

How Africa Shapes International Law: ECOWAS's Use of Force and Jus ad Bellum

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The Economic Community of West African States ("ECOWAS") has used force within West Africa for decades. ECOWAS began its practice of using force to resolve the regional crisis in Liberia in 1990 and has continued through 2024 in addressing the coup d'état in Niger. This Note will use three case studies of ECOWAS's use of force—Liberia (1990), Sierra Leone (1997), and The Gambia (2016)—to evaluate the legal basis for ECOWAS's interventions and the international response. This Note argues that ECOWAS has shaped international law in jus ad bellum by establishing a legal practice of intervention by prior consent or democratic legitimacy. This Note further postulates that ECOWAS's treaties and protocols can be interpreted under the Vienna Convention on the Law of Treaties not to conflict with the United Nations ("U.N.") Charter, that state silence in response to ECOWAS practices constitutes acquiescence in the formation of customary international law, that consistent U.N. Security Council statements commending and supporting ECOWAS practices could estop the U.N. Security Council from denouncing similar operations in the future, and that the principle of sovereign equality requires that African regional organizations such as ECOWAS are given equal weight and power to influence international law as Western counterparts, such as the North Atlantic Treaty Organization. This Note concludes that ECOWAS has changed the understanding of jus ad bellum in international law through its use of force within the region, and that the international community should pay attention to, and discuss, African legal practices to promote a homogenous body of international law.

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* Harvard Law School, J.D.; University of North Carolina at Chapel Hill, B.A. I am incredibly thankful to Professor Naz Modirzadeh for her support in the formation and writing of this paper through her Laws of War class and Writing Group at Harvard Law School. I am also thankful to Dustin Lewis of Harvard Law School's Program on International Law and Armed Conflict for his input and feedback when writing this Note. I am exceedingly thankful to Yusuke Tsuzuki, Cecilia Wu, Catherine Hendicott, Felicia Caten-Raines, and the rest of the editorial team at the *Harvard International Law Journal* for their attention, time, and thoughtfulness throughout the editing process.

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INTRODUCTION

Does international law treat all states equally? A study of the Economic Community of West African States' ("ECOWAS") use of force and the international response, or lack thereof, suggests that the answer is no. For more than three decades, ECOWAS has engaged in interventions that involve or threaten the use of force without the U.N. Security Council's authorization. To name a few, ECOWAS¹ has carried out military interventions in Liberia in 1990, Sierra Leone in 1997, and The Gambia in 2016, all without prior authorization from the U.N. Security Council. Yet, the international community has remained largely silent in response to ECOWAS's actions. States have not issued clear statements in response to actions taken by ECOWAS,² and scholarship on ECOWAS interventions is limited.³

By contrast, when the North Atlantic Treaty Organization ("NATO") intervened with force in Kosovo, a European, but non-NATO member, state,⁴ there was a clear reaction from the international community followed by an abundance of legal scholarship. Kosovo was plagued by civil unrest and violence between ethnic Albanians, who sought greater

1. When referencing ECOWAS's actions, this Note specifically references ECOWAS organs created through treaty law and armed forces that are provided by member states.

2. See *infra* Part II.

3. Erika de Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26 EUR. J. INT'L L. 979, 980 (2015).

4. See *NATO Member Countries*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_52044.htm [<https://perma.cc/97UU-4QE3>] (last visited Mar. 17, 2024).

autonomy, and the government of the Socialist Federal Republic of Yugoslavia (“SFRY”).⁵ By the late 1990s, the conflict had escalated into a humanitarian crisis that drew the attention of the international community, including NATO.⁶ The U.N. Security Council passed a series of resolutions calling for an immediate ceasefire and the withdrawal of Yugoslav forces from the region.⁷ When the Yugoslav Army failed to withdraw from Kosovo, NATO authorized airstrikes against Yugoslavia. NATO’s Secretary-General warned the U.N. Secretary-General of an impending humanitarian catastrophe in Kosovo, and, shortly thereafter, NATO began a bombing campaign against the Federal Republic of Yugoslavia (formerly the SFRY) in Kosovo.⁸

NATO’s use of force in Kosovo, without authorization from the U.N. Security Council or a claim of self-defense, captured the attention of the international legal community.⁹ The international response to NATO’s use of force was swift and clear. Within the same year as NATO’s air strikes in Kosovo, there were statements made by Albania, Austria, Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania, Slovenia, Russia, China, Australia, and NATO member states including France, Germany, Greece, Hungary, Italy, the Netherlands, Turkey, and the United Kingdom regarding NATO’s actions in Kosovo.¹⁰ There were also reactions by representatives and state-owned media sources from several Middle-Eastern states including Saudi Arabia, Israel, Egypt, Syria, and Iran.¹¹ The Independent International Commission on Kosovo was formed

5. *Kosovo Conflict*, ENCYC. BRITANNICA (Apr. 3, 2023), <https://www.britannica.com/event/Kosovo-conflict> [<https://perma.cc/AHA6-S2HY>].

6. Daniel Franchini & Antonios Tzanakopoulos, *The Kosovo Crisis – 1999*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 594, 595 (Tom Ruys et al. eds., 2018).

7. *See id.* at 595–96.

8. *Id.*

9. *See generally* KAREN DONFRIED, CONG. RSCH. SERV., RL30114, *KOSOVO: INTERNATIONAL REACTIONS TO NATO AIR STRIKES* (1999) (evaluating the reactions from several member and non-member states to NATO’s operations in Kosovo); *see also* Franchini & Tzanakopoulos, *supra* note 6, at 596.

10. *See* DONFRIED, *supra* note 9, at 1; *Australia Supports NATO on Yugoslavia*, RELIEFWEB (Oct. 12, 1998), <https://reliefweb.int/report/serbia/australia-supports-nato-yugoslavia> [<https://perma.cc/A74Q-NYMC>].

11. *See Middle Eastern Reactions to the Kosovo Crisis and NATO Airstrikes*, WASH. INST. FOR NEAR E. POL’Y (Apr. 19, 1999), <https://www.washingtoninstitute.org/policy-analysis/middle-eastern-reactions-kosovo-crisis-and-nato-airstrikes> [<https://perma.cc/N8CQ-VMH4>].

following the airstrikes and deemed them “illegal but legitimate” in the Kosovo Report to the U.N. Secretary General, which discussed the crisis in Kosovo and NATO’s involvement.¹² Since 1999, there has been extensive scholarship on the Kosovo crisis and NATO’s use of force.¹³

ECOWAS is a major power within African affairs and has been involved in many operations. In addition to intervening in Liberia in 1990, Sierra Leone in 1997, and The Gambia in 2016, ECOWAS has also played a major role in resolving crises in Guinea-Bissau (1998, 2012, 2015), Côte d’Ivoire (2003, 2010), Liberia (2003), Togo (2005), Guinea (2007), Mali (2012), and most recently Niger (2023).¹⁴ ECOWAS is often involved in operations under the auspices of preserving peace and security in the region. Despite ECOWAS’s continuous use of force or threat

12. THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *The Kosovo Report*, 4 (2000).

13. A precursory search of the 1999 actions of NATO in Kosovo yields no shortage of scholarly, legal, and governmental discussions on the legality and implications of NATO’s unilateral use of force within Kosovo. This Note will not conduct a deep dive into the literature. *See generally*, Ved P. Nanda, *Legal Implications of NATO’s Armed Intervention in Kosovo*, 75 INT’L L. STUD. (2000); DONFRIED, *supra* note 9; Dagmar Skrpec, *European and American Reactions to Kosovo: The Policy Divide Revisited in the Iraq War*, 23 SAIS REV. 93 (2003); Shalini Chawla, *NATO’s Response to the Kosovo Crisis*, 24 STRATEGIC ANALYSIS: MONTHLY 6, 1443 (2000); John D. Steinbruner, *The Consequences of Kosovo*, BROOKINGS INST. (Mar. 1, 1999), <https://www.brookings.edu/research/the-consequences-of-kosovo> [<https://perma.cc/MY8C-PDN5>]; David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT’L L.J. 129 (2001); Julie Mertus, *Humanitarian Intervention Reconsidered: Lessons from Kosovo*, WILSON CTR. (2001), <https://www.wilsoncenter.org/publication/234-humanitarian-intervention-reconsidered-lessons-kosovo> [<https://perma.cc/54B9-US6H>]; JOHN NORRIS & STROBE TALBOTT, *COLLISION COURSE: NATO, RUSSIA, AND KOSOVO* (2005); BENJAMIN S. LAMBETH, *NATO’S AIR WAR FOR KOSOVO: A STRATEGIC AND OPERATIONAL ASSESSMENT* (2001); ROB DE WIJK ET AL., *NATO AFTER KOSOVO* (2000); Milos Hrnjaz, *Twenty Years after the NATO Armed Intervention: The Kosovo Case and Remedial Secession*, 72 MEĐUNARODNI PROBLEMI 379 (2020); Fernando G. Nunez-Mietz, *Legalization and the Legitimation of the Use of Force: Revisiting Kosovo*, 72 INT’L ORG. 725 (2018); Stephan Kieninger, *The 1999 Kosovo War and the Crisis in U.S.-Russia Relations*, 43 INT’L HIST. REV. 781 (2021); Visar Xhambazi, *From Collective Defense to Collective Security: NATO Intervention in Kosovo*, 5 J. POL. SCI. & PUB. AFF. 2 (2017).

14. *See infra* Part II. While this is not an exhaustive list of all conflicts and crises within Africa that ECOWAS has been involved in, this list includes most major interventions conducted by ECOWAS from the first Liberian intervention in 1990 to the present. *See also* Svenja Raube, *An International Law Assessment of ECOWAS’ Threat to Use Force in Niger*, JUST SEC. (Aug. 16, 2023), <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger> [<https://perma.cc/N748-YQ8P>].

of force in regional affairs, its actions have not garnered the same reaction as Kosovo in 1999. States have answered with silence,¹⁵ and there is limited scholarly work addressing Africa's intervention practices.¹⁶ This is especially striking when compared to the numerous state and scholarly responses to NATO's use of force in Kosovo.¹⁷ There is no clear reason why ECOWAS's unilateral use of force within Africa has been treated differently by the international community than NATO's unilateral use of force within Europe, other than one taking place in Africa and the other in Europe. But international law cannot, consistent with sovereign equality,¹⁸ afford states and regional organizations differing levels of precedent-setting power in the development of international law. The premise of sovereign equality and the formation of customary international law ("CIL")—the international rights and obligations established through state practice and *opinio juris*¹⁹—require that the practice of all states be considered and bear equal weight in the formation of international law.²⁰ Despite the lack of attention it receives, ECOWAS has established a history of regional practice that builds a legal basis for intervening with force or the threat of force without the U.N. Security Council's authorization.

Specifically, ECOWAS has been a frequent player in progressing the principle of democratic legitimacy—intervening upon invitation by democratic leaders and recognized governments—as a legal justification to intervene with force.²¹ The conflict in Liberia was the first time ECOWAS intervened using force without U.N. Security Council authorization but instead with an invitation from the country's president. This set the stage for ECOWAS organs to later intervene in Sierra Leone and The Gambia with invitations from democratically elected leaders that lacked

15. Throughout research for this Note, no clear state responses like those offered in response to NATO's actions in Kosovo could be discerned.

16. See de Wet, *supra* note 3, at 980.

17. This Note is limited to research and statements written or available in English. While this necessary limits the scope of research, it also underlines the importance of giving weight to African practices in English-language analysis of international law.

18. Brad R. Roth, *The International Law of Sovereign Equality*, in SOVEREIGN EQUALITY AND MORAL DISAGREEMENT 53 (Brad R. Roth ed., 2011).

19. *Customary international law*, CORNELL L. SCH. LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/VF33-S3UU] (last visited Feb. 11, 2024).

20. See Roth, *supra* note 18, at 53.

21. See generally de Wet, *supra* note 3.

physical control over the territory and were living in exile. These interventions were followed by post hoc U.N. Security Council resolutions providing implied approval of ECOWAS's operations or commending ECOWAS's efforts to resolve crises. Furthermore, states outside of Africa have remained largely silent on the issue, arguably showing acquiescence to ECOWAS's practice of intervening based on democratic legitimacy.²² As a result, intervening in favor of democratic legitimacy appears to be gaining traction as a factor of consideration.²³ Whether invitation to intervene by democratic leaders and recognized governments has sufficient state practice and *opinio juris* to become international law is contested, but based on ECOWAS's practice and subsequent responses, it appears to be accepted law for the West African region.

This Note focuses on three specific crises where ECOWAS used or threatened force without U.N. Security Council authorization and with invitation from democratically elected leaders who did not have effective control over the region: in Liberia (1990), Sierra Leone (1997), and The Gambia (2016). This Note addresses the development of international law through ECOWAS practice, U.N. Security Council responses, and subsequent state silence.

This Note focuses on ECOWAS's application of the principle of intervention in favor of democracy and its implications on the development of regional CIL and supporting regimes. The credibility of this principle has been built by post hoc approvals and state silence, gradually changing CIL on *jus ad bellum*, or the use of force. ECOWAS has deployed unilateral use of force over three decades. The U.N. Security Council's lack of response during this time arguably creates reliance for ECOWAS on an established regional intervention regime. It could also preclude the U.N. Security Council from claiming in the future that ECOWAS cannot unilaterally use force based on the principle of intervention in favor of democratic legitimacy. In addition, states also knew of ECOWAS's practice, had time to respond, and had an interest in the law governing intervention, which makes their silence function as acquiescence to African intervention regimes.

22. See *infra* Part III.

23. See de Wet, *supra* note 3, at 989 (concluding that democratic legitimacy "does not yet seem to be a requirement for recognition of governments" but is "one factor that can be taken into account when recognizing a particular government" although "it has not yet replaced effective control").

The purpose of this Note is to evaluate the history of ECOWAS interventions, U.N. Security Council and sovereign responses, and the interventions' impacts on international law. Whether ECOWAS's strategies and actions are effective or appropriate is outside of the scope of this Note. While ECOWAS is also an active player in imposing sanctions within its region, this Note specifically focuses on use of force or the threat of use of force.

Part I provides a brief overview of *jus ad bellum* in international law and the Vienna Convention of the Law of Treaties ("VCLT"). Part II gives an overview of the history and formation of ECOWAS's interventions to provide proper context for their legal significance and introduces ECOWAS's legal arguments supporting its actions in Liberia, Sierra Leone, and The Gambia. Part III discusses the implications of ECOWAS's actions for the law of *jus ad bellum*, evaluating arguments rooted in the VCLT, U.N. Security Council responses, state silence and acquiescence, sovereign equality, and estoppel to assess the law-making power of African regional organizations.

I. INTERNATIONAL LAW AND *JUS AD BELLUM*

ECOWAS is shaping CIL in *jus ad bellum* through its intervention by invitation without U.N. Security Council authorization. There is a tension between the traditional "effective control" principle and the emerging "democratic legitimacy" principle,²⁴ with ECOWAS appearing to favor the latter. Furthermore, ECOWAS's practices challenge the role of Chapter VII²⁵ U.N. Security Council authorizations. This Part provides a broad survey of the international law of *jus ad bellum*, discusses the competing principles of effective control and democratic legitimacy, and then previews the legal arguments made in Part III.

The Doctrine of Sources, as articulated by the International Court of Justice's Statute, lists four sources of international law: treaties and conventions, custom, general principles of law, and judicial decisions and teachings to supplement the previous three sources.²⁶ For international

24. *Id.* at 981.

25. Chapter VII of the U.N. Charter covers "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." U.N. Charter arts. 39–51, <https://www.un.org/en/about-us/un-charter> [<https://perma.cc/6YR6-HDKX>] (last visited Mar. 17, 2024).

26. Statute of the International Court of Justice art. 38, ¶ 1.

law governing *jus ad bellum* by states, organizations, and other non-state actors, the primary treaty is the United Nations Charter (“U.N. Charter”). All member states of the United Nations are bound by the U.N. Charter.²⁷ Article 2(4) of the Charter prohibits the use or threat of force,²⁸ except in two cases: self-defense under Article 51²⁹ or prior authorization from the U.N. Security Council under Chapter VII, Articles 39³⁰ and 42.³¹ Article 53 of the U.N. Charter allows the U.N. Security Council to authorize regional organizations to use force.³² In cases where there is a conflict between treaties adopted by international and regional organizations and the U.N. Charter, the Charter has supremacy.³³ Although the Charter sets out the general structure governing *jus ad*

27. See JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 14–15 (2019).

28. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

29. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

30. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

31. U.N. Charter art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

32. U.N. Charter art. 53, ¶ 1 (“The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this 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.”).

33. U.N. Charter art. 103 (“In the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under

bellum, it does not provide specific definitions, and many of its sections are general outlines of law. The interpretation of the Charter's articles is determined through tools of treaty interpretation, CIL, subsequent treaty practice, and judicial interpretation.³⁴

Notwithstanding Article 2(4) restrictions, states and international organizations can legally use force on the sovereign territory of another state through invitation by the state or through Chapter VII U.N. Security Council authorization. When relying on an invitation for intervention as the legal justification for using force on the territory of another state, who provides the invitation matters. Historically, states have turned to the "effective control" test, stating that to provide a legitimate invitation for intervention, the leader or party extending the invitation must have effective control over the state.³⁵ An alternative principle is invitation based on democratic legitimacy. Here, whether a head of state inviting foreign intervention was democratically elected makes them the recognized government, regardless of whether they have effective control over the state.

The U.N. Charter places the power to determine when use of force is permissible with the fifteen members of the U.N. Security Council, five of which are permanent members with veto power: the United States, the United Kingdom, France, Russia, and China (collectively known as the "P5"). However, the U.N. Security Council has been slow to react to African conflicts and reluctant to authorize use of force or decide resolutions under Chapter VII authority.³⁶ This is especially evident in the African conflicts in Liberia, Sierra Leone, and The Gambia. In the absence of U.N. Security Council action, ECOWAS has intervened to resolve these conflicts through the use of force or threat of the use of force.

any other international agreement, their obligations under the present Charter shall prevail.").

34. See generally Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 FORDHAM INT'L L. J. 766 (2019); ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* (2009).

35. Chiara Redaelli, *Military Intervention on Request in Jus ad Bellum and Jus in Bello and the Question of Recognition of Governments*, 12 GOETTINGEN J. INT'L L. 105, 111–12 (2022); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMPAR. & INT'L L. 209, 212 (1996).

36. See Anne Vos, *The AU-ECOWAS Intervention Regimes and International Law* 15 (June 13, 2022) (LL.M. thesis, Tilburg Law School) (on file with Tilburg University).

Alongside the interpretation of the Charter, *jus ad bellum* is developed and defined through CIL.³⁷ The identification of CIL requires evidence of *opinio juris*, or a general practice accepted as law.³⁸ One such realm of CIL in *jus ad bellum* is intervention by invitation. States are sovereign over their territories and are able to invite whichever states, international organizations, or other actors they wish to enter and use force within the confines of their territories.³⁹ The commentaries on Article 20 of the Articles of the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) state that, “[c]onsent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring.”⁴⁰ The International Court of Justice (“ICJ”) in *Military and Paramilitary Activities in and against Nicaragua* stated that intervention by a foreign state or organization is “allowable at the request of the government of a State.”⁴¹

The question then becomes: Who has the authority to issue such an invitation? While the government or head of state is understood to be able to issue an invitation, this becomes problematic when there are competing governments or groups within a territory. States have long turned to the “effective control” test.⁴² The emerging view to potentially replace “effective control” is the “recognition doctrine of democratic legitimacy.”⁴³ Under this principle, proponents assert that democracy is a “necessary condition for the legitimacy of a state.”⁴⁴ The International

37. Statute of the International Court of Justice art. 38; *see also* CRAWFORD, *supra* note 27, at 21–22.

38. *Customary Law*, INT’L COMM. RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> [<https://perma.cc/L8W3-UV54>] (last visited Apr. 8, 2023).

39. *See generally* Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK ON THE USE OF FORCE 816, 837 (Marc Weller ed., 2015).

40. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, [2001] 2 Y.B. Int’l L. Comm’n, U.N. Doc. A/56/10, art. 20, cmt. 3 [hereinafter ARSIWA].

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

42. Redaelli, *supra* note 35; Wippman, *supra* note 35; *see also* Mohamed Helal, *The ECOWAS Intervention in The Gambia – 2016*, in THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 912, 920 (Tom Ruys et al. eds., 2018).

43. Helal, *supra* note 42, at 921 (democratic legitimacy is referenced by Professor Helal as an emerging doctrine, however, this Note treats democratic legitimacy as a principle in international law).

44. *Id.* (citing ALLEN BUCHANAN, HUMAN RIGHTS, LEGITIMACY, AND THE USE OF FORCE 146 (2010)).

Law Commission (“ILC”) has stated that the validity of consent (through invitation) depends on “whether the agent or person who gave the consent was authorized to do so on the behalf of the State.”⁴⁵ Thus, under this view, an invitation to intervene with force is legitimate when issued by a democratically elected leader or government, even if said officials are not within the country or do not have physical control over the territory.

The principle of peoples’ right to self-determination is used by proponents of both “effective control” and “democratic legitimacy.” Under effective control, if it is not clear who has physical control over the territory, other states should not intervene but allow the people of the nation to determine their own leadership.⁴⁶ States should not intervene with force based on the invitation of one side and thereby tip the scales, as it could be contrary to the people’s wishes. Proponents of democratic legitimacy argue that the people exercise their right to self-determination by electing leaders, and, in order to support the people’s right to self-determination, states should only intervene based on invitations by democratically elected governments over groups with physical control over the territory.

The persuasive power of these two competing principles in CIL is determined by analyzing state practice and state opinion. The ILC has recognized the “practice of international organizations” as a source for CIL.⁴⁷ While invitation based on democratic legitimacy has been cautioned against by some legal scholars,⁴⁸ state practice, *opinio juris*, and treaty law hold greater weight in the formation of CIL than do legal writings, which suggests support for the democratic legitimacy approach in Africa. African state practice at ECOWAS, combined with other states’ acquiescence by silence, appears to support the idea that intervention in favor of democratic legitimacy is a principle of customary international law.⁴⁹

45. ARSIWA, *supra* note 40, art. 20, cmt. 4.

46. Wouter G. Werner, *Self-Determination and Civil War*, 6 J. CONFLICT & SEC. L. 171, 180–81 (2001).

47. Int’l L. Comm’n, Report to the General Assembly (Part II), Ways and Means of Making the Evidence of Customary International Law More Readily Available, U.N. Doc. A/CN.4/6/Corr.1 (1949).

48. See, e.g., Fox, *supra* note 39, at 28 (examining the emergence of invitation based on democratic legitimacy and competing views).

49. See de Wet, *supra* note 3, at 998.

Regional CIL applies to the states in a particular geographical area,⁵⁰ and the ICJ affirmed the existence and legality of regional CIL in the *Nationalities Case*.⁵¹ Regional laws governing jus ad bellum become more complex due to the tensions between the U.N. Charter and the African Union (“AU”) as well as ECOWAS treaties—both establishing regional intervention regimes based on prior consent of member states.⁵² Through the African Union Act (“AU Act”), the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (“AUPSC”), and the ECOWAS Revised Treaty and Protocols, the AU and ECOWAS can intervene with force in the internal affairs of member states for the purposes of preventing mass atrocities and maintaining peace and security based on prior consent given by all member states.⁵³ Although the regimes established by these protocols and treaties have also received little academic attention, regional CIL is emerging from the intervention regimes of the AU and ECOWAS.⁵⁴ African states, through ECOWAS, have been actively establishing state practice and opinio juris in support of democratic legitimacy.

This Note discusses the results of ECOWAS practice on international law under the VCLT, state silence, estoppel, and sovereign equality. Although VCLT is commonly regarded as CIL for treaties formed between states, its application often extends to treaties involving non-state

50. Fox, *supra* note 39 at 34 (citing Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT’L & COMPAR. L. Q. 779, 782 (2019)).

51. *Id.* at 40; *see also* Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), *Judgment*, 1952 I.C.J. 176, 200 (Aug. 27) (stating that legality of regional customary international law is traceable back to Article 38(1)(b) of the ICJ Statute).

52. Vos, *supra* note 36, at 5 (citing JOHN-MARK IYI, HUMANITARIAN INTERVENTION AND THE AU-ECOWAS INTERVENTION TREATIES UNDER INTERNATIONAL LAW: TOWARDS A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT 4 (2016)).

53. *See id.* at 18; *see also* ECOWAS, Protocol Relating to the ECOWAS Mechanism for Conflict Prevention Management, Resolution, Peace-keeping and Security art. 10 (1999), <https://amaniafrica-et.org/wp-content/uploads/2021/04/Protocol-Relating-to-the-Mechanism-for-Conflict-Prevention-Management-Resolution-Peace-Keeping-and-Security-1999.pdf> [<https://perma.cc/9YTH-E2DE>]; ECOWAS Revised Treaty art. 58; Constitutive Act of the African Union art. 4. *See generally* Dan Kuwali, *The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention*, 9 AFR. J. CONFL. RESOLUT. 41 (2009).

54. JOHN-MARK IYI, HUMANITARIAN INTERVENTION AND THE AU-ECOWAS INTERVENTION TREATIES UNDER INTERNATIONAL LAW: TOWARDS A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT 4 (2016) (discussing the significance of the AU-ECOWAS intervention regimes).

organizations.⁵⁵ The relevant treaties here are the U.N. Charter and the treaties of ECOWAS. According to VCLT Article 31, treaties are interpreted in “good faith in accordance with the ordinary meaning . . . in light of [the treaty’s] object and purpose” and such interpretation includes any subsequent practice in the application of the treaty or relevant rules of international law.⁵⁶ VCLT Article 32 further allows supplementary means of interpretation, such as the circumstances surrounding the conclusion of the treaty.⁵⁷ When evaluating *jus ad bellum* and its development, the primary focus is usually on the role of the U.N. Security Council and states as the key actors who can “shape, interpret, and apply *jus ad bellum*.”⁵⁸ Statements by the U.N. Security Council and states, as well as any instances of state silence and lack of response, are given particular attention.

Estoppel is a well-established doctrine that is said to “appl[y] across the board of public international law.”⁵⁹ Under the doctrine of estoppel, a party is precluded from adopting different positions in “subsequent statements on the same issue” when another party could reasonably rely on previous statements or positions.⁶⁰ However, the full potential of estoppel as a general principle and rule of “substantive and customary international law” has not been fully explored, and the doctrine could play a significant role in understanding the impact of statements made by international organizations and actors.⁶¹ While estoppel is a recognized doctrine and is referenced and used in international law, it remains largely untested as a legal theory applied to states and international organizations.⁶²

55. See Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *Suspension and Expulsion of States from International Organizations: Analysis of the VCLT and of the Practice at the U.N. and the Council of Europe*, EUR. PARL. THINK TANK, (Nov. 7, 2023), [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2023\)751410](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)751410) [https://perma.cc/2BFQ-VCHE].

56. VCLT, *supra* note 55.

57. *Id.* art. 32.

58. Dustin A. Lewis et al., *Quantum of Silence: Inaction and Jus ad Bellum*, THE HARVARD LAW SCHOOL PROGRAM ON INTERNATIONAL LAW AND ARMED CONFLICT (HLS PILAC) 7–8 (2019).

59. Thomas Cottier & Jörg Paul Müller, *Estoppel*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 9–11 (Rüdiger Wolfrum ed., 2007).

60. *Id.* ¶ 1.

61. *Id.* ¶ 12.

62. *Id.* ¶ 13 (stating that estoppel is “bound to play an important role in . . . rules [governing] unilateral acts”).

The concept of sovereign equality is a fundamental principle of the U.N. and is enshrined in its Charter. Article 2, paragraph 1 of the U.N. Charter states that “[t]he Organization is based on the principle of the sovereign equality of all its Members.”⁶³ Sovereign equality is a “solemn principle” of the Charter and is further stressed in the Friendly Relations Declaration, stating that all states are “juridically equal.”⁶⁴ This means that each member state of the U.N. is considered to be equal in terms of its rights and responsibilities within the organization, regardless of its power, wealth, or resources.⁶⁵ This emphasizes the importance of respecting the sovereignty of all member states and recognizing their equal standing in the international community. Within the international legal order, sovereign equality is a core set of entitlements “attribute[d] equally to all states.”⁶⁶ The principle of sovereign equality is a cornerstone of the United Nations’ mission to promote peace, security, and cooperation among nations. The above international legal principles and concepts apply to the below ECOWAS interventions and can be changed and influenced by state practice and *opinio juris* to further develop international law.

II. ECOWAS’S USE OF FORCE: FORMATION AND HISTORY OF CONFLICTS

Understanding the scope and impact of ECOWAS operations first requires a review of the formation and history of the organization’s use of force. This Part reviews the formation of ECOWAS and its founding principle and purpose, as well as the history of the three main conflicts, Liberia, Sierra Leone, and The Gambia, that are evaluated in this Note. It is important to understand the formation and operations of ECOWAS to fully appreciate the context of the legal arguments and international responses discussed below.

63. U.N. Charter art. 2, ¶ 4.

64. Juliane Kokott, *States, Sovereign Equality*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶¶ 18–19 (Anne Peters ed., 2011).

65. See Antony Anghie, *Towards a Postcolonial International Law*, in CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM, AND TRANSNATIONALISM 123, 125 (Prabhakar Singh & Benoît Mayer eds., 2014).

66. BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT 53 (2011).

A. ECOWAS's Formation

ECOWAS was established on May 28, 1975, when fifteen West African countries⁶⁷ signed the Treaty of Lagos.⁶⁸ The Treaty of Lagos included most of West Africa and was created to “promote cooperation and development in all fields of economic activity, particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, finance, monetary policy, and socio-cultural affairs.”⁶⁹ In other words, ECOWAS was formed with a mandate to promote economic development in the region.⁷⁰ Originally, there was no provision establishing a multinational military force within the Treaty of Lagos.

Soon after its formation, ECOWAS signed additional protocols expanding its authority in the region. In 1978, ECOWAS members signed a Protocol on Non-Aggression that focused on peaceful settlements of disputes.⁷¹ Then, in 1981, ECOWAS members signed a Protocol Relating to Mutual Assistance on Defense and established the first multinational ECOWAS defense force.⁷² This was mandated for the purposes of ensuring necessary security in the region for economic progress and protecting the West African region from external aggression and foreign intervention.⁷³ The Protocol authorized armed action “in case of internal armed conflict within any member state engineered and supported actively from outside likely to endanger the security and peace in the entire Community” and

67. ECOWAS member states are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. See *ECOWAS Member States*, ECOWAS CEDEAO, <https://www.ecowas.int/member-states/> [<https://perma.cc/3D7X-JVBF>] (last visited Mar. 17, 2024).

68. Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 1010 U.N.T.S. 17 [hereinafter Treaty of ECOWAS].

69. Karsten Nowrot & Emily W. Schbacker, *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, 332 (1988) (citing Treaty of ECOWAS, *supra* note 68, art. 2).

70. *Basic Information*, ECOWAS CEDEAO, <https://www.ecowas.int/basic-information/> [<https://perma.cc/PS9C-K274>] (last visited Feb. 10, 2024).

71. Nowrot & Schbacker, *supra* note 69, at 333 (citing Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, 53 HEIDELBERG J. INT'L L. 603, 613 (1993) (citing Protocol on Non-Aggression, Apr. 22, 1978, 1690 U.N.T.S. 39)).

72. See Protocol Relating to Mutual Assistance on Defence pml., May 29, 1981, 1690 U.N.T.S. 51.

73. *Id.*

in cases of armed conflicts between member states.⁷⁴ ECOWAS intervention was permitted if a head of state submitted a written request, but “Community forces [would] not intervene if the conflict remain[ed] purely internal.”⁷⁵

ECOWAS established the practice of collective self-defense within the region and required mutual assistance against an armed threat by defining a threat against one member state as a threat to the community.⁷⁶ The “framework for collective intervention” was established through the creation of the Allied Armed Forces of the Community (“AAFC”), which operated as a military force with national units contributed by member states.⁷⁷ The “final step” that led to ECOWAS’s use of force in regional affairs was the creation of the Community Standing Mediation Committee (“SMC”) in May 1990.⁷⁸ The SMC was created in response to Liberia’s crisis at the time.⁷⁹ It was meant to “initiate mediation procedures for countries in conflict” and act on behalf of ECOWAS to initiate intervention under the Mutual Defense Protocol.⁸⁰ Going forward, ECOWAS became well-established and had institutions in place to address regional conflicts and call for intervention through force where the SMC found appropriate.

The following Sections review the history of the conflicts in Liberia (1990), Sierra Leone (1997), and The Gambia (2016)—the subject of the bulk of legal scholarship on ECOWAS’s use of force. In these three conflicts, ECOWAS, through its organs, authorized or threatened force based on invitations from democratically-elected leaders who did not have control of the state’s territory and without U.N. Security Council authorization. At the conclusion of each ECOWAS operation, the U.N. Security Council commended the organization’s efforts, seemingly providing post hoc approval. It is through these three case studies that this Note argues that ECOWAS has shaped international law on *jus ad bellum*, at least as it applies to West Africa.

74. *Id.* art. 4.

75. *Id.* arts. 16, 18.

76. *Id.* art. 2.

77. Peter A. Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 35 *DENV. J. INT’L L. & POL’Y* 333, 336 (2007).

78. *Id.*

79. *Id.*

80. *Id.* at 333–34.

B. ECOWAS and Liberia (1990)

ECOWAS's use of force in Liberia⁸¹ was the first time a sub-regional "economic community" used force within the region without prior U.N. Security Council authorization.⁸² Adding to the significance of this intervention was the U.N. Security Council's post hoc response that provided apparent approval and a basis for state practice in future interventions by humanitarian-motivated regional organizations.

The Liberian crisis unfolded when Samuel Doe "engaged in brutal repression of political opposition" after his contested and controversial presidential victory in 1985.⁸³ On December 24, 1989, a civil war broke out in Liberia when the National Patriotic Front in Liberia ("NPFL"), led by Charles Taylor, invaded.⁸⁴ The Armed Forces of Liberia ("AFL") responded by conducting a counterinsurgency campaign.⁸⁵ The NPFL targeted the Krahn and Mandingo ethnic groups as they were suspected supporters of Doe, and the ensuing violence forced refugees to flee to neighboring states.⁸⁶ The Liberian Council of Churches attempted to mediate between the factions, but when those efforts failed, a rebel faction broke away from the NPFL and created the Independent National Patriotic Front of Liberia ("INPFL"), led by Prince Yomie Johnson.⁸⁷ Then, President Doe requested aid both from the United States and from ECOWAS.⁸⁸ The United States refused, but ECOWAS responded through the SMC, which had been created to respond to this crisis. The SMC invoked the Mutual Defense Protocol, passed a resolution that called for a ceasefire and

81. I am grateful to the work of Peter A. Jenkins for drawing my attention to primary sources on the crisis in Liberia in his piece: Jenkins, *supra* note 77.

82. *Id.* at 342; see generally KLAAS VAN WALRAVEN, *CONTAINING CONFLICT IN THE ECONOMIC COMMUNITY OF WEST AFRICAN STATE: LESSONS FROM THE INTERVENTION IN LIBERIA, 1990–1997* (1999).

83. Jenkins, *supra* note 77, at 342 (citing HUM. RTS. WATCH, *Liberia Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights*, at 5–6 (June 1, 1993)).

84. HUM. RTS. WATCH, *supra* note 83, at 5–7.

85. *Id.* at 6–7.

86. *Id.*

87. Jenkins, *supra* note 77, at 342 (citing ABIODUN ALAO, *THE BURDEN OF COLLECTIVE GOODWILL* 36 (1998)).

88. *Id.* at 336 (citing ECOWAS, Authority Decision A/DEC. 9/5/90, 21 O.J. ECOWAS Spec. Supp. 5 (1992), reprinted in UNIVERSITY OF CAMBRIDGE RESEARCH CENTRE OF INTERNATIONAL LAW, *REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS* 38–39 (M. Weller ed., 1994)).

established the ECOWAS Cease-Fire Monitoring Group (“ECOMOG”), the military branch of ECOWAS.⁸⁹

In August 1990, ECOMOG entered Liberia following a plea from President Doe to assist and intervene.⁹⁰ The legitimacy of Doe’s ability to invite ECOWAS to intervene with force was questionable, as the NPFL led by Charles Taylor controlled all the territory outside of Liberia’s capital, Monrovia.⁹¹ Nonetheless, the initial intervention by ECOMOG was successful, and a ceasefire was established.⁹² The ceasefire was then broken by the United Liberation Movement for Democracy in Liberia (“UNLIMO”), and the conflict rekindled.⁹³ In response, Nigerian combat aircrafts, under the auspices of ECOMOG, struck targets in the territory controlled by Taylor, leading to the three rebel factions signing the Cotonou Peace Accord on July 25, 1993.⁹⁴ In September 1994, the factions signed another peace accord, the Akosombo Agreement, concluding ECOWAS’s involvement through ECOMOG in Liberia.⁹⁵

The President of the U.N. Security Council “commend[ed] the efforts made by [ECOWAS]... to promote peace and normalcy in Liberia” in 1991. Then, in 1992, the U.N. Security Council praised ECOWAS for addressing the “threat to international peace and security,” and requested that other states “respect the measures established by ECOWAS.”⁹⁶ Prior to this statement, the U.N. Security Council had not discussed the Liberian conflict.⁹⁷ The U.N. Security Council subsequently passed two resolutions: Resolution 788 in November 1992, which placed an embargo in Liberia and condemned attacks on the ECOWAS peace force,⁹⁸ and Resolution 813 in March 1993, which provided for U.N. observers in Liberia

89. *Id.* (citing ECOWAS, SMC Decision A/DEC. 1/8/90, *On the Cease-Fire and Establishment of an ECOWAS Cease-Fire Monitoring Group for Liberia*, 21 O.J. ECOWAS Spec. Supp. 6 (1992), reprinted in UNIVERSITY OF CAMBRIDGE RESEARCH CENTRE OF INTERNATIONAL LAW, REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 67–69 (M. Weller ed., 1994)).

90. *Id.* at 343; HUM. RTS. WATCH, *supra* note 83.

91. HUM. RTS. WATCH, *supra* note 84.

92. *See id.*

93. *Id.* at 11.

94. Jenkins, *supra* note 77, at 343 (citing Kofi Oteng Kufuor, *Developments in the Resolution of the Liberian Conflict*, 10 AM. U. J. INT’L L. & POL’Y 373, 385 (1994)).

95. Kufuor, *supra* note 94, at 390–91.

96. Jenkins, *supra* note 77, at 344 (citing S.C. Pres. Statement 2008/268 (Jan. 22, 1991)); *see also* S.C. Res. 778 pmbl. (Nov. 19, 1992) [hereinafter S.C. Res. 778].

97. *Id.* at 345.

98. S.C. Res. 778, *supra* note 96.

and incorporated humanitarian language, but did not authorize any use of force.⁹⁹ The U.N. Security Council never authorized the use of force in Liberia through a Chapter VII resolution. However, it subsequently praised and supported ECOWAS operations in the country.

In the Liberian conflict, ECOWAS stated that it was justified to take action to maintain regional peace and security based on treaty law and CIL.¹⁰⁰ ECOWAS justified its use of force under Article 18 of the Protocol Relating to Mutual Assistance on Defense allowing ECOWAS to intervene in internal affairs that are supported externally.¹⁰¹ The mandate of maintaining “peace in the region” is in line with the original purposes of the U.N. Charter. However, the responsibility of maintaining peace and security, based on the Charter, lies with the U.N. Security Council.¹⁰² Furthermore, ECOWAS intervened following a plea for assistance from President Doe, who had no territorial control outside of Monrovia.¹⁰³ Despite ECOWAS’s actions appearing *prima facie* illegal under the Charter’s terms, the U.N. Security Council responded with praise and did not make any statements on their illegality.¹⁰⁴ Thus, ECOWAS unilaterally made the decision to intervene with force in Liberia under their own treaties and protocols and with the invitation of an elected leader without territorial control. It received *post hoc* praise by the United Nations, paired with state silence that has spanned more than three decades. This was the first instance of ECOWAS using force, setting the groundwork for its future interventions in favor of democratic legitimacy.

C. *ECOWAS and Sierra Leone (1997)*

Following the conflict in Liberia, ECOWAS used force in 1997 amid a civil war and regional crisis in Sierra Leone.¹⁰⁵ ECOWAS intervened in Sierra Leone not based on U.N. Security Council authorization but rather

99. S.C. Res. 813 (Mar. 26, 1993).

100. Jenkins, *supra* note 77, at 344.

101. *Id.*; see also Protocol Relating to Mutual Assistance on Defence, *supra* note 72, art. 18.

102. Jenkins, *supra* note 77, at 345.

103. HUM. RTS. WATCH, *supra* note 83, at 7–9.

104. See Jenkins, *supra* note 77, at 346.

105. I am grateful to the work of Karsten Nowrot and Emily W. Schbacker for drawing my attention to primary sources on the crisis in Sierra Leone in their piece: Nowrot & Schbacker, *supra* note 69.

on an invitation by a democratically elected leader without effective control over his state.

On May 25, 1997, rebel soldiers in Sierra Leone overthrew both the civilian government and the then-elected president, Ahmad Tejan Kabbah.¹⁰⁶ Kabbah was democratically elected in the first free elections held in Sierra Leone in over thirty years.¹⁰⁷ The rebel soldiers, organized as the Revolutionary United Front ("RUF"), forced Kabbah into exile in Guinea and established themselves as the new government of Sierra Leone.¹⁰⁸ Major Johnny Paul Koromah of the RUF then declared himself the new head of government and "suspended the constitution."¹⁰⁹ Little international attention was given to the coup d'état unfolding in Sierra Leone.¹¹⁰

Though U.N. Secretary General Kofi Annan proposed a peacekeeping operation and general aid to Sierra Leone, the plan was never adopted. U.N. Security Council members appeared to think the operation would not gain the support of the United States.¹¹¹ From exile in Guinea, President Kabbah invited Nigeria, through ECOWAS, to use force in Sierra Leone.¹¹² Nigeria responded and "under the auspices of ECOWAS" sent troops to Sierra Leone to fight the rebels.¹¹³ Although the U.N. Security Council did not respond quickly, it passed Resolution 1132 to request the RUF to relinquish power given its unauthorized use of force.¹¹⁴

The conflict continued, and in February 1998, the U.N. Special Envoy to Sierra Leone reported food shortages and increased attacks on civilians.¹¹⁵ Nigeria, under ECOWAS, continued to use force against the RUF until March 10, 1998, when President Kabbah returned to power

106. *Id.* at 325.

107. *Id.*

108. *Id.* (citing Claudia McElroy, *Soldiers Topple Government in Sierra Leone*, GUARDIAN, May 26, 1997, at 13).

109. *Id.* at 327.

110. *Id.* at 325.

111. *Id.* at 326 (citing Mark Tran & Claudia McElroy, *UN Failure in Sierra Leone Feeds Recriminations: Foreigners Await Rescue as Nigeria Sends Troops to Reverse Coup*, GUARDIAN, May 29, 1997, at 15).

112. *Id.* at 327 (citing 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).

113. *Id.* at 332, 334.

114. S.C. Res. 1132, ¶ 1 (Oct. 8, 1997).

115. See U.N. Secretary-General, *Third Report of the Secretary-General on the Situation in Sierra Leone*, ¶ 10, U.N. Doc. S/1998/103 (Feb. 5, 1998).

and restored peace.¹¹⁶ The international community seemingly accepted ECOWAS's use of force in Sierra Leone.¹¹⁷ The U.N. Security Council issued a statement "welcom[ing] 'the fact that the military junta has been brought to an end' and commend[ing] 'the important role' that ECOWAS played in the 'peaceful resolution' of the crisis."¹¹⁸ Then, just six days later on March 16, 1998, the U.N. Security Council adopted a resolution welcoming Kabbah's return to power.¹¹⁹ Thus, although the U.N. Security Council did not authorize the use of force in Sierra Leone through a binding resolution, the statements and resolutions issued following the conflict appeared to approve of ECOWAS's actions post hoc.¹²⁰ Though President Kabbah won in a free election,¹²¹ he subsequently fled to Guinea in exile due to the ongoing conflict in his country.¹²² From Guinea, Kabbah invited Nigeria, through ECOWAS, to intervene with force in Sierra Leone.¹²³ The U.N. Security Council did not authorize the use of force in Sierra Leone by any state or organization, yet Nigerian troops as a part of ECOWAS forces intervened militarily in Sierra Leone.¹²⁴

The international community generally followed the intervention in Sierra Leone with silence which has continued for decades. The international community "accepted the Nigerian actions in Sierra Leone . . . [and was] willing to turn a blind eye to the legality of the intervention."¹²⁵ ECOWAS's actions in Sierra Leone built on and strengthened the previous precedent set by ECOWAS in Liberia of intervening with force in favor of democratic legitimacy.

D. ECOWAS and The Gambia (2016)

More recently and notably, ECOWAS not only threatened to use force in The Gambia, but also amassed troops, crossed the border, and prepared

116. Nowrot & Schbacker, *supra* note 69, at 330 (citing Howard French, *A West Africa Border with Back-to-Back Wars*, N.Y. TIMES, Jan. 25, 1998, at A3).

117. *Id.* at 330.

118. S.C. Pres. Statement 1998/5 (Mar. 16, 1998).

119. S.C. Res. 1156, ¶ 2 (1998).

120. *See de Wet, supra* note 3, at 985.

121. Nowrot & Schbacker, *supra* note 69, at 325.

122. *Id.* at 327 (citing Goldman, *supra* note 112, at 3).

123. *Id.*

124. *Id.* at 326 (citing Tran & McElroy, *supra* note 111, at 15).

125. Nowrot & Schbacker, *supra* note 69, at 330.

to follow through on its threat.¹²⁶ On December 1, 2016, The Gambia held presidential elections. The incumbent, Yahya Jammeh, had previously held elections with the façade of a democratic process while maintaining control through authoritarian measures since 1994.¹²⁷ He had intimidated political opponents, harassed journalists, bribed officials, and controlled society through security forces.¹²⁸ With a small contingent of AU observers overseeing the 2016 election,¹²⁹ however, the citizens of The Gambia elected Adama Barrow.¹³⁰ Jammeh initially conceded but rejected the results soon after and called for a new election under the supervision of an independent electoral commission.¹³¹

On December 10, 2016, the U.N. Security Council issued a press release condemning Jammeh's actions and calling on him to "carry out a peaceful and orderly transition process" and "requested that the security of the President-elect, Adam Barrow, and that of all Gambian citizen[s] be fully ensured."¹³² On the same day, ECOWAS issued a joint statement expressing their concern and calling on the government of The Gambia to "abide by its constitutional responsibilities and international obligations," while asking stakeholders to "contribute to a peaceful transition," "reject violence[,] and peacefully uphold the will of the people."¹³³ The next day, ECOWAS began to take the lead in addressing the situation in The Gambia.¹³⁴ ECOWAS's chairperson, Liberian President Ellen Johnson Sirleaf, condemned Jammeh's position, calling it a threat to peace "not

126. I am grateful to the work of Professor Mohamed Helal for drawing my attention to primary sources on the crisis in The Gambia in his piece: Helal, *supra* note 42.

127. *See id.* at 912.

128. *See generally* Abdoulaye Saine, *The Gambia's "Elected Autocrat, Poverty, Peripherality, and Political Instability" 1994–2006*, 34 *ARMED FORCES & SOC'Y* 450 (2008).

129. *Gambia's Jammeh Loses to Adama Barrow in Shock Election Result*, BBC NEWS (Dec. 2, 2016), <http://www.bbc.com/news/world-africa-38183906> [<https://perma.cc/S7P4-SDVG>].

130. Muhammed Jah, *The Total of Final Election Results by Aliou Momarr Njai – Chairman IEC*, INDEP. ELECTORAL COMM'N, THE GAM. (Dec. 5, 2016), <http://iec.gm/the-total-of-final-election-results> [<https://perma.cc/TA2B-2YJ5>].

131. *Gambia Leader Yahya Jammeh Rejects Election Result*, BBC NEWS (Dec. 10, 2016), <http://www.bbc.com/news/world-africa-38271480> [<https://perma.cc/Y8MD-VNBC>].

132. Press Release, Security Council, Security Council Press Statement on the Gambia Elections, U.N. Press Release SC/12616-AFR/3501 (Dec. 10, 2016).

133. ECOWAS, *African Union and U.N. Statement on the Political Developments in the Gambia*, UNOWAS (Dec. 10, 2016), <https://unowas.unmissions.org/ecowas-african-union-and-un-statement-political-developments-gambia> [<https://perma.cc/6U8V-BABL>].

134. Helal, *supra* note 42, at 914.

only in The Gambia” but in the “entire West African Subregion.”¹³⁵ On December 12, ECOWAS announced a mediation mission to The Gambia to attempt to redress the crisis.¹³⁶ That same day, the AU Peace and Security Council met and adopted a decision expressing its desire for a peaceful transition of power within The Gambia, as well as its intent to take measures to ensure compliance with the December 1 election results.¹³⁷

Jammeh did not cede power to President-elect Adama Barrow or indicate any intention to respect the election results.¹³⁸ On December 17, ECOWAS outlined their policy towards The Gambia, siding with President-elect Adama Barrow and stating that it would “take all necessary measures to strictly enforce the results” of the December 2016 elections.¹³⁹ In their statement, ECOWAS also requested the endorsement of the AU and the United Nations on all its decisions regarding The Gambia—including its mediation efforts.¹⁴⁰ A U.N. Security Council Presidential Statement released on December 21 commended ECOWAS’s mediation efforts and acknowledged Barrow as the president-elect of The Gambia.¹⁴¹ The AU Chairperson also issued a statement showing support for ECOWAS’s positions.¹⁴²

Then, on December 23, ECOWAS announced its plans to use force in The Gambia, with the Commission Chairperson Marcel de Souza designating Senegal to lead the operations with stand-by forces “on alert

135. *The Chairperson of ECOWAS Speaks on the Current Political Situation in The Gambia*, UNOWAS (Dec. 11, 2016), <https://reliefweb.int/report/gambia/chairperson-ecowas-speaks-current-political-situation-gambia> [<https://perma.cc/AL9D-MSP3>].

136. Edward McAllister, *Liberia’s Johnson Sirleaf to Lead Mediation Mission to Gambia*, REUTERS (Dec. 12, 2016), <https://news.yahoo.com/gambia-opposition-demands-president-jammeh-hand-over-power-121654154.html> [perma.cc/728F-2G6D]; see also *Government of Liberia, ECOWAS Authority Chair, President Sirleaf Comments on ECOWAS Mediation Intervention in The Gambia*, OCHA (Dec. 15, 2016), <https://reliefweb.int/report/gambia/ecowas-authority-chair-president-sirleaf-comments-ecowas-mediation-intervention-gambia> [<https://perma.cc/2C6D-TDDW>].

137. Press Release, Afr. Union Peace & Sec. Council, Communiqué of the Peace and Security Council on the Post-Election Situation in the Islamic Republic of The Gambia, Afr. Union Press Release PSC/PR/COMM. (DCXLIV) (Dec. 13, 2016).

138. See Helal, *supra* note 42, at 927.

139. ECOWAS, *Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government*, at 8 (Dec. 17, 2016).

140. *Id.*

141. S.C. Pres. Statement 2016/19 (Dec. 21, 2016).

142. *News & Events*, AFR. UNION (Dec. 19, 2016), <https://au.int/pt/happening/30?page=1> [<https://perma.cc/BQE4-7M5C>].

in anticipation of military intervention.”¹⁴³ Nigeria then announced that they would provide naval and air support for Senegalese forces under ECOWAS.¹⁴⁴ The Special Representative for West Africa, Mohamed Ibn Chambas, briefed the U.N. Security Council of ECOWAS’s intention to use all necessary means, including force, to uphold the election results.¹⁴⁵ On January 19, 2017, Barrow took the oath of office at the embassy in Dakar,¹⁴⁶ and the Senegalese army announced that ECOWAS forces had crossed into The Gambia to enforce the elections in “Operation Restore Democracy.”¹⁴⁷ The U.N. Security Council adopted Resolution 2337 on that same day, providing support for ECOWAS’s political measures to enforce the December 1 elections.¹⁴⁸ However, Council members made multiple, explicit statements that the resolution did not authorize the use or threat of force.¹⁴⁹ Following ECOWAS forces entering The Gambia, Jammeh agreed to end his rule and cede power to Barrow on January 21, 2017.¹⁵⁰

143. Helal, *supra* note 42, at 916 (citing *Gambia Crisis: Senegal Troops “on Alert” If Jammeh Stays on*, BBC NEWS (Dec. 23, 2016), <http://www.bbc.com/news/world-africa-38414790> [perma.cc/8HMK-5VHJ]).

144. *Id.* (citing Wale Odunsi, *Jammeh: Nigerian Troops, Warship Storm Gambia*, DAILY POST (Jan. 18, 2017), <http://dailypost.ng/2017/01/18/jammeh-nigerian-troops-warship-storm-gambia/> [https://perma.cc/4FVF-WGQB]).

145. *Id.* (citing U.N. SCOR, 72d Sess., 7862d mtg., U.N. Doc. S/PV.7862 (Jan. 13, 2017)).

146. *Adama Barrow Sworn in as Gambia’s President in Senegal*, AL JAZEERA (Jan. 19, 2017), <https://www.aljazeera.com/news/2017/1/19/adama-barrow-sworn-in-as-gambias-president-in-senegal> [https://perma.cc/5WPA-BUPR].

147. *Troops Enter The Gambia After Adama Barrow Is Inaugurated in Senegal*, GUARDIAN (Jan. 19, 2017), <https://www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal> [https://perma.cc/C3NR-YF6G].

148. S.C. Res. 2337 (Jan. 19, 2017).

149. The U.N. representative from Uruguay stated that Article 53 of the U.N. Charter specified that regional organizations cannot take any enforcement action without the “express, affirmative and prior” authorization by the U.N. Security Council and that nothing in Resolution 2337 was an express authorization of the use of force. Helal, *supra* note 42, at 918 (citing U.N. SCOR, 72d Sess., 7866 mtg., U.N. Doc. S/PV.7866 (Jan. 19, 2017)). The representative from Bolivia stated that “the adoption of the resolution cannot and should not be interpreted to represent Security Council support or endorsement of the use of force.” *Id.* The representative from Egypt stated that Resolution 2337 “does not endorse any mandatory automatic enforcement . . . in accordance with Chapter VIII of the Charter.” *Id.* The representative from Russia stated that Resolution 2337 was supporting ECOWAS and AU solutions “through peaceful means.” *Id.*

150. *Yabya Jammeh Leaves The Gambia After 22 Years of Rule*, GUARDIAN (Jan. 21, 2017), <https://www.theguardian.com/world/2017/jan/21/anxious-gambians-await-former-president-yahya-jammeh-departure> [https://perma.cc/9ESB-YBZQ].

The practice of intervention in favor of democratic legitimacy was thus further established in The Gambia, where ECOWAS intervened based on an invitation by democratically elected President Barrow. While Barrow was the head of state recognized by both ECOWAS and the U.N. Security Council, he was in Dakar with no effective control of The Gambia when he took his oath and invited ECOWAS to intervene.¹⁵¹ Absent a legitimate invitation, ECOWAS's action would have been subject to Article 2(4) of the U.N. Charter and would have required prior U.N. Security Council authorization to be legal. Nonetheless, the U.N. Security Council issued statements of apparent post hoc approval of ECOWAS's actions following its entry into The Gambia and Jammeh's cession of power to Barrow. The Council did so despite its previous resolutions and member statements expressly stating that it had not authorized any use or threat of force in The Gambia. Again, the international community responded with silence. As a result, ECOWAS actions in The Gambia further strengthened the precedent set in Liberia and Sierra Leone for invitation by democratic legitimacy and solidified that ECOWAS did not need prior U.N. Security Council authorization before intervening in the region.

The above Sections depict three internal conflicts within Western Africa where ECOWAS intervened with force or the threat of force without U.N. Security Council authorization, based on invitation from a democratic leader without effective control over the territory. In all three instances, the U.N. Security Council provided post hoc approval or commendation of ECOWAS's actions. It is through these practices that ECOWAS is developing international law in the manner discussed below.

E. Other ECOWAS Interventions

While this Note focuses on the conflicts in Liberia, Sierra Leone, and The Gambia as well as the development of regional international law for intervention in favor of democratic legitimacy, ECOWAS has intervened with sanctions, peacekeeping missions, and force within the region on many occasions. ECOWAS is a major institution in West Africa both as a source of military power and as a mediator. The below provides a very brief summary of other conflicts within Africa that involved ECOWAS interventions: Guinea-Bissau (1998, 2012, and 2015), Côte d'Ivoire (2003 and 2010), Liberia (2003), Togo (2005), Guinea (2007), Mali (2012), and

151. See *Adama Barrow Sworn in as Gambia's President in Senegal*, *supra* note 146.

Niger (2023). These conflicts are complex and present multiple political and legal issues that are not within the scope of this Note. However, the totality of instances where ECOWAS has intervened in conflicts of internal nature within West Africa shows the relevance and significance of ECOWAS as an organization both in Africa and on the international plane.

As discussed above, the first use of force by ECOWAS was in Liberia in 1990. ECOWAS also intervened in Guinea-Bissau in 1998 when civil war in the region caused many deaths, severe damage to infrastructure, and economic disruption.¹⁵² Neighboring states backed the government, but coup forces had gained near-total control over the territory.¹⁵³ President Bernardo Vieira requested assistance, and, in June 1998, ECOWAS (through ECOMOG) intervened in response to the President's request.¹⁵⁴ Although the government did not have effective control over the armed forces, the President's request was considered legitimate by ECOWAS, and the United Nations, E.U., and AU condemned the rebel activities and took diplomatic measures to resolve the crisis.¹⁵⁵ However, it fell to ECOWAS to intervene in the conflict.¹⁵⁶ As a result, ECOWAS was able to broker the Abuja Agreement and provide monitoring forces for future presidential elections.¹⁵⁷

In 2003, ECOWAS deployed troops to Côte d'Ivoire in response to a military mutiny in which rebels gained control of the northern half of the country.¹⁵⁸ In late 2002, ECOWAS intervened in the conflict to help monitor a cease-fire agreement, but as the crisis developed, its mandate changed to help assist the government.¹⁵⁹ ECOWAS deployed 1,258 troops to Côte d'Ivoire.¹⁶⁰ ECOWAS's efforts to address the crisis were commended by the U.N. Secretary General, who called on the international

152. See *Guinea Bissau Civil War ECOMOG Operations (June 1998-April 1999)*, GLOB. SEC., <https://www.globalsecurity.org/military/world/war/guinea-bissau-2.htm> [<https://perma.cc/V9GW-SELK>] (last visited Apr. 20, 2023).

153. *Id.*

154. *Id.*

155. *Id.*

156. See *id.*

157. *Id.*

158. Pan African News Agency, *ECOWAS Deploys 1,258 Troops in Côte d'Ivoire*, OCHA (Mar. 19, 2003), <https://reliefweb.int/report/c%3%B4te-divoire/ecowas-deploys-1258-troops-c%3%B4te-divoire> [<https://perma.cc/66GS-C2FS>].

159. *Id.*

160. *Id.*

community to “support the ECOWAS peace initiative,” and affirmed the readiness of the United Nations to support ECOWAS’s “ongoing sub-regional efforts to resolve the crisis.”¹⁶¹

ECOWAS again intervened in Liberia in 2003.¹⁶² ECOWAS prepared to send between 1,000 and 5,000 troops to Liberia.¹⁶³ The intervention was met with international support. For example, a Press Secretary statement from the U.S. White House (during President George W. Bush’s administration) described that the United States had worked intensively with ECOWAS and the United Nations on the situation in Liberia.¹⁶⁴

In 2005, ECOWAS intervened in Togo to support the country’s democratic transition following the death of its long-time president, Gnassingbe Eyadema.¹⁶⁵ Eyadema’s son, Faure Gnassingbé, claimed the presidency following his father’s death in a coup d’état. ECOWAS placed sanctions—the first in ECOWAS’s history—on Togo until Gnassingbé agreed to step down.¹⁶⁶ The intervention helped facilitate free and fair elections. Following the success of ECOWAS’s embargos and sanctions, U.N. Secretary General Kofi Annan thanked ECOWAS for its role in Togo’s political succession crisis.¹⁶⁷

161. U.N. Secretary-General, Secretary-General Welcomes Result of ECOWAS Extraordinary Summit on Côte d’Ivoire (Sept. 30, 2002), <https://www.un.org/sg/en/content/sg/statement/2002-09-30/secretary-general-welcomes-results-of-ecowas-extraordinary-summit-cote-divoire> [<https://perma.cc/4B3T-6C25>].

162. *Timeline: A History of ECOWAS Military Interventions in Three Decades*, AL JAZEERA (Aug. 1, 2023), <https://www.aljazeera.com/news/2023/8/1/timeline-a-history-of-ecowas-military-interventions-in-three-decades> [<https://perma.cc/JH4X-2CQT>].

163. Janet Fleischman, *ECOWAS: Troops to Liberia Must Respect Human Rights: Letter to President John Kufuor*, HUM. RTS. WATCH (Jul. 18, 2003), <https://www.hrw.org/news/2003/07/18/ecowas-troops-liberia-must-respect-human-rights> [<https://perma.cc/87NF-YQ74>].

164. Press Release, White House Off. of Press Sec’y, Statement on Liberia (Jul. 25, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030725-3.html> [<https://perma.cc/QYG2-5J6L>].

165. *ECOWAS Arms Embargo on Togo*, STOCKHOLM INT’L PEACE RSCH. INST., https://www.sipri.org/databases/embargoes/eu_arms_embargoes/togo_ECOWAS/ecowas-arms-embargo-on-togo [<https://perma.cc/M37L-6979>] (last visited Mar. 8, 2024).

166. *Id.*

167. U.N. News, Annan Congratulates West African Leaders on Positive Role in Togo’s Political Crisis (May 19, 2005), <https://news.un.org/en/story/2005/05/138452> [<https://perma.cc/K8R7-VZG8>].

In Guinea in 2009, a military coup attracted international attention for committing crimes against humanity.¹⁶⁸ ECOWAS intervened with U.N. support to mediate the crisis, dispatching observers for future elections and imposing embargoes.¹⁶⁹ ECOWAS continued to further establish itself as a key player in “sub-regional peacekeeping and mediation.”¹⁷⁰

In 2010, ECOWAS threatened the use of “legitimate force” in Côte d’Ivoire if incumbent President Laurent Gbagbo did not step down from power.¹⁷¹ Following the November 2010 election, President-elect Alasane Ouattara requested that ECOWAS intervene to remove incumbent Gbagbo.¹⁷² Ouattara was the recognized winner, backed by the United Nations, AU, ECOWAS, and the E.U.¹⁷³ Violence escalated between the supporters of Gbagbo and Ouattara, concluding with Gbagbo’s capture in 2011.¹⁷⁴ In 2011, the U.N. Security Council passed Resolution 1975, which condemned Gbagbo’s violence against civilians and called for him to immediately step down.¹⁷⁵ The United Nations established the United Nations Operation in Côte d’Ivoire (“UNOCI”), which intervened with force to protect civilians and U.N. peacekeeping operations.¹⁷⁶

ECOWAS intervened in Mali in 2012 to address destabilization during a political transition.¹⁷⁷ The group monitored the situation and had standby forces ready to be deployed to protect humanitarian corridors.¹⁷⁸ It later agreed to send 3,300 troops to secure the northern region.¹⁷⁹

ECOWAS then staged two more interventions in Guinea-Bissau, one in 2012 and one in 2015. In 2012, ECOWAS placed sanctions on

168. See WORLD PEACE FOUNDATION, GUINEA SHORT BRIEF 1–2 (2017) [hereinafter *Guinea-Bissau Brief*].

169. *Id.* at 3.

170. *Id.*

171. *ECOWAS Bloc Threatens Ivory Coast’s Gbagbo with Force*, BBC NEWS (Dec. 25, 2010), <https://www.bbc.com/news/world-africa-12077298> [<https://perma.cc/2B8S-3QZ5>].

172. Julie D. Gagnon, *ECOWAS’s Right to Intervene in Cote D’Ivoire to Install Alassane Ouattara as President-Elect*, 3 NOTRE DAME J. INT’L & COMP. L. 51, 51 (2013).

173. See *Post-Election Crisis*, UNOCI, <https://peacekeeping.un.org/en/mission/past/unoci/elections.shtml> [<https://perma.cc/GN9T-V5R7>] (last visited Mar. 28, 2024).

174. See *id.*

175. *Id.*

176. *Id.*

177. See *ECOWAS Agrees to Mali Intervention Force*, AL JAZEERA (Nov. 11, 2012), <https://www.aljazeera.com/news/2012/11/11/ecowas-agrees-to-mali-intervention-force> [<https://perma.cc/GQ6S-Z7NS>].

178. *Id.*

179. *Id.*

Guinea-Bissau and sent 630 troops to the region¹⁸⁰ to protect institutions and political figures after a military coup.¹⁸¹ In 2015, Guinea-Bissau again faced political fragility following their previous instability, and new crises erupted in the region.¹⁸² ECOWAS intervened again to help resolve regional crises through mediation efforts, helping to establish the Conakry Accord and monitoring its implementation.

Most recently, ECOWAS has threatened to use force in response to the July 2023 coup d'état in Niger.¹⁸³ Following the coup, ECOWAS threatened to use military force if the military government failed to return power to the democratically elected government.¹⁸⁴ The ECOWAS chairman, Nigerian President Bola Tinubu, said that ECOWAS states would first exhaust all diplomatic options prior to the use of force.¹⁸⁵ The situation in Niger is ongoing, and ECOWAS has implemented sanctions and maintained the threat of force.¹⁸⁶ Despite the coup, ECOWAS confirmed that President Bozoum “remains the legitimate elected president and head of the state of Niger.”¹⁸⁷ In a surprising turn of events, Burkina Faso, Mali, and Niger announced in January of 2024 that they would leave ECOWAS.¹⁸⁸ Because the ECOWAS treaty requires one year's notice to

180. Guinea-Bissau Brief, *supra* note 168, at 3.

181. See Richard Valdmanis, *W. Africa Bloc to Send Troops to Coup-Hit Bissau*, REUTERS (Apr. 26, 2012), <https://www.reuters.com/article/idUSJJOE83P01D> [<https://perma.cc/E4QM-84KD>]; see also *ECOWAS Sanctions Guinea Bissau After Failed Talks*, OCHA (Apr. 30, 2012), <https://reliefweb.int/report/guinea-bissau/ecowas-sanctions-guinea-bissau-after-failed-talks> [<https://perma.cc/CNY3-PHSR>].

182. *ECOWAS's Efforts at Resolving Guinea-Bissau's Protracted Political Crisis, 2015-2019*, ACCORD (Sep. 2, 2019), <https://www.accord.org.za/conflict-trends/ecowass-efforts-at-resolving-guinea-bissaus-protracted-political-crisis-2015-2019> [<https://perma.cc/RL3H-KPCC>].

183. Raube, *supra* note 14.

184. *Id.*

185. *Id.*

186. Nnamdi Obasi, *ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate*, INT'L CRISIS GRP. (Dec. 5, 2023), <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate> [<https://perma.cc/4YSW-BKN7>].

187. Omar Hammady, *Assessing the Legality of ECOWAS Planned Military Intervention in Niger*, BLOG EUR. J. INT'L L. (Sept. 6, 2023), <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> [<https://perma.cc/MBK9-CML3>].

188. Ilaria Allegrozzi, *Burkina Faso, Mali, and Niger Quit Regional Bloc*, HUM. RTS. WATCH (Feb. 2, 2024), <https://www.hrw.org/news/2024/02/02/burkina-faso-mali-and-niger-quit-regional-bloc> [<https://perma.cc/K8VS-BGSS>].

withdraw, these states would have one year to either “change their mind” or follow through with leaving ECOWAS.¹⁸⁹

The above speaks to the prevalence of ECOWAS actions in Western Africa beyond the three conflicts in Liberia, Sierra Leone, and The Gambia. ECOWAS is a frequent player in the region, and was involved in other interventions, diplomatic efforts, and mediations that did not involve significant ECOWAS military or peacekeeping operations. The developing situation in Niger and the intent of three states to leave ECOWAS have brought renewed attention to the Western Africa organization and highlight the importance of ECOWAS. Even if the composition of ECOWAS or role of the organization in the region changes over time, ECOWAS has already made its impact on the development of international law.

ECOWAS used force on the grounds of either prior consent or democratic legitimacy for its actions in Liberia, Sierra Leone, and The Gambia. Use of force in Liberia was justified on the grounds of prior invitation and maintaining security in the region, and, in Sierra Leone and The Gambia, on invitation of democratically elected presidents. Each intervention built upon the legal basis set by prior interventions and the subsequent international responses. Thus, over time, ECOWAS legitimized interventions in Africa based on (1) prior consent when joining regional organizations, and (2) invitation based on democratic legitimacy and not effective control. Even if this is not a widely accepted practice in the international community writ large, it has become a solidified regional practice in Africa.

III. IMPLICATIONS FOR JUS AD BELLUM

ECOWAS's practices in Africa shape the law of jus ad bellum. This Part examines the implications of ECOWAS interventions for international law. Section A interprets the U.N. Charter and ECOWAS treaties, under principles of the VCLT, in relation to one another and taking into account subsequent state practice. Section B turns to the principle of sovereign equality in international law and how it may govern international law given African practices. Section C discusses whether state silence in response to ECOWAS practice constitutes acquiescence and leads to the establishment of CIL. Section D considers U.N. Security Council responses and postulates whether the U.N. Security Council would be

189. *Id.*

estopped from condemning any future ECOWAS interventions as violations of international law.

A. *Vienna Convention on the Law of Treaties*

The U.N. Charter is central to the jus ad bellum regime, but ECOWAS operates under its own treaties and protocols. Notably, regional organizations like ECOWAS are not U.N. treaty regime members, but the states that are party to ECOWAS are also party to the U.N. Charter.¹⁹⁰ While ECOWAS is not bound by the U.N. Charter, its member states are. There are two ways to view the interaction of these two regimes: as conflicting or coexisting. It would be illogical for the U.N. Security Council to continuously provide praise and approval for actions that violated the U.N. Charter regime. Thus, these regimes should be interpreted to coexist under the VCLT.

Two separate intervention regimes are established through the U.N. Charter and ECOWAS's treaties and protocols. The U.N. Charter stipulates a general prohibition on the use of force, unless (1) the U.N. Security Council authorizes it through a Chapter VII action, finding a breach of peace and security under Article 39 and authorizing force under Article 42, or (2) force is used in self-defense, as outlined in Article 51.¹⁹¹ U.N. Article 103 asserts the supremacy of the U.N. Charter when conflicts arise between obligations of regional agreements and the U.N. Charter.¹⁹² U.N. Charter Article 53 further states that enforcement actions cannot be taken by regional arrangements without the authorization of the U.N. Security Council except under limited circumstances.¹⁹³ ECOWAS, through its Protocol Relating to Mutual Assistance in Defence, permits the use or threat of force, authorized by ECOWAS's governing body, with troops committed by member states, in the interest of maintaining peace and security within the region.¹⁹⁴ The Protocol references the U.N. Charter and the Article 2(4) prohibition on the use of force, as well as the Charter of the Organization of African Unity.¹⁹⁵ ECOWAS protocols do

190. See *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states> [<https://perma.cc/87NY-C8BF>] (last visited Feb. 11, 2024) (listing members of the United Nations, which includes all fifteen ECOWAS member states).

191. U.N. Charter arts. 2 ¶¶ 4, 39, 42, 51.

192. U.N. Charter art. 103.

193. U.N. Charter art. 53.

194. See Protocol Relating to Mutual Assistance on Defence, *supra* note 72.

195. *Id.* pmbl.

not provide any requirements for U.N. Security Council authorization to take enforcement actions within the region. The Protocol empowers the Defence Council to determine strategy and means of intervention in emergency conflicts within the region.¹⁹⁶

Article 31 of VCLT provides that treaty interpretation shall take into account “subsequent practice in the application of the treaty” and “relevant rules of international law.”¹⁹⁷ In this case, subsequent practice of *jus ad bellum* includes decades of a regional organization using force within their region without U.N. Security Council authorization. The U.N. Security Council’s responses to ECOWAS’s unilateral use of force within its region suggests that it does not view such acts as Article 2(4) or Articles 53 and 103 violations, but rather as constructive measures ensuring regional peace and security. This practice under VCLT Article 31 suggests that Articles 53 and 103 of the U.N. Charter may read in an exception for regional organizations authorizing force within their own regions for purposes in line with the Charter that are not seen as Article 2(4) violations. Applicable laws in *jus ad bellum* include those of invitation, which would potentially encompass democratic legitimacy. ECOWAS’s protocols, however, do not reference democratic legitimacy, but only peace and security of the region.¹⁹⁸

Regional agreements interact with the U.N. Charter and can be construed to either conflict with the Charter or refine the interpretation of the Charter. Interpreting U.N. Charter Articles 53 and 103 as modified by ECOWAS’s practice would suggest that regional organizations can unilaterally authorize and carry out interventions with force to maintain regional peace and security without either the U.N. Security Council’s explicit authorization or violating the U.N. Charter. This would be the most logical and least disruptive VCLT analysis of the two intervention regimes. The alternative would be that ECOWAS’s regime violates the U.N. Charter, but the U.N. Security Council chooses to praise actions violating international law. This Note argues that the first interpretation is more appropriate. It is also important to note that VCLT Article 32 allows supplementary means of interpretation, such as the circumstances

196. *See id.* art. 14.

197. VCLT art. 31, *supra* note 55.

198. *See* Protocol Relating to Mutual Assistance on Defence, *supra* note 72, pmb1.

of conclusion.¹⁹⁹ The U.N. Charter was concluded in 1945.²⁰⁰ It was not until fifteen years later that “the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples” and widespread decolonization ensued.²⁰¹ Many of these formerly colonized nations were African countries, finding themselves finally recognized as sovereigns on the international stage, but also suddenly bound by international law they took no part in forming.²⁰² This is at the heart of many arguments in the Third World Approach to International Law scholarship,²⁰³ and it would seem more prudent to interpret Africa’s governance the over African territories through regional organizations into the U.N. Charter, rather than holding them as violative and subject to a U.N. Security Council without African representation in the P5.

The U.N. Security Council’s historical support of ECOWAS interventions, despite lacking formal authorization, suggests a nuanced approach to the authority and power of regional organizations, potentially driven by pragmatic considerations rather than strict adherence to the Charter. The U.N. Charter should be interpreted as permitting regional organizations, with the consent of member states, to authorize force within their regions for the purpose of maintaining peace and security; this allows the two treaty regimes to coexist as they have for the past three decades. It is also important to recognize the historical context of the U.N. Charter regime and international law and its relationship to African nations that were once colonized. ECOWAS is thus not operating under an extra-Charter basis, but through legitimacy and recognition under the Charter. Regional organizations appear to have a clear ability to determine who the legitimate government is in a contested situation, to invite use of force, or to authorize force to maintain peace and security.

199. VCLT art. 32, *supra* note 55.

200. *Preparatory Years: UN Charter History*, UNITED NATIONS, <https://www.un.org/en/about-us/history-of-the-un/preparatory-years> [<https://perma.cc/LDY7-4EZM>] (last visited Feb. 11, 2024).

201. *United Nations and Decolonization*, UNITED NATIONS, <https://www.un.org/dppa/decolonization/en/about> [<https://perma.cc/2XQH-ZRZM>] (last visited Feb. 11, 2024).

202. See Anghie, *supra* note 65, at 137.

203. See generally *id.*

B. Sovereign Equality

Under international law, the principle of sovereign equality considers all states as legally equal.²⁰⁴ This doctrine recognizes each state as an equal subject of international law, holding sovereign power and possessing both rights and obligations under CIL.²⁰⁵ While the specific rights and obligations of each state may vary depending on the treaties and international agreements it has ratified, all states have an equal ability to acquire rights.²⁰⁶

Sovereign equality is also closely related to state practice in international law, which affords all states the same capacity to contribute to the development and interpretation of international law through their practices and statements.²⁰⁷ Importantly, the development of international law cannot give different weight to actions by certain states based on their region or perceived global power. Rather, state practices bear equal weight regardless of a state's geographic region.²⁰⁸ In addition, regional organizations consist of sovereign states, and the practice of regional organizations can create, clarify, and modify the interpretation of legal norms. As the states within regional organizations enjoy sovereign equality, regional organizations themselves also enjoy sovereign equality through the weight of their state membership.

Yet, "most policymakers, international lawyers, and legal academics outside of the [African] continent consider African states to be objects rather than subjects of international law . . . [and the] Eurocentric, and linear bias in Western legal academia . . . is truly unfortunate."²⁰⁹ This bias should not diminish the impact and weight that African states carry in the development of international law. The actions of ECOWAS, a regional organization of sovereign states, hold the same significance and weight in setting established practices and shaping international law as

204. See VAUGHAN LOWE, *INTERNATIONAL LAW* 114–15 (2007).

205. See Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 *YALE L.J.* 207, 208–09 (1944).

206. *Id.* at 209.

207. See Anghie, *supra* note 65, at 125–26; see generally Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 *HUMANITY: INT'L J. HUM. RTS, HUMANITARIANISM & DEV.* 146 (2015).

208. Anghie, *supra* note 65, at 125.

209. Mohamed Helal, *Crisis in the Gambia: How Africa is Rewriting Jus ad Bellum*, *OPINIO JURIS* (Jan. 24, 2017) <http://opiniojuris.org/2017/01/24/crisis-in-the-gambia-how-africa-is-rewriting-jus-ad-bellum/> [<https://perma.cc/T43S-3SYT>] (quoting Jeremy Levitt).

the actions of any other regional organization, such as NATO. The fact that there is a lack of English-language scholarship or international focus on ECOWAS does not undermine its significance or ability to establish regional practice and develop international law. ECOWAS practices are precedent-setting and impactful on the development of international law and norms.

C. *State Silence*

ECOWAS consistently used force within West Africa for over three decades, but other states have remained largely silent. This Note defines silence in this context as the absence of a “publicly discernible response” that is “reflective of a legal position” or an “explicit communication” of a “legal position.”²¹⁰ This Section analyzes how international law treats state silence, when silence can be considered acquiescence for the formation of CIL, and how this applies to ECOWAS practice.

International law “does not provide clear guidance on what could or should be inferred from apparent silence or inaction [but] international actors have long imbued silence with legal significance, at least in some instances.”²¹¹ Legal scholars and international courts have referenced cases such as *Temple of Preah Vihear* and U.N. documents such as those put forward by the ILC, but the nuance of silence doctrine is contested.²¹² CIL is built over time; if all states were required to communicate legal positions on all matters of international law before they became customary, CIL would not exist. Practically, “[s]tates do not—and indeed, could not—express . . . view[s] on each such act or statement by all other States at all times.”²¹³ Silence often operates as the norm, rather than the exception.²¹⁴ This creates a dichotomy: all silence cannot automatically equal acceptance because states cannot respond to everything, but silence must sometimes constitute acceptance because of the nature of CIL.

210. Lewis et al., *supra* note 58, at 7.

211. *Id.* at 2.

212. The details of the debate over the specifics surrounding state silence and its legal significance are beyond the scope of this Note. For more information on this topic and the debate surrounding state silence and *ius ad bellum*, see *id.*

213. *Id.* at iv.

214. *Id.*

The practice of “avoiding responding” is often observed in the statements and scholarship of Western states regarding African practice.²¹⁵ States can try to stall CIL development by not responding to the actions of other states and intentionally not providing *opinio juris* on the matter. It cannot be the case that affirmative state responses are necessary to establish *opinio juris* acceptance of state practice as (1) it is impractical to expect the majority of states to have the capacity to develop discernable positions on all practices, and (2) if such were the case, states could effectively halt the development of international law by choosing to remain silent. If silence by Western states can impede the formation of CIL, it would effectively exclude the Global South and the African continent from participating in the development of such law.²¹⁶ African practices should not be disregarded because Western states fail to respond—positively or negatively—to state practice in the region.

Silence or inaction can impact the development of CIL through general practice, *opinio juris*, or both.²¹⁷ The ILC in draft conclusions on the “Identification of International Law” stated that “failure to react over time to a practice may serve as evidence of acceptance of law (*opinio juris*), provided that states were in a position to react.”²¹⁸ While the exact threshold between silence and acquiescence is unclear, this Note contends that the actions of ECOWAS in Liberia, Sierra Leone, and The Gambia constitute a set of state practices in which silence can be interpreted as acquiescence.

215. See James T. Gathii, *The Promise of International Law: A Third World View*, 36 AM. U. INT’L L. REV. 377, 387 (2021) (discussing the dominance of research agendas for Western audiences and characterization of non-Western legal engagements to be “falling short . . . [and] inadequate,” leaving “little scope for scholarship outside these well-established systems of scholarly knowledge circulation”). See generally Lewis et al., *supra* note 58.

216. See generally Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 EUR. J. INT’L L. 7, 70–73 (2023) (discussing how “Western countries have presented their own state practice as creating customary international law for all” and “efforts by major Western states to transform the law to suit their own vision of international relations and to present their state practice and scholarly opinions as decisive”).

217. Lewis et al., *supra* note 58, at 22.

218. Naz K. Modirzadeh & Pablo Arrocha Olabuenaga, *A Conversation Between Pablo Arrocha Olabuenaga and Naz Khatoon Modirzadeh on the Origins, Objectives, and Context of the 24 February 2021 ‘Arria-Formula’ Meeting Convened by Mexico*, 8 J. USE FORCE & INT’L L. 291, 295 (2021).

The “failure to react over time to practice [including that of regional organizations] may also serve as evidence of *opinio juris* under certain circumstances.”²¹⁹ The ICJ has viewed silence as acquiescence when a state had awareness of the events and had a direct interest.²²⁰ The ILC, in its draft on the identification of CIL, has identified requirements for the lack of open objection to constitute evidence of acceptance of practice as law.²²¹ The requirements have been articulated as there being (1) a state interest in the law that would be formed or effected, (2) a level of knowledge of the state practice, (3) ability to respond, and (4) time to respond.²²² Evaluated based on the ILC requirements, the silence in response to ECOWAS’s practices is sufficient to establish state acquiescence.

For the first requirement, states—both in the Global North and Global South—have clear interests in the laws governing unilateral use of force and intervention by invitation, since territorial integrity is one of the cornerstones of international law.²²³ State sovereignty, as a rule and principle of international law, gives states exclusive authority over their territories and protects their populations from external interference or control.²²⁴ The general prohibition of the use of force, enshrined in Article 2(4), encapsulates the protection that sovereignty affords states from interference in their internal affairs, specifically through force.²²⁵

219. Vos, *supra* note 36, at 33 (citing Int’l Law Comm’n, Report to the General Assembly, Draft Conclusions on Identification of Customary International Law with Commentaries, U.N. Doc. A/73/10 (2018) [hereinafter Draft Conclusions on Identifications of Customary International Law]).

220. Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 23 (June 15) (dissenting opinion by Spender, J.); *see also* Lewis et al., *supra* note 58, at 14–15 (explaining that the ICJ has articulated five requirements for state acquiescence: notoriety or awareness, interest, lapse of time, consistency, and provenance).

221. *See* Przemyslaw Roguski, *The Importance of New Statements on Sovereignty in Cyberspace by Austria, the Czech Republic and United States*, JUST SEC. (May 11, 2020), <https://www.justsecurity.org/70108/the-importance-of-new-statements-on-sovereignty-in-cyberspace-by-austria-the-czech-republic-and-united-states/> [https://perma.cc/96QD-3XT2]; *Draft Conclusions on Identifications of Customary International Law*, *supra* note 219, at 141–42. Several states objected to the ILC’s criteria of state silence being able to provide evidence of acceptance for practices as CIL, but the ILC did not change its position. *See* Lewis et al., *supra* note 58, at 4.

222. Draft Conclusions on Identifications of Customary International Law, *supra* note 219, at 141–42.

223. *See* DONALD R. ROTHWELL ET AL., INTERNATIONAL LAW: CASES AND MATERIALS WITH AUSTRALIAN PERSPECTIVES 289–90.

224. *See* Anghie, *supra* note 65, at 124.

225. U.N. Charter art. 2, ¶ 4.

It is important to states what rules and principles govern when force can be used within their territory. If regional organizations could unilaterally use force to maintain peace and security in the region, it would affect a state's sovereignty. Furthermore, it is important to states whether legitimate invitations to use force within their territories could be based on effective control, democratic legitimacy, or both.²²⁶ Without clarification on this matter, states might intervene on behalf of opposing parties, both thinking they are acting legally, and conflicts could quickly escalate.

With regards to the second requirement, states have detailed knowledge of ECOWAS's practices in Liberia, Sierra Leone, and The Gambia. While there has not been much legal writing in English on these conflicts, the factual information is well-established and easily available.²²⁷ These conflicts were also discussed, albeit briefly and often post hoc, by the United Nations.²²⁸ The United Nations openly acknowledged ECOWAS's involvement in these crises through statements and resolutions. This has allowed plenty of time for information to be disseminated and made available.

As for the third and fourth requirements, Western states in particular have both the ability and time to respond. In fact, Western states did just

226. See Helal, *supra* note 42, at 932 (stating that it is dangerous to recognize both the right of legitimate but ineffective governments to invite intervention and the right of those with effective control to invite intervention).

227. For a non-exhaustive list of sources providing details of ECOWAS interventions, see Raube, *supra* note 14; Helal, *supra* note 42; Jenkins, *supra* note 77; HUM. RTS. WATCH, *supra* note 83; Kufuor, *supra* note 94; Nowrot & Schbacker, *supra* note 69; McElroy, *supra* note 108; Goldman, *supra* note 112; Saine, *supra* note 128; *Gambia's Jammeh Loses to Adama Barrow in Shock Election Result*, *supra* note 129; Jah, *supra* note 130; *Gambia Leader Yabya Jammeh Rejects Election Result*, *supra* note 131; ECOWAS, *African Union and U.N. Statement on the Political Developments in the Gambia*, *supra* note 133; *Adama Barrow Sworn in as Gambia's President in Senegal*, *supra* note 146; *Troops Enter the Gambia After Adama Barrow is Inaugurated in Senegal*, *supra* note 147; *Yabya Jammeh Leaves The Gambia After 22 Years of Rule*, *supra* note 150; *Guinea Bissau Civil War ECOMOG Operations (June 1998-April 1999)*, *supra* note 152; Pan African News Agency, *supra* note 158; U.N. Secretary-General, *supra* note 161; *Timeline: A History of ECOWAS Military Interventions in Three Decades*, *supra* note 162; HUM. RTS. WATCH, *supra* note 163; U.N. News, *supra* note 167; World Peace Foundation, *supra* note 168; *ECOWAS Bloc Threatens Ivory Coast's Gbagbo with Force*, *supra* note 171; Gagnon, *supra* note 172.

228. See, e.g., S.C. Res. 778 pmb. (Nov. 19, 1992); S.C. Res. 813 (Mar. 26, 1993); S.C. Res. 1132 ¶ 1 (Oct. 8, 1997); U.N. Secretary-General, *supra* note 115; S.C. Pres. Statement 1998/5 (Mar. 16, 1998); S.C. Res. 1156 ¶ 2 (1998); Press Release, Security Council, *supra* note 132; S.C. Pres. Statement 2016/19 (Dec. 21, 2016); S.C. Res. 2337 (Jan. 19, 2017).

that in response to NATO's actions in Kosovo.²²⁹ Additionally, many years have passed since the crises in Liberia, Sierra Leone, and The Gambia. States had ample time and opportunity to issue responses to ECOWAS interventions if they were so inclined, yet they have not. The three well-known instances of ECOWAS's practice of unilateral use of force over three decades have been met by state silence; this consistent silence is likely indicative of acquiescence to ECOWAS's intervention regime.

D. U.N. Security Council Responses and Estoppel

As previously discussed, the U.N. Security Council responded to Liberia, Sierra Leone, and The Gambia with resolutions that commended ECOWAS's actions. Under the doctrine of estoppel, the U.N. Security Council may thus be precluded from disapproving of ECOWAS unilateral interventions to maintain peace and security in the region.²³⁰ In public international law, the doctrine of estoppel "protects legitimate expectations of States induced by the conduct of another State."²³¹ Estoppel is underpinned by the requirement that a state "ought to be consistent in its attitude to a given factual or legal situation."²³² The principle of estoppel comes from the need for stability and predictability in patterns of state conduct, as well as considerations of good faith.²³³ Arguments "based upon estoppel" have been used with "growing frequency" in "relations between States" and it is "not uncommon to find estoppel discussed in the context of good faith."²³⁴ International jurisprudence recognizes "the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est* [a person making contradictory statements is not to be heard]."²³⁵ This principle was outlined by the ICJ in the *Temple of Preah Vihear* case when Judge Spender's dissenting opinion stated,

229. See DONFRIED, *supra* note 9.

230. See Lewis et al. *supra* note 58, at 15–16 for a general discussion on estoppel and state silence; see also Cottier & Müller, *supra* note 60.

231. Cottier & Müller, *supra* note 59, ¶ 1.

232. I. C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 468 (1958).

233. See *id.* at 469.

234. See *id.* at 471.

235. Lewis et al., *supra* note 58, at 15 (quoting Arnold D. McNair, *The Legality of the Occupation of the Ruhr*, 5 BRIT. Y.B. INT'L L. 17, 25 (1924); citing CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES xvii (2017)).

“[T]he principle [of preclusion] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which [the State] . . . [was] entitled to rely and in fact did rely.”²³⁶ The effect of the doctrine of estoppel is that, in the context of a case before the courts, a party would be “barred—estopped or precluded—from successfully adopting different, subsequent statements on the same issue.”²³⁷

Although the contours and scope of the application of estoppel in international law has not yet been defined, this Note argues that the U.N. Security Council has created reliance through consistent statements regarding ECOWAS action and is thus precluded from issuing contradictory statements in the future. The scope of the doctrine of estoppel arguably applies not only to states, but also to international bodies with the ability and authority to speak with one voice, such as the U.N. Security Council. The U.N. Security Council is a unique organ of international law, as it can issue legally binding resolutions. When there are ambiguities in the legal regime of *jus ad bellum*, statements by the U.N. Security Council have historically received much weight and have been referenced by the ICJ, states, international organizations, and other actors.²³⁸ It is therefore reasonable for states and regional organizations to rely on U.N. Security Council statements and practices when interpreting international law, determining the legality of operations under *jus ad bellum*, and addressing crises. Consistent positions taken by the U.N. Security Council over time create a reliance interest for states or organizations who use force to maintain security in their regions or territories; this interest could become detrimental reliance if organizations conducted similar future operations and the U.N. Security Council condemned the actions. Under the doctrine of estoppel, this cycle could preclude the U.N. Security Council from contradicting previous positions.

The U.N. Security Council provided post hoc statements of apparent approval of ECOWAS interventions using or threatening force in Liberia, Sierra Leone, and The Gambia. In 1997, ECOWAS intervened

236. *Cambodia v. Thai*, 1962 I.C.J. at 143–44 (Spender, J., dissenting).

237. Cottier & Müller, *supra* note 59, ¶ 1.

238. See Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 896–97 (2005).

with force in Sierra Leone based on the invitation of a democratically elected leader without any effective control over the state; the U.N. Security Council responded with a statement commending the group's role in ending the military junta²³⁹ and later a resolution welcoming President Kabbah's return.²⁴⁰ The U.N. Security Council did not condemn or criticize ECOWAS's actions, but instead praised ECOWAS for its initiatives following the crisis. This again happened when ECOWAS intervened in The Gambia. ECOWAS explicitly threatened to use force within The Gambia based on an invitation from a democratically elected leader with no effective control, and their troops crossed into The Gambia in 2016. The U.N. Security Council postured itself as supporting ECOWAS's policies through statements and resolutions, and there was close political coordination between the United Nations and ECOWAS throughout the unfolding crisis.²⁴¹ The U.N. Security Council issued a resolution the same day that ECOWAS troops crossed into The Gambia that explicitly did not authorize force, but commended ECOWAS efforts and made no critical or general statements on the legality of their actions.²⁴² Other resolutions passed by the U.N. Security Council during the conflicts in Liberia, Sierra Leone, and The Gambia provided observers for the area, commenced embargos, or called for peace and cooperation, but none discussed ECOWAS as violating international law or critiqued any of ECOWAS's actions.²⁴³

The totality of U.N. Security Council responses is sufficient to create reasonable reliance for regional organizations with regards to intervening with force in their own territories under certain circumstances. The U.N. Security Council's post hoc affirmations, "expressly or impliedly"²⁴⁴ approving ECOWAS's operations in favor of democratic legitimacy, have spanned twenty years. Their approval ratifies a consistent regional practice over time and in multiple conflicts. It is thus reasonable for ECOWAS to

239. S.C. Pres. Statement 1998/5 (Feb. 26, 1998).

240. S.C. Res. 1156 ¶ 1 (Mar. 16, 1998).

241. Helal, *supra* note 42, at 926.

242. See S.C. Res. 2337 (Jan. 19, 2017).

243. See generally S.C. Res. 778 pmbl. (Nov. 19, 1992); S.C. Res. 813 (Mar. 26, 1993); S.C. Res. 1132 ¶ 1 (Oct. 8, 1997); U.N. Secretary-General, *supra* note 115; S.C. Pres. Statement 1998/5 (Mar. 16, 1998); S.C. Res. 1156, *supra* note 240, ¶ 2; Press Release, Security Council, *supra* note 132; S.C. Pres. Statement 2016/19 (Dec. 21, 2016); S.C. Res. 2337, *supra* note 242.

244. *Cambodia v. Thai.*, 1962 I.C.J. at 143–44 (Spender, J., dissenting).

rely on decades of U.N. Security Council approval and acquiescence when conducting future, unilateral operations involving an invitation based on democratic legitimacy within the region. In such scenarios, the U.N. Security Council may be “barred—estopped or precluded—from successfully adopting different, subsequent statements on the same issue,”²⁴⁵ even though the U.N. Security Council has broad discretion and often evaluates conflicts on a case-by-case basis.²⁴⁶ Further, while the role of estoppel may be unclear in the context just ad bellum, the same arguments in favor of estoppel could still have normative effects on foreign relations and international law.

CONCLUSION

Since 1990, ECOWAS has used force within West Africa to maintain peace and security. It has done so with invitations from democratically elected and recognized officials but without U.N. Security Council authorization. While current events in Niger may change the composition of and create new tensions within ECOWAS,²⁴⁷ the regional organization remains a major international player. ECOWAS’s consistent practice of intervention in favor of democratic legitimacy and the maintenance of security based on prior consent from regional organization member states has shaped both international law applicable to the region and the interpretation of the U.N. Charter. The U.N. Security Council has repeatedly commended ECOWAS’s use of force, while states have remained largely silent on the issue for decades. State silence, U.N. Security Council responses and estoppel, and the principle of sovereign equality in the face of ECOWAS’s consistent practices have established customary law for the region which may set a precedent beyond West Africa. Disparate treatment of African practice does not stop African practices from shaping international law.

The international community responds differently to conflicts in Africa compared to conflicts in Europe. In response to NATO’s year-long intervention in Kosovo, at least twenty countries made some type of statement regarding NATO’s use of force. In three clear instances of

245. Cottier & Müller, *supra* note 59, ¶ 1.

246. *Role of the Security Council*, U.N. PEACEKEEPING, <https://peacekeeping.un.org/en/role-of-security-council> [<https://perma.cc/9NEJ-TFSM>] (last visited Feb. 11, 2024).

247. Allegrozzi, *supra* note 188.

ECOWAS intervention in favor of democratic legitimacy between 1990 and 2016, no state has clearly expressed its position regarding ECOWAS's use of force. If a homogeneous system of international law is the desired outcome, then the international community must pay equal attention and afford equal weight to African practices to prevent the continued development of fragmented systems of international law.

Emerging global politics suggest that it will only get more difficult for the U.N. Security Council to issue Chapter VII resolutions authorizing force. Given this geopolitical situation and the lack of African representation in the P5, it does not come as a surprise that the AU has been developing its own standards for maintaining peace and security within the African continent as "African solutions to African problems."²⁴⁸ Article 4(h) of the AU Constitutive Act enshrines the ability of the AU to authorize armed interventions to prevent genocide, war crimes, and crimes against humanity.²⁴⁹ Under Article 4(h), the AU is not required to seek U.N. Security Council authorization prior to approving an intervention.²⁵⁰ It is becoming increasingly difficult to argue why African states should be at the mercy of decisions made by the United States, the United Kingdom, France, China, and Russia on how force can be used to address crises within Africa—especially when Africa has no representation within the P5 and members of the P5 are in some cases in blatant violation of international law themselves.²⁵¹

ECOWAS practice shapes international law. The U.N. Security Council has met ECOWAS practice in *jus ad bellum* with apparent *post hoc* approval, and states have remained silent over three decades despite having the knowledge and opportunity to respond. The same trend is not observed when it is predominantly Western regional organizations using force. State silence can be considered acceptance of African practices as states consistently abdicated their opportunities to respond. Accordingly,

248. Christof Hartmann, *ECOWAS and the Restoration of Democracy in The Gambia*, 52 AFR. SPECTRUM 85, 94 (2017).

249. Helal, *supra* note 209.

250. *Id.*

251. See generally Oona A. Hathaway, *How Russia's Invasion of Ukraine Tested the International Legal Order*, BROOKINGS INST. (Apr. 3, 2023), <https://www.brookings.edu/on-the-record/how-russias-invasion-of-ukraine-tested-the-international-legal-order/> [<https://perma.cc/KS7Z-PB34>]; see also Rob McLaughlin, *Keeping the Ukraine-Russia Jus ad Bellum and Jus in Bello Issues Separate*, LIEBER INST. W. POINT (Mar. 7, 2022), <https://lieber.westpoint.edu/keeping-ukraine-russia-jus-ad-bellum-jus-in-bello-issues-separate/> [<https://perma.cc/C4AH-PWBY>].

ECOWAS has shaped the regime of *jus ad bellum* to solidify the principle of intervention in favor of democratic legitimacy in the region. As the U.N. Security Council becomes more gridlocked and Africa continues to lack representation on the P5, regional organizations are more likely to step in as the predominant actors ensuring peace and security in their regions. The law-making power of Africa, demonstrated through ECOWAS, has created a body of law through which to evaluate regional organizations' intervention regimes. African practice will continue to develop international law. Other states ought to respond clearly, and international lawyers ought to pay due attention to African practices when discussing CIL.

