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**ECOWAS'S RIGHT TO INTERVENE IN CÔTE D'IVOIRE TO INSTALL
ALASSANE OUATTARA AS PRESIDENT-ELECT**

Julie Dubé Gagnon[†]

On January 6, 2011, President-elect Alassane Ouattara of Côte d'Ivoire requested the Economic Community of West African States (ECOWAS) to intervene in order to remove incumbent Laurent Gbagbo, who refused to leave power following the democratic presidential elections of November 2010. In December 2010, ECOWAS gave a final ultimatum to Laurent Gbagbo to comply with its request on ceding his throne. Otherwise, ECOWAS warned, it would be compelled to use legitimate force to serve the demands of the Ivorian people. This Article ascertains the illegality of a military intervention for pro-democratic motives in light of the current post-election crisis in Côte d'Ivoire. ECOWAS could not have lawfully intervened in Côte d'Ivoire in order to install Alassane Ouattara because such use of military force contravenes the U.N. Charter, and permitting such derogation would destabilize international peace and security.

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INTRODUCTION

The right to intervene using military force by a regional organization for pro-democratic motives animates heated debate among international legal scholars. Indeed, many seemingly irreconcilable issues arise when assessing the legality of such an intervention without prior blessing from the United Nations (U.N.) Security Council. The question was raised on January 6, 2011, when President-elect Alassane Ouattara of Côte d'Ivoire requested the Economic Community of West African States (ECOWAS) intervene in order to remove incumbent Laurent Gbagbo, who refused to leave power following the presidential elections of November 2010.¹

In order to ascertain the legality of a pro-democratic intervention (PDI) in light of the recent post-electoral context of Côte d'Ivoire, Part I of this Article exposes the facts behind the escalation of turmoil and the request for an ECOWAS involvement. Part II subsequently lays out the legal framework under the U.N. Charter to which military force conducted by a regional organization needs to abide. To that end, the U.N. Charter provides that no such intervention can occur lawfully without prior authorization from the Security Council. In the present Ivoirian case, no such authorization was granted. Thus, other avenues advocating for a lawful use of force despite the Security Council's lack of approval have been proffered by legal scholarship. These include the right to intervene under the PDI doctrine, which will be

¹ See *Opposition to Ivory Coast's Gbagbo Eroding: ECOWAS*, AGENCE FR. PRESSE ENGLISH WIRE, Feb. 8, 2011, available at WL NewsRoom.

discussed in Part III. Part IV presents the proposal for a lawful intervention pursuant to a developed African regional custom that would translate as meeting the requirements of Article 53 of the U.N. Charter.²

Further, Part V of this Article is divided in two sections. The first section of Part V argues issues of consent expressed following the paradigm of intervention by invitation. Proponents of military intervention by a regional organization argue that the *de jure* head of state, here President-elect Ouattara, can lawfully request and invite foreign military intervention. Conversely, adherents of the opposing view contend that only the head of state in effective control (*de facto*), incumbent Gbagbo, can legally request military action. Unfortunately, international law is not clear in that regard. The second section discusses the views that no such Security Council authorization is required because Côte d'Ivoire has consented to military intervention by adhering to the ECOWAS treaties, which permit the use of force in order to restore democracy and peace in the region. Finally, Part VI of this Article concludes with a necessity argument, suggesting that ECOWAS is not the best-suited actor to intervene if such intervention were to be found lawful.

This Article overall concludes that ECOWAS could not have lawfully intervened in Côte d'Ivoire in order to install Alassane Ouattara because such use of military force contravenes the U.N. Charter, and permitting such derogation would destabilize international peace and security. This is not to say however, that there is no need in international law to search for a lawful compromise between the economy of the U.N. Charter and the human reality on the ground, oftentimes kept in the shadow of the international community's preoccupations.

I. FACTS

Côte d'Ivoire plunged into civil turmoil in September 2002 when subversive soldiers attempted to overthrow President Laurent Gbagbo.³ Although the coup failed, it led to the outbreak of wide-scale civil conflict taking its roots in the ten-year-old animosity that has existed between the Muslim population of the North and the Christian and Animist populations of the South.⁴ In late 2002, *de facto* partition of the country resulted from the

² U.N. Charter art. 53 (“[N]o enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council,” with certain exceptions.).

³ See Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT'L L.J. 785, 808–09 (2006) [hereinafter Levitt, *PDI in Africa*].

⁴ *Côte d'Ivoire (2002–2008)*, PLOUGHSHARES (Jan. 2009), http://ploughshares.ca/pl_armedconflict/cote-divoire-2002-2008/ [hereinafter PLOUGHSHARES]. A major source of this tension is the perceived discrimination of northerners, who contend that they have been politically marginalized for years. They have been denouncing their isolation since the exclusion of Alassane Ouattara, originally a popular northern politician, from the 2000 presidential election. The presence of large numbers of immigrants within Côte d'Ivoire has escalated inter-ethnic tensions and instigated the racist “Ivoirité” movement. “Ivoirité” means

uprising: the rebels apprehended the northern half of the country while the government maintained control of the southern part.⁵ After five years of civil unrest and unimplemented peace agreements, President Gbagbo and rebel leader Guillaume Soro signed the Ouagadougou Peace Accord in March 2007.⁶ In that context, the 2010 presidential elections were meant to advance the peace process in the country.⁷

The coastal West African state, however, was once again ravaged by civil turbulence following incumbent President Laurent Gbagbo's refusal to concede defeat against his opponent Prime Minister Alassane Ouattara from the November 28, 2010, second-round elections.⁸ Mr. Ouattara's victory is strongly backed by the international community, including the U.N., the African Union, ECOWAS, and the European Union.⁹ In fact, the President of the Independent Electoral Commission proclaimed the provisional results of the second tour on December 2, 2010, declaring that Ouattara had won 54.1% of the votes while Gbagbo only obtained 45.9%.¹⁰ Immediately following the release of the results, Gbagbo contested them, as the Constitution of Côte d'Ivoire permits,¹¹ before the Constitutional Council, and the latter proceeded to declare Gbagbo as the winner after having annulled the results from some northern regions.¹² According to the Constitutional Council, Gbagbo garnered 51.45% of the votes while Ouattara only obtained 48.55%.¹³ Gbagbo, therefore, claims to have been duly elected and refuses to hand power over to Ouattara. Following these conflicting electoral outcomes, both Ouattara and Gbagbo took oaths of office.¹⁴

Meeting on December 24, 2010, ECOWAS heads of state, after determining that Gbagbo had not heeded their demand that he cede the presidency, decided to "make an ultimate gesture to Mr. Gbagbo by urging him to make a peaceful exit."¹⁵ They dispatched a delegation to deliver an

"Ivorian," with a very racist connotation. Many workers from neighboring countries have migrated to Côte d'Ivoire to work in the agricultural sector. *Id.*

⁵ See Levitt, *PDI in Africa*, *supra* note 3, at 809.

⁶ Ouagadougou Political Agreement, U.N. Doc. S/2007/144 (Mar. 13, 2007). See also PLOUGHSHARES, *supra* note 4.

⁷ See *Post-election Crisis*, U.N. OPERATIONS IN CÔTE D'IVOIRE [UNOCI], <http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml> (last visited Feb. 13, 2013) [hereinafter UNOCI].

⁸ *Id.* The first round of elections was held on October 31, 2010, and because no majority result was reached, a second round of elections took place pursuant to the Ivorian Constitution. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ CONSTITUTION DE LA RÉPUBLIQUE DE CÔTE D'IVOIRE, Loi N° 2000-513 §§ 34–38 (2000), available at <http://www.la-constitution-en-afrique.org/article-21220503.html>.

¹² See UNOCI, *supra* note 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ ECOWAS, Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, *Final Communiqué*, ¶ 9, ECW/CEG/ABJ/EXT/FR./Rev. 0 (Dec. 24 2010),

ultimatum reiterating ECOWAS's demand and to offer to escort him into exile abroad.¹⁶ "In the event that Mr. Gbagbo fails to heed this immutable demand," they further decided that ECOWAS "would be left with no alternative but to take other measures, including the use of legitimate force, to achieve the goals of the Ivorian people."¹⁷ In light of the aforementioned, does ECOWAS have a right to intervene in Côte d'Ivoire using force in order to instate the internationally recognized *de jure* President-elect, Alassane Ouattara?

II. ECOWAS, AS A REGIONAL ORGANIZATION, HAS NO RIGHT TO INTERVENE UNDER THE U.N. CHARTER

The imposition of democracy on President-elect Ouattara through force in Côte d'Ivoire by a regional organization such as ECOWAS is difficult to reconcile with the U.N. Charter. Article 2(4) of the U.N. Charter prohibits member states of the United Nations to use force against any state.¹⁸ The Charter identifies two exceptions to this general prohibition on the use of force. First, under Chapter VII, Article 39 states that the U.N. Security Council shall determine whether a threat to the peace, breach of the peace, or act of aggression exists.¹⁹ If the Security Council determines the existence of any of these three scenarios, Article 42 permits it to authorize the use of force to maintain or restore international peace and security in the event that other actions not involving armed force are ineffective.²⁰ The second exception is at Article 51, which preserves a nation's "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."²¹ By its terms, Article 51 indicates that there must be an armed attack before a state can respond with force. Accordingly, for the imposition of democracy through force to be legal under this provision, it would have to be in response to an armed attack.

The Charter also makes explicit that this prohibition against the use of force applies with equal force to regional arrangements.²² To that end, Article 52 recognizes that regional arrangements may play a role in the maintenance of international peace and security, but the Charter also affirms the primacy of the Security Council in that regard.²³ Article 53 provides for the Security Council to exercise control over any regional enforcement action by emphasizing that

available at http://www.ecowas.int/publications/en/communique_final/session_extra/Communique_Final_CI_election.pdf.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 10.

¹⁸ U.N. Charter art. 2, para. 4.

¹⁹ *Id.* art. 39.

²⁰ *Id.* art. 42.

²¹ *Id.* art. 51.

²² *Id.* art. 52, para. 1.

²³ *Id.* art. 52.

“no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”²⁴ Further, Article 54 requires regional organizations to keep the Security Council apprised “of activities undertaken or in contemplation . . . for the maintenance of international peace and security.”²⁵

The plain language of these articles makes clear that while the Charter permits or even encourages regional organizations to take measures to protect regional peace, it does not grant regional organizations the authority to use force without obtaining prior Security Council authorization.²⁶ Although Article 52 encourages states to use regional organizations for the “peaceful settlement” of disputes, it does entail military options.²⁷ Applying this framework to the case of Côte d’Ivoire, there has been no such armed attack²⁸ as required by Article 51; thus, the only lawful avenue for ECOWAS to intervene under the Charter’s authority would be to act pursuant to the prior authorization of the Security Council or by invitation. The latter issue will be discussed later in this Article. At the time of writing, however, the U.N. Security Council has not authorized such military intervention to take place, neither by ECOWAS nor by other forces. Is there, however, state practice or regional custom permitting regional organizations to intervene without the Security Council’s authorization?

There are three possible answers to this question. First, scholars have argued that under the PDI doctrine, such interventions could be lawful. Second, the PDI doctrine has been closely discussed with the emerging African regional custom to intervene despite lack of Security Council authorization. Third, scholarly work has also suggested that Security Council approval is not required in such cases because consent from the inviting state is implicit by the adherence of treaties permitting military intervention for the maintenance of democracy, or even, that the consent given by the *de jure* head of state is sufficient to translate into a lawful invitation to intervene. Part III discusses these arguments advocating for a right to intervene despite Security Council authorization.

²⁴ *Id.* art. 53.

²⁵ *Id.* art. 54.

²⁶ See Peter E. Harrell, Note, *Modern-Day “Guarantee Clauses” and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force*, 33 YALE J. INT’L L. 417, 422 (2008).

²⁷ *Id.* See also U.N. Charter art. 52.

²⁸ As of December 24, 2010, however, before ECOWAS’s demand to intervene in Côte d’Ivoire, it can be implied that there was fighting. See, e.g., AMNESTY INT’L, CÔTE D’IVOIRE: SIX MONTHS OF POST-ELECTORAL VIOLENCE (2011), available at <http://www.amnesty.org/en/library/asset/AFR31/003/2011/en/cee4c3da-2f40-4575-8d9f-f1aee7bf483b/af310032011en.pdf> (documenting serious violence that followed the disputed November 2010 presidential election).

III. RIGHT TO USE MILITARY FORCE UNDER THE PRO-DEMOCRATIC INTERVENTION DOCTRINE: NOT A LAWFUL AVENUE FOR ECOWAS

Military intervention in the name of democracy has attracted much attention in the legal literature on democracy and the use of force in international law. According to the PDI doctrine, states would be entitled to use force against another state in order to overthrow a non-democratic government.²⁹ There are two opposing views regarding the legality of using force under the PDI doctrine. First, the most promising, having Jeremy I. Levitt as its major proponent, argues that in Africa, a norm of PDI has crystallized through the consent doctrine and customary regional law.³⁰ In his view, state practice and treaty law in Africa indicate that PDI

[i]s an intervention by a state, group of states, or regional organization in another state involving the threat or use of force in order to protect or restore a democratically constituted government from unlawful and/or violent seizures of power, especially when the circumstances that underpin such seizures threaten a substantial part of a state's population with death or suffering on a grand scale.³¹

According to him, PDI is typically based on state consent, whether treaty-based or *ad hoc*, or authorized by the Security Council.³² Further, PDI can be conducted through regional organizations, such as ECOWAS.³³ Levitt notes that the three most authoritative legal sources that provide for a norm of PDI in Africa are found in African state practice, treaty law, and regional organizational practice.³⁴ This section of the Article, however, determines that there is no such state practice and *opinio juris* justifying a right to PDI in general, whereas Part IV of this Article, as noted, will focus on the regional custom argument and Part V on the consent issue.

Opposing views to Levitt have argued that PDI “rarely constitutes an autonomous justification for the use of force that would otherwise be illegal.”³⁵ In that regard, practice has shown that “it is usually invoked to complement other arguments when circumstances leave great doubts as to the legality of the impugned action.”³⁶ Such was the case in Grenada, Panama and Iraq, where international forces have intervened in the name of “democracy.” These cases

²⁹ See Jean d'Aspremont, *Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law*, 31 U. PA. J. INT'L L. 1089, 1125 (2010) [hereinafter d'Aspremont, *Mapping*].

³⁰ Levitt, *PDI in Africa*, *supra* note 3, at 788–89.

³¹ *Id.* at 789.

³² *Id.* at 792.

³³ *Id.*

³⁴ *Id.* at 788–89, 793 n.29.

³⁵ D'Aspremont, *Mapping*, *supra* note 29, at 1110.

³⁶ *Id.*

will be discussed shortly. Thus, according to Jean d'Aspremont, the concept of PDI "has failed to garner enough support to constitute a new customary limitation to the prohibition on the use of force."³⁷ Indeed, in practical legal terms, pro-democratic interventions are difficult to reconcile with the prohibition on the use of force of Article 2(4).³⁸ To date, the majority of legal scholars, including Louis Henkin, Oscar Schachter, and Jean d'Aspremont, consider PDI in the absence of Security Council authorization incompatible with the prohibition on the use of force and the principle of non-intervention and thus illegal under contemporary international law.³⁹

Despite this legal impasse requiring Security Council authorization, it has been averred that there is a need "to seek a legal construction reconciling the right to [PDI] with the prohibition on the use of force of Article 2(4) and with state practice" in light of the "positive" international reactions to military interventions for such democratic purposes.⁴⁰ This search for a new reconciliation is justified according to legal scholarship by the need to maintain international law in compliance with the realities on the terrain of international relations.⁴¹ In fact, the International Court of Justice (I.C.J.) stated in 1991 that such consistency ensures the "effectiveness of the international legal order by providing stability to the inherently fragile international system."⁴² The examples that are hereby illustrated, however, propose that there might not be such *opinio juris* proclaiming the legality of pro-democratic interventions in absence of Security Council authorization even though the aim of the interventions—to promote democracy—is legitimate.

The first case where democracy was used as a justification for military use of force was the Grenada intervention.⁴³ American troops, with the support of the Organisation of East Caribbean States, invaded Grenada in October 1983 in response to a coup d'état against the government of Maurice Bishop.⁴⁴ In three days, they managed to overthrow the coup.⁴⁵ Subsequent to this intervention orchestrated in the absence of Security Council authorization,

³⁷ *Id.* at 1110–11.

³⁸ See Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 379 n.334 (1998).

³⁹ See, e.g., d'Aspremont, *Mapping*, *supra* note 29, at 1110; 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); Nowrot & Schabacker, *supra* note 38, at 379; Oscar Schachter, Editorial Comment, *The Legality of Pro-Democratic Intervention*, 78 AM. J. INT'L L. 645, 649 (1984).

⁴⁰ See Nowrot & Schabacker, *supra* note 38, at 379. See also Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1155 (1962).

⁴¹ See Nowrot & Schabacker, *supra* note 38, at 379.

⁴² *Id.* at 379–80 (citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 173, 178 (Apr. 11)).

⁴³ See John Burgess, *Most Residents of Nearby Barbados Appear to Support Grenada Invasion*, WASH. POST, Oct. 29, 1983, at A15, cited in Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT'L L. 33, 72 (2008).

⁴⁴ See *id.*

⁴⁵ *Id.*

legal scholars, such as Brad R. Roth, have argued that restoring democracy was a sufficient legal justification.⁴⁶ Several important facts, however, mitigate this position. As such, the U.N. General Assembly, subsequent to the U.S.-led operation, condemned the intervention as illegal by an overwhelming majority of 108 states against twenty-seven.⁴⁷ The General Assembly emphasized that it was “[d]eeply deplor[ing] the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State.”⁴⁸ It is noteworthy to mention that the majority of African states voted in favor of this resolution.⁴⁹ Although Resolutions of the General Assembly are not directly binding in law, they are certainly an expression of *opinio juris* that the U.S.-led operation cannot be regarded as a precedent for a right to PDI.⁵⁰

The U.S. offensive in Panama is a second possible precedent for the idea that democracy may justify military intervention.⁵¹ On December 20, 1989, the U.S. military invaded Panama with 14,000 troops in order to overthrow Manuel Noriega because he had nullified the election results of his opponent.⁵² At the time, President Bush explicitly justified the action on the basis of protecting democracy, among other secondary justifications, such as combating drug trafficking.⁵³ It could be argued that the Panama case is even stronger than the Grenada example, considering that the request for intervention came from Guillermo Endara who was formally elected by the Panamanian people but was kept out by Noriega. The U.N. General Assembly, however, again severely condemned the intervention by an outstanding majority vote.⁵⁴ It stated that it “[s]trongly deplores the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States.”⁵⁵ Thus, similar to Grenada, the intervention

⁴⁶ See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 309 (1999).

⁴⁷ G.A. Res. 38/7, U.N. Doc. A/RES/38/7 (Nov. 2, 1983); *Resolutions Adopted by the General Assembly at Its 38th Session*, U.N. (2010), <http://www.un.org/depts/dhl/resguide/r38.htm>.

⁴⁸ G.A. Res. 38/7, *supra* note 47, ¶ 1.

⁴⁹ See Petersen, *supra* note 43, at 73.

⁵⁰ *Id.* (citing SCOTT DAVIDSON, *GRENADA: A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW* 147 (1987)).

⁵¹ Compare W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 19 *FORDHAM INT'L L.J.* 794, 800–01 (1995), with Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 *AM. J. INT'L L.* 516, 519 (1990).

⁵² See Petersen, *supra* note 43, at 73.

⁵³ See Address to the Nation Announcing United States Military Action in Panama, 2 *PUB. PAPERS* 1722–23, ¶ 2 (Dec. 20, 1989).

⁵⁴ G.A. Res. 44/240, U.N. Doc. A/RES/44/240 (Dec. 29, 1989). The vote was 75-20-40. See Petersen, *supra* note 43, at 74.

⁵⁵ G.A. Res. 44/240, *supra* note 54, ¶ 1.

in Panama should not serve as evidence of a right to intervene for pro-democratic motives in international law.⁵⁶

Lastly, the March 2003 U.S.-led invasion of Iraq is the most recent case in which regime change for democracy was invoked as a justification for military intervention without obtaining prior authorization from the Security Council.⁵⁷ In their official justification for the war, neither the United States nor the United Kingdom mentioned regime change as the principle reason for intervention.⁵⁸ Instead, they justified the intervention by interpreting Resolutions 678, 687, and 1441 of the U.N. Security Council.⁵⁹ Human rights were also invoked as a justification for intervention, but Vice President Cheney adhered to the neo-colonial ideology, which championed PDI.⁶⁰ Nonetheless, a considerable part of the international community condemned the intervention including Canada, Belgium, France, Germany, and Russia.⁶¹ The Iraq War, therefore, cannot be regarded as a precedent for the emergence of a norm of pro-democratic intervention.

In addition, other conceptual problems may arise when considering PDI as a lawful avenue for military intervention. This Article, however, does not carry the pretention to resolve these issues. It is worth noting, in any case, that the debate over the significance of democracy and its legitimacy in international law is not yet resolved.⁶² Many scholars think about the idea of democracy as a legal principle or in terms of a “right to democratic

⁵⁶ See Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 298 (1991).

⁵⁷ See Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL'Y 765, 778 (2004).

⁵⁸ See Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT'L L. 233, 271, 273–74 (2004).

⁵⁹ S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991); S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002). See also Permanent Rep. of the U.S., *Letter from the Permanent Rep. of the U.S. to the U.N. Addressed to the President of the Security Council*, U.N. Doc. S/2003/351 (Mar. 20, 2003) (by John D. Negroponte); Lord Goldsmith, Attorney General, Parliamentary Answer on the Legal Basis for the Use of Force Against Iraq (Mar. 17, 2003), available at <http://guardian.co.uk/uk/2005/mar/11/politics.iraq?INTCMP=ILCNETTXT3487>.

⁶⁰ See David E. Sanger & John F. Burns, *Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein*, N.Y. TIMES, March 20, 2003, at A1, available at <http://www.nytimes.com/2003/03/20/world/threats-responses-white-house-bush-orders-start-war-iraq-missiles-apparently.html?pagewanted=all&src=pm>; *War in Iraq: Not a Humanitarian Intervention*, HUM. RTS. WATCH (Jan. 26, 2004), <http://www.hrw.org/news/2004/01/25/war-iraq-not-humanitarian-intervention>.

⁶¹ See Elizabeth Bumiller, *White House Letter; Who's Cool at the Group of 8 Meeting? It's All in Bush's Gestures*, N.Y. TIMES, June 2, 2003, at A8, available at <http://www.nytimes.com/2003/06/02/world/white-house-letter-who-s-cool-group-8-meeting-its-all-bush-s-gestures.html>.

⁶² See RICHARD BURCHILL, *DEMOCRACY AND INTERNATIONAL LAW* (2006). See also Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877 (2006) [hereinafter d'Aspremont, *Legitimacy*].

governance.”⁶³ According to Thomas M. Franck, the right is based on the theory that governments derive their powers from the consent of the governed.⁶⁴ This requires an electoral process characterized by public participation.⁶⁵ Thus, an important manifestation of this right is conducting free and fair elections, but the meaning of the latter concept is also a source of debate in legal scholarship.⁶⁶

This section of the Article thus concludes that state practice concerning the norm of pro-democratic intervention is far from conclusive and that *opinio juris* does not provide strong support for the existence of such a right under international law. In response to this, Levitt has argued that African states and regional organizations have nonetheless “adopted, operationalized, and acted under norm-creating mechanisms that are eroding traditional prohibitions on the use of force” provided for in the U.N. Charter and general international law.⁶⁷ He contends that Africa is the first region to evolve with a comprehensive collective security framework.⁶⁸ Part IV of this Article will thus assess whether ECOWAS could intervene in Côte d’Ivoire following African regional custom in that regard.

IV. NO AFRICAN REGIONAL CUSTOM PERMITTING INTERVENTION

If ECOWAS cannot intervene in Côte d’Ivoire, justifying its action under the PDI doctrine in general, it may possibly do so under a regional practice justification. Levitt has stated that although it may be too early to claim that a right to PDI clearly exists under customary international law, as discussed in Part III of this Article, its recognition in customary regional law in Africa is “timely and futuristic.”⁶⁹ This section of the Article, however, will argue that no such regional custom prevails in Africa, and even if it did, subsequent practice cannot develop in contravention of the U.N. Charter. The interventions by ECOWAS in Sierra Leone and Liberia are examples frequently cited by scholars who argue that the Security Council approved the interventions *ex post facto*, thus contributing to the emerging regional norm.⁷⁰

⁶³ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46–47 (1992).

⁶⁴ *Id.* at 46.

⁶⁵ *Id.* at 63.

⁶⁶ See, e.g., ERIC C. BJORN LUND, *BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY* (2004) (evaluating international and domestic election monitoring and their contributions to democracy).

⁶⁷ Jeremy I. Levitt, *The Law on Intervention: Africa’s Pathbreaking Model*, 7 GLOBAL DIALOGUE 50, 51 (2005), cited in Levitt, *PDI in Africa*, *supra* note 3, at 794.

⁶⁸ Levitt, *PDI in Africa*, *supra* note 3, at 794.

⁶⁹ *Id.* at 833.

⁷⁰ See, e.g., *id.* at 800–03; see also Bryan D. Kreykes, *A Case for Delegation: The U.N. Security Council, Regional Conflicts, and Regional Organizations*, 11 *TOURO INT’L L. REV.* 1, 10–11 (2008).

The Sierra Leone and Liberia case studies, however, are also illustrations of unlawful military interventions.⁷¹

In July 1990, President Samuel Doe, *de jure* President, sent a letter inviting ECOWAS to introduce peacekeeping forces in Liberia.⁷² Charles Taylor, who had effective control of Liberia, refused to consent to any ECOWAS action.⁷³ The Economic Community of West African States Monitoring Group (ECOMOG), a cease-fire monitoring group, was then created as a peacekeeping force and did not purport to obtain consent of both parties to the conflict before intervening.⁷⁴ The intervention was an enforcement action rather than one keeping peace because there was no peace to keep yet.⁷⁵ The 1990 ECOWAS enforcement action to establish peace in Liberia was conducted without Security Council authorization.⁷⁶ The international community, however, reacted in a positive manner because the aim of the intervention was morally legitimate.⁷⁷ Because of this, international actors disregarded the flagrant deviation from Article 53 of the U.N. Charter and commended ECOWAS for its broad efforts to establish peace in Liberia.⁷⁸

For the first time, a few months after the intervention, in January 1991, the Security Council considered the Liberian conflict.⁷⁹ As such, the President of the Security Council issued a statement commending ECOWAS's efforts to "promote peace and normalcy in Liberia."⁸⁰ In November 1992, more than a year after the intervention, the Security Council adopted its first resolution which "[c]ommend[ed] ECOWAS for its efforts to restore peace, security and stability in Liberia."⁸¹

The legal basis for ECOWAS's intervention in Liberia was hardly discussed by the Security Council.⁸² For its part, the ECOWAS Standing

⁷¹ See, e.g., Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT'L L. 643, 667 (2007). See also Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 135 (1999).

⁷² Letter from Samuel K. Doe, President, to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (July 14, 1990), cited in Hakimi, *supra* note 71, at 667 n.132.

⁷³ See Hakimi, *supra* note 71, at 667.

⁷⁴ *Id.*

⁷⁵ See Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 350 (1998) [hereinafter Levitt, *Humanitarian Intervention*].

⁷⁶ *Id.*

⁷⁷ See Hakimi, *supra* note 71, at 670–72.

⁷⁸ *Id.*

⁷⁹ *Id.* at 669; U.N. SCOR, 46th Sess., 2974th mtg., U.N. Doc. S/PV.2974 (Jan. 22, 1991) [hereinafter U.N. Doc. S/PV.2974]. See also Luca Renda, *Ending Civil Wars: The Case of Liberia*, 23 FLETCHER F. WORLD AFF. 59, 60–69 (1999).

⁸⁰ U.N. Doc. S/PV.2974, *supra* note 79, at 9.

⁸¹ S.C. Res. 788, ¶ 1, U.N. Doc. S/RES/788 (Nov. 19, 1992).

⁸² CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 212 (Malcolm D. Evans & Phoebe N. Okowa eds., 1st ed. 2000).

Mediation Committee appeared to justify the intervention in broad humanitarian and regional security terms.⁸³ The consistency with Article 53 of the U.N. Charter was never raised.⁸⁴ Some scholars, however, have interpreted the Security Council's applause as retroactive authorization for such purposes of Article 53.⁸⁵ This interpretation has been criticized as not being completely honest.⁸⁶ In fact, the Security Council's commendations do not constitute retroactive authorization for purposes of Article 53 of the U.N. Charter because it did not authorize any enforcement action.⁸⁷ Moreover, by the time the Security Council adopted its first resolution, the issue of Security Council authorization was moot because by then, ECOWAS had successfully negotiated peace accords in Liberia.⁸⁸ According to David Wippman, the Security Council then endorsed the peace accords without commenting on the unauthorized enforcement action that brought it about.⁸⁹ Additionally, it has been suggested that the failure to authorize the use of force was deliberate because the Security Council had no intention to pay for such action.⁹⁰

Similarly to the Liberian case, ECOWAS, under ECOMOG, intervened in Sierra Leone in June 1997 and reinstated Ahmad Tejan Kabbah as President in March 1998.⁹¹ A peace accord was signed in 1996 as an outcome of the civil war, and as a result, presidential elections took place, from which Kabbah was elected.⁹² The cease-fire and peace accords, however, did not create a *détente* but rather furthered tension, and on May 25, 1997, a military junta overthrew Kabbah.⁹³ Again, ECOWAS did not request Security Council authorization.⁹⁴ The Security Council, in Resolution 1132, only retroactively expressed its support for the ECOWAS action in October 1997,⁹⁵ and later, in Resolution 1156, it welcomed Kabbah's return to office.⁹⁶

⁸³ See ECOWAS Authority of Heads of State and Government, Decision Relating to the Establishment of the Standing Mediation Committee, Banjul, Republic of Gambia, A/DEC.9/5/90 (May 30, 1990), *reprinted in* REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 38–39 (Marc Weller ed., 1994).

⁸⁴ See Hakimi, *supra* note 71, at 670.

⁸⁵ See, e.g., Levitt, *Humanitarian Intervention*, *supra* note 75, at 347.

⁸⁶ See Hakimi, *supra* note 71, at 670.

⁸⁷ *Id.*

⁸⁸ *Id.* at 671–72.

⁸⁹ David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 226 (1996).

⁹⁰ See Hamiki, *supra* note 71, at 670.

⁹¹ See Petersen, *supra* note 43, at 79–80.

⁹² *Id.* at 79.

⁹³ *Id.* at 79–80.

⁹⁴ See *id.* at 80.

⁹⁵ S.C. Res. 1132, ¶ 3, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (The Security Council expressed “its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourag[ed] it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations.”).

⁹⁶ S.C. Res. 1156, ¶ 1, S/RES/1156 (Mar. 16, 1998) (The Security Council “[w]elcome[d] the return to Sierra Leone of its democratically elected president on 10 March 1998.”).

Some authors have raised doubts concerning the democratic intentions of the intervening states, noting that Nigeria, the leader of the intervention, was itself ruled by an autocratic government.⁹⁷ Niels Petersen, however, suggests that in evaluating the intervention as a precedent of a democracy principle emerging in a region, the reaction of the international community is more significant than the legality of the intervention itself.⁹⁸ He argues that Resolution 1132 requested the military junta to reinstate democratic order whereas Resolution 1156 welcomed the country's return to democracy.⁹⁹ In his view, therefore, the case of Sierra Leone confirms the existence of a principle of pro-democratic intervention for the purposes of peace and security in the region.¹⁰⁰

One could argue, however, that Resolution 1132 does not generally authorize ECOWAS to take military measures to remove the junta in Sierra Leone.¹⁰¹ In fact, the legitimization of the use of force in the Resolution is limited to ensuring the strict implementation of the economic embargo.¹⁰² In addition, some authors have argued that the Security Council is not required to authorize Article 53 enforcement actions before such actions are actually carried out.¹⁰³ According to this stance, an authorization by the Security Council at any stage should be understood as an implicit authorization of the prior actions undertaken by the regional organization.¹⁰⁴ Such a general understanding of after-the-fact authorization under Article 53, however, is incompatible with the requirement that the Security Council exercise effective control over regional enforcement actions.¹⁰⁵ Authors have argued that control necessarily includes the power to prevent enforcement actions and that the Security Council will thus only preserve effective control through prior authorization.¹⁰⁶

Conversely, it could also be argued, pursuant to Article 31(2)(b) of the Vienna Convention on the Law of Treaties, that subsequent practice can change the interpretation of a treaty,¹⁰⁷ here the U.N. Charter. The I.C.J. expressed this clearly in its November 1950 judgment in *Colombia v. Peru* in the following terms: “The Party which relies on a custom of this kind

⁹⁷ Matthias Goldmann, *Sierra Leone: African Solutions to African Problems?*, 9 MAX PLANCK Y.B. U.N. L. 457, 473–74 (2005).

⁹⁸ See Petersen, *supra* note 43, at 80.

⁹⁹ *Id.* at 80–81.

¹⁰⁰ *Id.*

¹⁰¹ S.C. Res. 1132, *supra* note 95, ¶ 3 (authorizing ECOWAS to halt maritime shipping to search for petroleum products, arms, and related materials).

¹⁰² *Id.*

¹⁰³ See Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 520 (1963), *cited in* Nowrot & Schabacker, *supra* note 38, at 363 n.235.

¹⁰⁴ Nowrot & Schabacker, *supra* note 38, at 363.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* See also Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 159 (1982).

¹⁰⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

[regional or local custom] must prove that this custom is established in such a manner that it has become binding on the other Party.”¹⁰⁸ This practice, however, cannot be applied in the case of regional custom for PDI without prior authorization from Security Council because the U.N. is considered here as one of the parties to the treaty. As such, a regional custom cannot emerge in violation of the U.N. Charter. Any other interpretation of Article 53 results in legal uncertainty at the time of the action.¹⁰⁹ Further, the use of *ex post facto* authorization may also encourage regional organizations to initiate military actions with the expectation that the Security Council would grant its blessing afterwards.¹¹⁰

Accordingly, in the cases of Liberia and Sierra Leone, although the ultimate result of the ECOWAS actions—peace—may be commendable notwithstanding years of armed conflict, the long term stability of the international system requires regional organizations to act within the framework set out in the U.N. Charter. As such, ECOWAS, not having Security Council authorization at hand, cannot intervene in Côte d’Ivoire under an argument of African regional custom permitting such action despite the requirements of Article 53 of the U.N. Charter not being met. Because Ouattara has requested for such intervention to take place, is his consent sufficient in international law to qualify the use of force as legitimate?

V. CÔTE D’IVOIRE INVITED ECOWAS TO INTERVENE: WHO CAN LAWFULLY GIVE CONSENT?

A. *Invitation by De Jure vs. De Facto Head of State: Ouattara or Gbagbo?*

As noted, Ouattara requested by letter on January 6, 2011, an ECOWAS-led intervention with the aim to install him as President.¹¹¹ Ouattara appears to be the *de jure* President-elect, while Gbagbo the *de facto* President in effective control. The I.C.J. has confirmed in the case of the *Military and Paramilitary Activities in Nicaragua* that a state can call upon another state to assist it and consent to the use of force by the latter on its territory.¹¹² The possibility of inviting another state to use force on one’s own territory was again confirmed in the *Armed Activities on the Territory of the Congo* case.¹¹³ Thus, this is not a limitation to the prohibition on the use of

¹⁰⁸ Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20).

¹⁰⁹ Nowrot & Schabacker, *supra* note 38, at 363.

¹¹⁰ *Id.*

¹¹¹ Aislinn Laing, *Alassane Ouattara Calls for Special Forces to Seize Laurent Gbagbo* (Jan. 6, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/cotedivoire/8243941/Alassane-Ouattara-calls-for-special-forces-to-seize-Laurent-Gbagbo.html>.

¹¹² *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 246 (June 27).

¹¹³ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶¶ 42–54, 92–105 (Dec. 19).

force in the same sense as self-defense because the prohibition on the use of force only prohibits the use of military action without consent.¹¹⁴ In fact, once the host state consents, the use of force is not in contradiction with the territorial integrity of the host state and accordingly does not violate Article 2(4) of the U.N. Charter.¹¹⁵ In light of this, it should be determined, in the context of Côte d'Ivoire, who exactly has the right to give legitimate consent. This was found to be a difficult task.

Levitt argues that whether a government is in effective control does not seem to seriously impede the legality and legitimacy of a PDI intervention.¹¹⁶ If PDI is based on state consent, it seeks to uphold democratically elected governments irrespective of who is in *de facto* control because the intervention is on behalf of the government that obtained power democratically or is otherwise considered legitimate.¹¹⁷ According to Levitt's view, even ousted regimes lacking effective control can make a valid request for intervention.¹¹⁸ In Africa, therefore, the democratic entitlement that underlies PDI is challenging the traditional conceptions of the effective control doctrine.

In that regard, David Wippman notes that under conventional reading of international law, effective control is an essential—perhaps the only—component of a government's authority to represent a state in the course of international relations.¹¹⁹ Reliance on effective control serves important purposes in the international legal order. Wippman argues that it precludes states from too readily ignoring the autonomy of other states and from too easily justifying interventions that are self-interested or likely to result in the internationalization of an internal dispute.¹²⁰ Control, therefore, ordinarily affords *de facto* leaders a partial, if not exclusive, claim to speak in the name of the state.¹²¹

In line with Levitt's view, however, the growing importance of criteria for democratic legitimacy in international law¹²² diluted the requirement of *effectivité* of the government issuing the invitation.¹²³ The democratic legitimacy of a government has typically offset its poor *effectivité*.¹²⁴ According to d'Aspremont, this indicates that the *effectivité* of the government giving the invitation no longer constitutes the overarching condition of the validity of the consent to the intervention of another state.¹²⁵ In fact, this

¹¹⁴ D'Aspremont, *Mapping*, *supra* note 29, at 1130–31.

¹¹⁵ *Id.*

¹¹⁶ Levitt, *PDI in Africa*, *supra* note 3, at 793.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ David Wippman, *Pro-Democratic Intervention by Invitation*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 293, 309 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Wippman, *PDI*].

¹²⁰ *Id.* at 297.

¹²¹ *Id.*

¹²² See d'Aspremont, *Legitimacy*, *supra* note 62, at 913–16.

¹²³ D'Aspremont, *Mapping*, *supra* note 29, at 1130–31.

¹²⁴ *Id.*

¹²⁵ *Id.*

finding seems implied by the I.C.J. in its decision in the *Armed Activities* case in the Congo, which never questioned whether the Congolese government was effective enough to validly invite other states to use force on its territory.¹²⁶ This might explain why democratic governments, which do not exercise an effective control over the territory of the state, seem to be entitled to validly invite another state to forcefully intervene, such as in the case of Sierra Leone.¹²⁷ D'Aspremont, however, argues that democratic legitimacy can be subject to manipulations and abusive interpretation, and as such, "the possession of certain democratic trappings sometimes seems to suffice to endow an ineffective government with the power to invite a foreign state to intervene."¹²⁸ In this way, reducing the requirements for validly consenting to the forceful intervention of another state further dilutes the general prohibition on the use of force.¹²⁹

Similarly, by seeking to answer whether a democratically elected government and popularly supported government can consent to military intervention against the wish of *de facto* authorities more or less in control of the state, Wippman concludes with an unclear answer.¹³⁰ In the case at hand, Gbagbo is in effective control, but Ouattara seems to have gained the support of the international community and, in the same fashion, of the population. Due to the closeness of the votes, however, it is difficult to determine which candidate carries more endorsement by the population. Wippman suggests that "[i]n some cases . . . mechanical reliance on effective control as a proxy for authority to represent the State seems to serve no useful purpose other than helping to preserve the rule."¹³¹ He notes that "any use of force that on balance is welcomed by a majority of a State's population should be treated as [lawful] under international law."¹³² This prong is "too subjective and too subject to abuse,"¹³³ as also noted by d'Aspremont. On the other hand, when the majority of the population gives support to the ousted *de jure* government not in control, their invitation should receive some legitimacy.¹³⁴

This Article thus takes the stance that Gbagbo, in effective control, has the sole authority to give consent to military force because the facts are not clear in terms of whom the population, by a high majority, supports. Even though the international community supports Ouattara as President-elect, the use of force might not be the most justifiable means to resolve the issue at hand. It is important to recall that the U.N. Charter, in that sense, permits the

¹²⁶ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 42–54, 92–105 (Dec. 19).

¹²⁷ D'Aspremont, *Mapping*, *supra* note 29, at 1131.

¹²⁸ *Id.* at 1132.

¹²⁹ *Id.*

¹³⁰ See Wippman, *PDI*, *supra* note 119.

¹³¹ *Id.* at 309.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 310.

use of force in situations of urgency only.¹³⁵ Can consent to use military force, however, be implied by the mere adherence to the ECOWAS treaties?

B. Treaty-based Consent

Levitt has argued that in Africa, a norm of PDI has crystallized notably through the consent doctrine, whether treaty-based or *ad hoc*.¹³⁶ In fact, in the Liberia case, ECOWAS cited treaties as part of its justification for the intervention.¹³⁷ It is thus possible, in the event of an ECOWAS intervention in Côte d'Ivoire, that such justifications be asserted.

International law supports the notion that states can enter into guarantee clauses that legitimate the use of force within their territory under specified circumstances.¹³⁸ Such treaty clauses, however, cannot be applicable if they are inconsistent with the U.N. Charter. Article 103 of the U.N. Charter states that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”¹³⁹ Thus, if ECOWAS were to intervene in Côte d'Ivoire pursuant to a treaty agreement authorizing the use of force, it cannot do so in violation of the principles enshrined in the Charter pertaining to the prohibition on the use of force. An examination of the treaty provisions will demonstrate this.

In December 1999, ECOWAS adopted the Protocol Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (“Conflict Protocol”), of which Côte d'Ivoire is a member state.¹⁴⁰ The Conflict Protocol recognizes that peace, security, stability, democracy, and good governance are central to the development of the West African region.¹⁴¹ In fact, one of its key objectives is to protect member states from being “affected by the overthrow or attempted overthrow of a democratically elected government.”¹⁴² It also affirms its commitment to promoting and consolidating democratic government and institutions in each member state, supporting processes for the political restoration of collapsed governments or those that have been seriously eroded and protecting fundamental human rights and freedoms.¹⁴³ Additionally, the ECOWAS Conflict Protocol aims to prevent, manage, and resolve internal and interstate

¹³⁵ U.N. Charter art. 2, 39–42.

¹³⁶ Levitt, *PDI in Africa*, *supra* note 3, at 788.

¹³⁷ See Harrell, *supra* note 26, at 439.

¹³⁸ *Id.* at 426.

¹³⁹ U.N. Charter art. 103.

¹⁴⁰ Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, pmbl., ECOWAS Doc. A/P10/12/99 (Dec. 10, 1999) [hereinafter ECOWAS Conflict Protocol], available at http://www.operationspaix.net/DATA/DOCUMENT/3744~v~Protocole_relatif_au_Mecanisme_de_prevention_de_gestion_de_reglement_des_conflits_de_maintien_de_la_paix_et_de_la_securite.pdf.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* art. 2, 45.

conflict.¹⁴⁴ Furthermore, Article 10 gives the ECOWAS Mediation and Security Council the power to “authorise all forms of intervention [including] the deployment of . . . military missions.”¹⁴⁵ Article 22 of the Conflict 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.¹⁴⁶

Article 25 of the Conflict Protocol provides that ECOWAS may take enforcement action in internal conflicts: (1) that “threaten[] to trigger a humanitarian disaster or that 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.”¹⁴⁷ Article 26 also grants the authority to initiate actions by ECOMOG to the Mediation and Security Council, a requesting member state, the African Union, or the U.N.¹⁴⁸

In light of this framework, ECOWAS does not itself have the authority without the Security Council to intervene with military force. Thus, if ECOWAS were to justify its intervention because Côte d’Ivoire consented to the Conflict Protocol, it unlawfully conflicts with the U.N. Charter because express authorization from the Security Council is not derivable. The Conflict Protocol further frustrates the correct application of the doctrine of consent by its clear conflict with the operation of consent as set out by the I.C.J. decision in the *Armed Activities on the Territory of the Congo* case.¹⁴⁹ According to this decision, a state may withdraw its consent at any time after it has been given, and such withdrawal need not be done by any formal means—a mere statement is sufficient.¹⁵⁰ The Conflict Protocol does not provide any means by which a member state may revoke its consent short of withdrawing from the Conflict Protocol. As set out by Article 56 of the Conflict Protocol, withdrawal is a formal process whereby a member state must submit a written notice to the Executive Secretary of ECOWAS.¹⁵¹ Once submitted, the state continues to be bound by the Protocol for one year. Thus, even if a member state were to give notice of withdrawal, its consent would be considered to continue, and ECOWAS would retain the authority to deploy ECOMOG into its territory for another year. Wippman contends that the “will of the State at the moment of intervention should prevail over the will of the State at the moment of treaty formation.”¹⁵² A state’s grant of authority should be

¹⁴⁴ *Id.* art. 3.

¹⁴⁵ *Id.* art. 10.

¹⁴⁶ *Id.* art. 22.

¹⁴⁷ *Id.* art. 25.

¹⁴⁸ *Id.* art. 26.

¹⁴⁹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

¹⁵⁰ *Id.* ¶¶ 110–11.

¹⁵¹ ECOWAS Conflict Protocol, *supra* note 140, art. 56.

¹⁵² Wippman, *PDI*, *supra* note 119, at 315.

“impressed with an implicit but limited right of revocation.”¹⁵³ Thus, the provisions of the Conflict Protocol create an unlawful restriction on the right of a state to withdraw at any time its consent to the use of force on its territory by another state. This is further evidence that ECOWAS may not justify its intervention in Côte d’Ivoire pursuant to the theory of consent because the treaty’s terms contravene the essence of the U.N. Charter, and in such case, the Charter must prevail.¹⁵⁴

VI. ECOWAS IS NOT THE APPROPRIATE FORCE TO INTERVENE

In closing, even if the use of force by ECOWAS were lawful under a right to pro-democratic intervention, this fact cannot supersede other principles of international law governing the use of force. The use of force can only be used as a last resort in the *jus ad bellum*.¹⁵⁵ In fact, armed force must be necessary to achieve the objective sought,¹⁵⁶ which is, here, the installment of President-elect Ouattara. In the past decade, however, the African Union has been consistent in various cases, including Togo, Mauritania, Madagascar, and Niger, in deploying non-military means, such as sanctions, mediation, and negotiation, to resolve those situations.¹⁵⁷ All such means of resolving a situation must be exhausted before a state or a group of states, such as ECOWAS, may exercise force.¹⁵⁸ In the case at hand, several sanctions are currently in place against Côte d’Ivoire in order to pressure Gbagbo to step down.¹⁵⁹ These include limitations on the trade of diamonds, other economic sanctions, and diplomatic measures.¹⁶⁰ As a result, it is too soon to conclude that all other means have been exhausted such that resort to force is the only option left.

Additionally, the presence of U.N. and French forces in Côte d’Ivoire, currently numbering 11,033 uniformed personnel,¹⁶¹ defeats the argument that military actions by ECOWAS is necessary. These forces are in Côte d’Ivoire pursuant to the authorization of the Security Council,¹⁶² and should the

¹⁵³ *Id.*

¹⁵⁴ U.N. Charter art. 103.

¹⁵⁵ See CHARLES CHENEY HYDE, 1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 66 (1922) (discussing the case of *The Caroline*).

¹⁵⁶ *Id.*

¹⁵⁷ See J. Emeka Wokoro, *Towards a Model for African Humanitarian Intervention*, 6 REGENT J. INT’L L. 1, 23–24 (2008); see also Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups d’État*, 44 VAND. J. TRANSNAT’L L. 123, 136–51 (2011).

¹⁵⁸ Omorogbe, *supra* note 157, at 136–51.

¹⁵⁹ S.C. Res. 1962, pmb., U.N. Doc. S/RES/1962 (Dec. 20, 2010).

¹⁶⁰ *Id.* See also PLOUGHSHARES, *supra* note 4.

¹⁶¹ *UNOCI Facts and Figures*, UNOCI, <http://www.un.org/en/peacekeeping/missions/unoci/facts.shtml> (last visited Feb. 20, 2013).

¹⁶² See generally S.C. Res. 1968, U.N. Doc. S/RES/1968 (Feb. 16, 2011); S.C. Res. 1967, U.N. Doc. S/RES/1967 (Jan. 19, 2011); S.C. Res. 1962, *supra* note 159; S.C. Res. 1951, U.N. Doc. S/RES/1951 (Nov. 24, 2010).

Security Council decide that military intervention is necessary, these forces are well equipped to carry out such orders.¹⁶³ Because these forces are already in place, and at the command of the Security Council, they are capable of taking the same actions that ECOWAS would; in that regard, it is not necessary for ECOWAS to intervene. Further, it is uncertain if ECOWAS has the means to intervene.¹⁶⁴ Ghana, for instance, “declined to participate in a potential intervention, citing an overburden of international peacekeeping deployments in other regions.”¹⁶⁵ “Nigeria is also thought to have domestic security concerns of its own following the recent elections that might preclude it from contributing forces.”¹⁶⁶ It is doubtful under the circumstances whether ECOWAS is truly the proper actor to intervene.

CONCLUDING REMARKS

This study has shown that ECOWAS may not lawfully intervene in Côte d’Ivoire in order to install Alassane Ouattara without prior authorization from the Security Council. In fact, neither customary law nor *opinio juris* allows for such pro-democratic action to take place without fulfillment of Article 53 of the U.N. Charter. In addition, although international law permits *de jure* heads of states to give consent for military intervention in some situations, such as when the grand majority of the population gives support to the ousted leader, it has been argued that Gbagbo, in effective control, is the mere authority to bestow proper consent. In fact, the assessment of the support from the population is a subjective appreciation that may lead to abuse and international disorder. Furthermore, the mere fact that Côte d’Ivoire adheres to the ECOWAS treaty allowing for military action does not preclude the application of the requirements set out in the U.N. Charter. Finally, it is questionable whether ECOWAS would be the proper entity to intervene if military use of force were authorized.

In closing, despite the fact that, at this time, an ECOWAS intervention would appear to be unlawful, this Article advocates for a search of consensus in order to properly address humanitarian crises in times when the Security Council appears silent or hesitant to intervene. Lobel and Ratner have argued that the inability of the Security Council to authorize force when some believe

¹⁶³ See, e.g., S.C. Res. 1528, ¶ 8, U.N. Doc. S/RES/1528 (Feb. 27, 2004). In November 2004, the French forces (Force Licorne), part of UNOCI (peacekeeping mission) quickly intervened on the ground in order to protect civilians. See INT’L CRISIS GRP., CÔTE D’IVOIRE: LE PIRE EST PEUT-ÊTRE À VENIR, RAPPORT AFRIQUE N° 90, at 7 (2005), available at www.crisisgroup.org/en/regions/africa/west-africa/cote-divoire/090-cote-divoire-the-worst-may-be-yet-to-come.aspx.

¹⁶⁴ See Perrine Mouterde, *Does ECOWAS Have the Will and Muscle for Military Intervention?*, FRANCE 24 (Feb. 17, 2012), <http://www.france24.com/en/20110107-ecowas-ivory-coast-military-intervention-planning-west-africa#>.

¹⁶⁵ NICOLAS COOK, CONG. RESEARCH SERV., RS21989, CÔTE D’IVOIRE’S POST-ELECTION CRISIS 18 (2011).

¹⁶⁶ *Id.*

it to be clearly needed propels the search for implied authorizations.¹⁶⁷ The example of Rwanda is compelling in that regard.¹⁶⁸ That said, this Article could have analyzed the possible intervention of ECOWAS in light of the humanitarian crisis currently unwinding in Côte d'Ivoire¹⁶⁹ and could have discussed military force under the responsibility to protect doctrine.¹⁷⁰ In the interest of peace, however, it is too early, as of 2013, to conclude that the use of force is the only method to resolve the post-election crisis.

¹⁶⁷ Lobel & Ratner, *supra* note 71, at 130.

¹⁶⁸ *Id.* at 142 (placing a two-month limit on France's authorized use of force in Rwanda).

¹⁶⁹ See William Lambers, *Humanitarian Crisis Unfolding in Côte d'Ivoire and Liberia*, YAHOO! NEWS (Mar. 15, 2011), http://www.associatedcontent.com/article/7861438/humanitarian_crisis_unfolding_in_cote.html.

¹⁷⁰ See generally INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT (2001).