and peacemaking and peacekeeping to achieve sustainable peace and security. Furthermore, as with Paragraph 46 of the ECOWAS framework, Article 11(2)(b) of the SADC protocol sets out elaborate criteria for when regional intervention in internal conflicts is justified, namely, when there is: (1) large-scale conflict or violence between sections of the population of a state, or between the state and/or its armed or paramilitary

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forces and sections of the population; (2) a threat to the legitimate authority of the government (such as a military coup); (3) a condition of civil war or insurgency; and (4) any crisis that could threaten the peace and security of other member states. The SADC protocol also states that OPDS "shall respond to an invitation by a member country to become involved in mediating a conflict within its borders".

Lesotho

In 1998, when segments of Lesotho's civilian population, including opposition party supporters and elements in the sitting government, backed a mutiny by junior military officers, the small landlocked country plummeted into chaos. The situation quickly deteriorated as loyalist and opposition forces clashed on the streets of the capital, Maseru. At the request of the lawful government, South Africa and Botswana launched a robust intervention to thwart any attempt at a coup d'etat and to restore law and order in accordance with the SADC protocol. And unlike the ECOWAS interventions in Liberia, Sierra Leone, Guinea-Bissau and Guinea, when SADC launched its operation in Lesotho, the complete legal framework for the intervention was already in place.

ECOWAS and SADC

A key distinction between the law of ECOWAS and that of SADC is that the latter appears to be more conservative in seeming to require that a country consent to an intervention, whereas the former clearly does not require such consent. Moreover, Article 11(3)(d) of the SADC protocol requires that enforcement action be taken only as a last resort and only with the authorisation of the Security Council. The ECOWAS framework and protocol do not explicitly require such authorisation. Yet SADC did not seek any such endorsement prior to launching its 1998 operation in Lesotho. That said, both the SADC and ECOWAS treaty regimes have similar criteria for intervention—and both provide for a pro-democratic right to intervene.

The African Union

The Constitutive Act of the African Union came into force in March 2001. The act lays out a completely new governance framework for the African continent: the African Union's new EU-like structure varies considerably from that of its predecessor, the Organisation of African Unity.

Article 4 on the principles of the African Union includes three very important provisions on regional security and peacekeeping: one accords the union the "right" to intervene in a member state in respect of "grave circumstances", namely, war crimes, genocide and crimes against humanity; another accords member states the "right" to request the African Union to intervene in order to restore peace and security; and the third provision condemns and rejects unconstitutional changes of government. These provisions complement and "continentalise" those enumerated in the ECOWAS framework and protocol and in the SADC protocol. In 2003, the African Union adopted a peace and security protocol to evolve further its peacemaking and collective security capability.

The Peace and Security Protocol

The protocol establishing the Peace and Security Council of the African Union (AUPSC) came into force on 26 December 2003, and serves as the first continent-wide, regional, collective security system.

AUPSC is empowered to carry out several important functions that complement the

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above-mentioned security mechanisms in Africa. AUPSC's key function is to promote peace, security and stability in Africa through early warning, preventive diplomacy, mediation, and most important, peace support operations, intervention, humanitarian action, disaster management, peace-building, post-conflict reconstruction, and any other function as may be decided on by the African Union. AUPSC may employ force in multiple contexts, whether to thwart conflict and safeguard human rights, to ensure access to humanitarian agencies, or to deliver humanitarian relief during natural disasters.

The AUPSC protocol empowers the African Union to engage in numerous activities from policy oversight to fully fledged military intervention. Furthermore, AUPSC is charged with instituting "sanctions whenever an unconstitutional change of Government takes place", implementing a "common defense policy", and co-ordinating and co-operating with sub-regional and regional mechanisms (and the United Nations), particularly on peace and security issues. African Union member states are bound by AUPSC's decisions and actions and "shall extend full cooperation to, and facilitate action by, the Peace and Security Council for the prevention, management and resolution of crises and conflicts".[2]

The AUPSC protocol confers on the African Union more powers and coherent legal authority to engage in peace enforcement than the UN Charter does the Security Council. The protocol clearly delineates the circumstances under which intervention may take place, and African Union law creates an affirmative duty on member states to institute sanctions against regimes that come to power extra-constitutionally. Against this background, it is more than evident that the AUPSC framework was a response to Africa's fragile security environment and reflects the recognition of African leaders that an apparatus was needed to deal with any and all security issues, whether man-made or acts of God.

Africa's Daring Example

The willingness of African states to codify criteria for military intervention and openly to condemn in the continent's foremost political body undemocratic seizures of power is astounding. Even more surprising is the fact that African nations have contracted authority to the African Union to override their sovereignty by authorising and launching humanitarian interventions, demonstrating their commitment to achieving peace, security, and stability in the continent.

Final Words

The birth of this seemingly new African liberalism on the regional security front has resulted in a whittling away of the absolutist/positivist mantle of state sovereignty and non-intervention, and an acceptance of the logic of sovereignty as responsibility. While it is true that political elites often have mixed motives for supporting particular policy prescriptions, democrats and autocrats alike recognise that peace and security are precursors to creating an enabling environment for authentic political and economic development. Both reformers and thieves recognise respectively that it is necessary to have some measure of stability to effectuate positive change in, or pilfer, the state; hence,

2. See Jeremy I. Levitt, "The Peace and Security Council of the African Union", *Journal of Transnational Law and Contemporary Problems* 13, no. 1 (spring 2003), p. 118.

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there are incentives for both democrats and autocrats to operate in a conflict-free environment. This may explain the general consensus among political elites in Africa to endow regional bodies with the authority to employ under certain circumstances the use of force in states.

Whatever the case may be, it is unambiguously clear that African states and their organisations have created the world's most legally coherent frameworks to combat conflict and regional insecurity. No other nations or regions have offered comparable structures—nor demonstrated a similar willingness to sacrifice human and tangible resources and sovereignty for peace. While not every African intervention discussed above qualifies as a humanitarian intervention, the continuity in state practice and treaty-law developments confirms the existence of, and strengthens, the right of humanitarian intervention under customary international law. The new African interventionism has not only influenced state behaviour inside and outside Africa, it has also added significant weight to the development of the corpus of international law. ❑

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