Intervention by invitation and the scope of state consent

Routledge
Taylor & Francis Group

Journal on the Use of Force and International Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjuf20

Intervention by invitation and the scope of state consent

Russell Buchan & Nicholas Tsagourias

To cite this article: Russell Buchan & Nicholas Tsagourias (19 Oct 2023): Intervention by invitation and the scope of state consent, Journal on the Use of Force and International Law, DOI: 10.1080/20531702.2023.2270264

To link to this article: https://doi.org/10.1080/20531702.2023.2270264

Published online: 19 Oct 2023.

JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW
https://doi.org/10.1080/20531702.2023.2270264

Intervention by invitation and the scope of state consent*

Russell Buchan[a] and Nicholas Tsagourias[b]

[a]Professor of International Law, University of Reading, Reading, UK; [b]Professor of International Law, University of Sheffield, Sheffield, UK

ABSTRACT

In July 2023, the democratically elected president in Niger was overthrown in a military coup. The ousted president called on the international community to help restore democracy in Niger and ECOWAS threatened to use force to achieve this objective. This article explores whether ECOWAS's threat of force was lawful under international law on the basis of the doctrine of intervention by invitation and considers two possible grounds. First, given Niger's membership of ECOWAS and the AU, it examines whether Niger has consented to intervention under these organisations' constitutive agreements. Second, it assesses whether Niger's deposed democratic president can provide *ad hoc* consent to intervention on the basis of his government's democratic credentials even though it does not exercise effective control over Niger's territory and population. More generally, this article uses Niger as a springboard to elaborate on when consent can be invoked as a justification for military intervention.

ARTICLE HISTORY Received 9 October 2023; Accepted 9 October 2023

KEYWORDS Niger coup; use of force; consent; intervention by invitation; external assistance; Economic Community of West African States

1. Introduction

On 26 July 2023 the Nigerien military, led by the Head of the Presidential Guard General Abdourahamane Tchiani, seized power from the democratically elected president, Mohamed Bazoum, and suspended the constitution.[1] President Bazoum, along with his family, have been placed under house

CONTACT Russell Buchan r.buchan@reading.ac.uk

*All websites accessed 6 October 2023.

[1]'Explainer: What's behind the Niger coup?', *The Guardian* (8 August 2023) www.theguardian.com/global-development/2023/aug/08/explainer-whats-behind-the-niger-coup.

arrest[2] and are reportedly[3] living under austere conditions. Explanations for the coup vary. Some suggest the military (and, in particular, General Tchiani) was disgruntled after being side-lined by the president;[4] others claim it was because of growing concerns over poverty and security in Niger;[5] while still others maintain that Russia is deliberately fomenting civil unrest in a former French colony as part of its wider confrontation with the West.[6]

On 30 July the Economic Community of West African States (ECOWAS) – of which Niger is a member state – imposed sanctions against the military junta and gave it an ultimatum to reinstate President Bazoum within one week or face military intervention.[7] On 1 August Burkina Faso and Mali, both ruled by military juntas, warned ECOWAS that they would consider any military intervention in Niger a 'declaration of war' against them.[8] With the deadline passing, on 10 August ECOWAS issued a statement announcing the establishment of a 'standby force' and again warned the military junta that 'no option is off the table including the use of force as the last resort'.[9]

This article assesses the legality under international law of ECOWAS's threat to use force to restore constitutional order in Niger. Whether such a threat is lawful depends on whether the projected use of force is lawful. As the International Court of Justice (ICJ) explained in its *Nuclear Weapons* advisory opinion: 'The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal'.[10] This article focuses specifically on intervention by invitation as the legal basis for the threatened action.

Before we proceed, certain clarifications are necessary. First, we use the traditional term 'intervention by invitation' instead of the terms often used

[2]'Niger coup: West African countries suspend key military meeting on "standby" force', *The Guardian* (12 August 2023) www.theguardian.com/world/2023/aug/12/niger-coup-west-african-countries-suspend-key-military-meeting-on-standby-force.

[3]'West African bloc prepared for military intervention after Niger coup', *The Guardian* (17 August 2023) https://amp.theguardian.com/world/2023/aug/17/west-african-bloc-prepared-for-military-intervention-after-niger-coup.

[4]'Niger's leader detained by this guards in "fit of temper", President office says', *CBS News* (26 July 2023) www.cbsnews.com/news/niger-president-mohamed-bazoum-coup-attempt-detained-guards-army-niamey/.

[5]'Attempted coup in Niger: backgrounder', *African Center for Strategic Studies* (27 July 2023) https://africacenter.org/spotlight/attempted-coup-in-niger-an-explainer/.

[6]'Out of Africa, a new world war?', *Bloomberg* (8 August 2023) www.bloomberg.com/opinion/articles/2023-08-08/russia-backed-niger-coup-could-lead-to-war-with-us-europe.

[7]'Did the Niger coup just succeed? and other questions answered about what's next in the Sahel', *Atlantic Council* (10 August 2023) www.atlanticcouncil.org/blogs/new-atlanticist/experts-react/did-the-niger-coup-just-succeed-and-other-questions-answered-about-whats-next-in-the-sahel/.

[8]'Burkina Faso, Mali warn against military intervention in Niger', *Aljazeera* (1 August 2023) www.aljazeera.com/news/2023/8/1/burkina-faso-and-mali-warn-against-foreign-intervention-after-niger-coup.

[9]'West African Leaders Activate Standby Force to put Pressure on Junta in Niger', *The Guardian* (10 August 2023) www.theguardian.com/world/2023/aug/10/west-african-leaders-activate-standby-force-to-put-pressure-on-junta-in-niger.

[10]*Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep 226, para 47.

in the literature such as 'military assistance on request', 'intervention on request', and 'intervention by consent'. We treat these terms as synonymous because their common feature is the existence of host state consent. Intervention by invitation is thus a consensual intervention.

Second, the discussion is placed within the international legal framework regulating the use of force because such interventions refer to military interventions within a state, that is, conduct involving the threat or use of force. International law has traditionally viewed intervention as an all-inclusive concept without differentiating between the means (forcible or non-forcible) used to exercise coercion. For example, Oppenheim defines intervention as interference, 'forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question'.[11] In the *Nicaragua* case, the ICJ opined that the most obvious form of coercion is the threat or use of force.[12] However, gradually, forcible intervention as the most pernicious form of intervention acquired its own legal ontology in the concept of the use of force which is prohibited in Article 2(4) of the UN Charter and customary international law[13] and viewed as a 'cornerstone' of international law.[14]

In contemporary international law all states are bound by the UN Charter and the customary law prohibition of the threat or use of force whereas international organisations (including regional and sub-regional ones) are bound by its customary law iteration as international legal persons or through their member states.[15] This means that ECOWAS as an international organisation with legal personality[16] is bound by the customary law principle of non-use of force whereas its member states are bound by Article 2(4) of the UN Charter (as UN members) and customary law.

[11] Robert Y Jennings and Adam D Watts, *Oppenheim's International Law* (Oxford University Press, 1992) 428.

[12] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) (merits) [1986] ICJ Rep 14, para 205.

[13] The General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations includes among its principles the prohibition on the threat or use of force as well as 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law': UNGA Res 2625 (XXV), UN Doc A/RES/2625 (24 October 1970). It is also interesting to note that while the Court has previously qualified certain acts as violative of the principles of non-intervention and non-use of force, it has recently distinguished between the two. For example, in the *Armed Activities* case, the Court opined that the impugned action could amount to intervention but it 'was of such a magnitude and duration that the Court considers it to be a grave violation of the use of force expressed in Article 2, paragraph 4 of the Charter': *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*) (merits) [2005] ICJ Rep 168, para 165. On the normative decoupling of the principles of non-intervention and non-use of force, see Russell Buchan and Nicholas Tsagourias, 'The Crisis in Crimea and the Principle of Non-Intervention' (2017) 19 *International Community Law Review* 165, 173–7.

[14] *Armed Activities* (n 13) para 148.

[15] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (advisory opinion) [1980] ICJ Rep 73.

[16] Revised Treaty of the Economic Community of West African States (ECOWAS) (1991) 2373 UNTS 23, https://ecowas.int/wp-content/uploads/2022/08/Revised-treaty-1.pdf (ECOWAS Treaty) Article 88.

Against this background, this article considers the legal status of intervention by invitation as the legal basis for ECOWAS's threat to intervene to restore the constitutional order. In particular, it considers two issues that are shrouded in legal controversy: (i) the scope of treaty-based consent to intervention by looking at ECOWAS's constitutive treaty and related instruments and (ii) who has authority to grant *ad hoc* consent to intervention. That said, the aim of the article is broader insofar as it uses the events in Niger as a springboard to elaborate on the nature, scope, and validity of consent as a justification for military intervention.

2. Intervention by invitation and the nature, scope, and validity of consent

There are many instances in international relations where states and international organisations have intervened militarily in other states by relying on a treaty or an *ad hoc* invitation by the government or other authorities of the intervened state. We will not provide a list of all such instances, but it suffices to mention certain contemporary examples. For instance, the 2013 French-led intervention in Mali relied on the invitation issued by the interim president;[17] Russia relied on Syria's request of assistance to justify its military action against ISIS in Syria;[18] and Saudi Arabia relied on the request of Yemen's president to justify its military intervention. In 2016, ECOWAS threatened to use force in The Gambia after the sitting president Yahya Jammeh refused to accept that he had lost the presidential election to Adama Barrow.[19] Subsequently, Senegal (an ECOWAS member state) used force in The Gambia, which precipitated a transfer of power from Jammeh to Barrow. Senegal, acting on behalf of ECOWAS, justified ECOWAS's intervention on the basis of 'the appeal made … by President Adama Barrow to the international community, and in particular ECOWAS'.[20]

Contemporary international law treats military interventions by invitation as lawful provided they stay within the bounds of consent.[21] Yet, there are different approaches to the nature of consent and its justificatory role. According to one

[17]Identical letters of 11 January 2013 from the Permanent Representative of France to the United Nations, addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/17 (14 January 2013).

[18]Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the President of the Security Council, UN Doc S/2015/792 (15 October 2015); Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations, addressed to the Secretary-General and the President of the Security Council, UN Doc A/70/429-S/2015/789 (16 October 2015).

[19]ECOWAS, Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States (17 December 2016) (' … h) The Authority shall take all necessary measures to strictly enforce the results of the 1 December 2016 elections').

[20]UNSC Verbatim Record, UN Doc S/PV.7866 (19 January 2017) 2.

[21]*Nicaragua* (n 12) para 246; *Armed Activities* (n 13) paras 42–54, 92–105; Institut de Droit International, *Resolution on Military Assistance on Request* (8 September 2011).

approach, consent removes the impugned conduct from the ambit of Article 2(4) of the UN Charter. The use of force is thus lawful because it is not caught by the prohibition. According to another approach, consent is a circumstance precluding the *wrongfulness* of the conduct operating as justification.[22] The difference between this approach and the first one is quite thin because, if the wrongfulness of the conduct is precluded, the conduct is lawful. The difference is more conceptual in that the first approach operates in the realm of the primary rules on the use of force and consent whereas the second operates in the realm of secondary rules even if they both arrive at the same result. According to a third approach, interventions by invitation constitute *prima facie* breaches of Article 2(4) but responsibility is excused because of the existence of consent. This approach also sees consent as a secondary rule but treats it as a circumstance *excusing* the consequences of responsibility and not as *justification* which is what the second approach does. In our opinion, the first approach according to which consent displaces Article 2(4) is the correct one and is the most prevalent in international law doctrine.[23] Consensual interventions are thus lawful *ab initio*.[24] Be that as it may, questions remain as to the scope of treaty-based consent and the authority that should grant valid *ad hoc* consent. We now consider these questions in turn.

2.1. The scope of treaty-based consent

In this section we consider the scope of treaty-based consent by looking at the ECOWAS constitutive treaty and related instruments. The main question

[22] International Law Commission, *Articles on State Responsibility for Internationally Wrongful Acts* (2001), Article 20. See also Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook on the Use of Force* (Oxford University Press, 2015) 816; Eliav Lieblich, 'Why Can't We Agree on when Governments Can Consent to External Intervention? A Theoretical Inquiry' (2020) 7 *Journal on the Use of Force and International Law* 5; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Brill, 1993) 13–5.

[23] Russell Buchan and Nicholas Tsgaourias, *Regulating the Use of Force in International Law: Stability and Change* (Edward Elgar, 2021) 106–12; Laura Visser, 'May the Force be with You: The Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review* 21.

[24] International Law Association, Use of Force Committee, *Final Report on Aggression and the Use of Force* (2018) 18, www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-7 ('a State's use of force on the territory of another State with its consent involves no breach of Article 2(4) ab initio'). In the UK's view, 'international law is equally clear that this prohibition does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents': Prime Minister's Office, Summary of the UK Government's Position on the Military Action against ISIL, Policy Paper (25 September 2014) www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summaryof-the-government-legal-position-on-military-action-in-iraq-against-isil. See further Theodore Christakis and Karine Mollard-Bannelier, 'Volenti Non Fit Injuria? Les Effets du Consentement a` L'intervention Militaire' (2004) 50 *Annuaire Francais de Droit International* 102; Georg Nolte, 'Intervention by Invitation' in Anne Peters and Rudiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford University of Press Online, 2010) para 16; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 349; Jenning and Watts (n 11) para 130. The use of the word 'intervention' is inapt since it has a negative connotation of non-consensual interference. That said, we will continue to use the term 'intervention' since it reflects the accepted terminology and because intervention can be used in a descriptive manner without attaching any normative value.

to ask is whether these instruments empower ECOWAS to intervene within its member states and, if they do, whether Niger's consent to intervention by signing and ratifying these instruments is open-ended or needs to be revalidated in real time.

ECOWAS's constitutive treaty was signed in 1975 and revised in 1991 but it does not provide for a right to intervention.[25] ECOWAS, however, has gradually adopted a defence and security mandate.[26] In 1999, the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security was adopted.[27] One of the Mechanism's objectives is to 'constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises'.[28] Article 25 of the Protocol sets out the circumstances in which the Mechanism applies and these are, among others, '[i]n the event of an overthrow or attempted overthrow of a democratically elected government' and '[a]ny other situation as may be decided by the Mediation and Security Council'.

The Mediation and Security Council is one of the organs established to implement the Mechanism. It can make decisions by a two-thirds majority on all matters relating to peace and security including the authorisation of all forms of intervention and the deployment of political and military missions.[29] Another organ is ECOWAS's Monitoring Group (ECOMOG), which consists of civilian and military standby forces. It is charged, *inter alia*, with the following missions: peacekeeping and restoration of peace; humanitarian intervention in support of humanitarian disaster; enforcement of sanctions; peacebuilding, disarmament, and demobilisation; policing activities; and any other operations as may be mandated by the Mediation and Security Council.[30]

It follows from this overview that there is a treaty-based right to intervention by ECOWAS when a democratically elected government is overthrown. Consequently, ECOWAS's threat to intervene or any subsequent intervention is lawful. The fact that Niger's consent is general and not incident-specific does not affect its validity because the circumstances which invite

[25] Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma *et al* (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2012) vol 1, para 33; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart, 2021) 412–4; Henderson (n 24) 22; *Final Report on Aggression and the Use of Force* (n 24) 18.

[26] See the 1978 Protocol on Non-Aggression, https://treaties.un.org/doc/Publication/UNTS/Volume%201690/v1690.pdf and the 1981 Protocol Relating to the Mutual Assistance on Defence, https://amaniafrica-et.org/wp-content/uploads/2021/04/Protocol-Relating-to-Mutual-Assistance-in-Defence-1981.pdf.

[27] 1999 Protocol Relating to the Mechanism for Conflict Prevention, 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.

[28] *Ibid*, Article 3(h).

[29] *Ibid*, Article 10.

[30] *Ibid*, Article 22.

such intervention are mentioned in Article 25 of the Protocol.[31] Moreover, by becoming a member, Niger has consented to ECOWAS's organs to determine whether the circumstances inviting intervention exist and whether intervention is warranted.[32]

Be that as it may, the immediate question is whether Niger's consent to intervention in the ECOWAS Treaty is open-ended and remains in force until Niger withdraws from this organisation[33] or whether its consent needs to be reaffirmed in real time when the intervention is contemplated. It has been claimed that in cases of treaty-based consent to intervention supplementary *ad hoc* consent is needed at the time of intervention. For example, de Wet claims:

> The second constraint imposed by customary international law concerns the requirement that *ex ante* consent as expressed in pro-invasion treaty clauses must be complemented by ad hoc consent at the time of the forcible measures. While the post-Cold War practice in this regard is limited, current (African) state and organizational practice suggests that the pro-invasion clauses in article 4(h) of the AU [African Union] Constitutive Act and article 25 of the 1999 ECOWAS Protocol have in practice been interpreted and applied in line with this customary right of states to withdraw prior consent to forcible measures at any time.[34]

If supplementary *ad hoc* consent is required, it has been argued that the opposition of Niger's new regime to ECOWAS's planned intervention constitutes withdrawal of Niger's consent.[35] The military junta for example declared a new government in Niger on 10 August,[36] referred to ECOWAS's threats as aggression, and insisted that the ousted president will be prosecuted for 'treason'.[37]

Those advocating additional *ad hoc* consent rely on state practice, the importance and indeed the peremptory character of the rule prohibiting the use of force, the UN's purposes, the need of Security Council

[31] Using general and open language is not an impediment to consent as the ICJ opined in the *Armed Activities* case. In this case, the ICJ held that the Democratic Republic of the Congo gave its consent to the presence of Ugandan troops on its territory in an agreement which stipulated co-operation 'in order to insure security and peace along the common border' and 'to put an end to the existence of the rebel groups': *Armed Activities* (n 13) para 47.

[32] ECOWAS Treaty (n 16) Articles 5 and 9.

[33] *Ibid*, Article 91. Incidentally, the Constitutive Act of the African Union (2000) 2158 UNTS 3, Article 31 – which provided for cessation of membership – was deleted in the 2003 amendment.

[34] Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020) 179. See also Institut de Droit International (n 21) paras 4(3), 5; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189, 246; David Wippman, 'Pro-Democratic Intervention by Invitation' in Gregory H Fox and Brad R Roth (ed), *Democratic Governance and International Law* (Cambridge University Press, 2000) 313.

[35] Omar Hammady, 'Assessing the legality of ECOWAS planned military intervention in Niger', *EJIL: Talk!* (6 September 2023) www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/.

[36] 'Niger: ECOWAS force on 'standby' as junta names government', *Made for Minds* (10 August 2023) www.dw.com/en/niger-ecowas-force-on-standby-as-junta-names-government/a-66490425.

[37] 'Niger military junta says it will prosecute ousted President for high treason', *The Guardian* (14 August 2023) www.theguardian.com/world/video/2023/aug/14/niger-military-junta-prosecute-ousted-president-high-treason-video.

authorisation for any regional use of force, and the implications on state sovereignty of an open-ended consent to intervention[38] to justify their position. We disagree with the view that additional consent is required.

First, according to treaty law, state consent to a treaty does not fluctuate according to changes of government and does not need to be refreshed every time there is a new government. Moreover, although it is the government of the state that grants its consent, consent is decoupled from the government and becomes state consent.[39] If the opposite were true – namely, that consent should be revalidated – it would undermine the *pacta sunt servanda* principle,[40] which is central to treaty law as well as the international legal order and could lead to legal uncertainty and instability. States can instead withdraw from a treaty or an international organisation according to the procedures laid down in the respective treaties.[41] Niger can thus withdraw from ECOWAS,[42] but even in this case it will be bound by the treaty until the withdrawal is completed.[43] Whether an intervention during the exiting period is politically wise is a different question even if it is permitted by law.

Second, with regard to the justification which invokes the importance of the contracted-out provision (non-use of force) and the values it represents as well as the serious implications that such consent may have on the consenting state's sovereignty, it is posited that states may consent to rules that limit their sovereignty and this is an expression of state sovereignty rather than its demise. Moreover, this view does not explain if it is limited to the use of force or extends by analogy to any other important treaty provision. If that was the case, it will make treaty relations precarious but also defeat the object and purpose of a treaty bearing in mind that treaties often constitute well-crafted compromises.[44] Furthermore, consent to a treaty covers all its provisions and cannot be divided on the basis of individual provisions. States can attach reservations to specific provisions provided they are permitted by the treaty[45] or amend the treaty according to the rules of the treaty.[46] States can also withdraw from a treaty according to the rules of the treaty. In the *Armed Activities* case, the Court opined that informal consent can be withdrawn informally, which implies that formal consent as in a treaty can be withdrawn formally according to the rules of the

[38]On this basis, Wippman (n 34) 315 speaks of an implicit 'right of revocation'.
[39]Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (VCLT) Article 11.
[40]*Ibid*, Article 26.
[41]If the constitutive treaty does not provide for withdrawal, the default position is *ibid*, Articles 54–56. Yet, until a state leaves, it is bound by all the obligations.
[42]ECOWAS Treaty (n 16) Article 91.
[43]*Ibid*, Article 91(2).
[44]VCLT (n 39) Article 18.
[45]The ICJ seems to have recognised the possibility of open-ended consent to intervention when it determined that the DRC's agreement to Ugandan troops presence was not open-ended, and that DRC had withdrawn its consent: *Armed Activities* (n 13) paras 51–3.
[46]AU Constitutive Act (n 33) Article 32; ECOWAS Treaty (n 16) Article 90.

treaty but above all the ICJ rejected the claim that consent to intervention can be withdrawn at will.[47]

Third, the ECOWAS Treaty is not a simple treaty but a constitutional one. Although we do not want to delve into detailed analysis of the constitutional character of treaties establishing international organisations (which, besides, is a question that has been extensively examined in the literature[48]), we provide the gist of the argument in order to explain the legal character of the ECOWAS Treaty and how this affects the scope of state consent. Constitutions constitute a political and legal order by setting out its principles and aims, its institutions and their competences, its rules on decision-making, the rules that regulate the relations between institutions and member states, and rules on revision and withdrawal. Constitutions may be 'thick' insofar as they are based on values, loyalty, and solidarity or 'thin' by providing the political and legal scaffolding of the order they establish. The ECOWAS Treaty establishes an international organisation with legal personality, that is, a new political and legal order. It lays down its fundamental principles and aims. It establishes organs and sets out their competences and powers which are quite broad and endows ECOWAS with the power to intervene militarily in its member states. The treaty also lays down the principles and rules that define the relations between and among member states as well as rules on decision-making which are not always based on unanimity. It follows that the ECOWAS Treaty has a constitutional dimension and is not a simple agreement. For this reason, state consent to the treaty is for the life of the organisation or until the state withdraws from the organisation.[49] Also, the scope of state consent is broad because it touches on very important aspects of state sovereignty that are conferred to the organisation – for example, the decision to use force – but also because international organisations acquire a life of their own once established.[50] In this regard state consent is also prospective to capture new developments in international organisations without the need for formal amendment.

[47] *Armed Activities* (n 13) paras 46–51.

[48] Bardo Fassbender, *The United Nations Charter as Constitution of the International Community* (Martinus Nijhoff, 2009); Nicholas Tsagourias, 'Constitutionalism: A Theoretical Roadmap' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 1; Bardo Fassbender, 'The Meaning of International Constitutional Law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 307; Wouter Werner, 'The Never-Ending Closure' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 329; Jeffrey L Dunoff, and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *European Law Journal* 125.

[49] ECOWAS Treaty (n 16) Article 91. See Buchan and Tsgaourias (n 23) 170–1.

[50] *Admission of a State to the United Nations (Charter, Art. 4)* (advisory opinion) [1948] ICJ Rep 57, 68, individual opinion by Judge Alvarez ('an institution, once established, acquires a life of its own … and it must develop … in accordance with the requirements of international life').

Fourth, requiring supplementary *ad hoc* consent by the incumbent government makes the pro-intervention provisions in the ECOWAS Treaty redundant and undermines the purpose for which they were inserted. The aim of these provisions is to respond to atrocities and unconstitutional change through collective action even without the particular state's consent.[51] They are also informed by the mantra 'African solutions to African problems'.[52] If the *ad hoc* consent of the incumbent government is required for ECOWAS action, we can hardly think of a situation where a government that commits egregious violations of human rights or grabs power unconstitutionally would invite external intervention.

Fifth, no customary international law can be discerned requiring supplementary *ad hoc* consent. The facts and statements surrounding The Gambia or Burundi incidents (which are often used as examples to support this view) are not clear and, more importantly, it is not clear whether consent was mentioned for political or legal purposes. As said, ECOWAS intervened in The Gambia in 2017 at the request of the president-elect and it seems that the intervention was based on *ad hoc* consent (to be discussed later) and not on treaty-based consent.[53] In another incident, ECOWAS's Peace and Security Council (PSC) demanded that Burundi's government accept a peacekeeping force to protect civilians or face intervention on the basis of Article 4(h) of the AU's Constitutive Act.[54] Burundi rejected the demand[55] and eventually the AU decided the situation did not warrant intervention.[56] This incident does not support the view that supplementary consent is required because it was questioned whether the threshold of 'grave circumstances' in Article 4(h) was met and whether the use of force was the last resort. Also, very few states criticised the demand on legal grounds.[57]

Sixth, the view that supplementary *ad hoc* consent is required because the principle of non-use of force is a *jus cogens* norm is not convincing.

[51] Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention' (2003) 85 *International Review of the Red Cross* 807.

[52] The Preamble to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002) https://au.int/sites/default/files/treaties/37293-treaty-0024_-_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf (PSC Protocol) states: 'determined to enhance our capacity to address the scourge of conflicts on the Continent and to ensure that Africa, through the African Union, plays a central role in bringing about peace, security and stability on the Continent'.

[53] UN Doc S/PV.7866 (n 20).

[54] African Union, Peace and Security Council, *Communiqué*, 565th meeting, Doc No PSC/PR/COMM.(DLXV) (2015) www.peaceau.org/uploads/psc-565-comm-burundi-17-12-2015.pdf.

[55] Ministry of Foreign Affairs and International Cooperation, *Letter to AU Commission's President*, Doc. No. 204.01/17777/RE.2015 (2015).

[56] African Union, Peace and Security Council, *Communiqué*, 571st meeting, Doc No PSC/AHG/COMM.2 (DLXXI) (2016) www.peaceau.org/uploads/571-psc-com-burundi-29-1-2016.pdf.

[57] de Wet (n 34) 173.

According to Corten, if a state sends troops into another state on the basis of a treaty and there is actual force, 'in the absence of any ad hoc consent, there is cause for evoking the use of "force" against a State, even if, as a hypothesis, a treaty concluded beforehand authorised the contested armed action'. He goes on to say 'if, however, such consent relates to a genuine use of force, it is hard to imagine one can circumvent the requirement for ad hoc consent, as only such consent can exclude the characterisation of force and at the same time set aside the principle of observance of the peremptory prohibition stated in Charter article 2(4)'.[58] The reasoning is quite laboured but ultimately unconvincing.

First of all, the principle of non-use of force is not a *jus cogens* norm.[59] Secondly, we cannot see any difference between *ad hoc* consent to military action (which, for Corten, does not breach Article 2(4)) and treaty-based consent to military action which *prima facie* breaches Article 2(4) and its peremptoriness unless there is supplementary *ad hoc* consent. Both treaty-based and *ad hoc* consent cover the same category of conduct: military action. Third, even if for the sake of argument, we accept that the principle of non-use of force is a peremptory norm, its peremptoriness does not arise in this case because consensual intervention remains outside Article 2(4) of the UN Charter. Consequently, the rule is not applicable. This also means that treaty-based consent to intervention does not render the ECOWAS Treaty void or the relevant provision voidable.[60] As a matter of fact, we are not aware of any state or commentator making such a claim with regard to the ECOWAS Treaty or other similar treaties such as the AU's Constitutive Act. Fourth, this view cannot explain the Security Council's powers to use force. Justifications to the effect that the Security Council was given such power[61] or that it operates within the rule prohibiting the use of force and not its derogations[62] are at best unconvincing and at worst tautological. Such powers are conferred on the Security Council by a treaty (the UN Charter) and in this respect they do not differ from other treaties endowing an international organisation with similar powers.

[58]Corten (n 25) 251; International Law Commission, 'Fourth report on Responsibility of International Organizations by Giorgio Gaja, Special Rapporteur', UN Doc A/CN.4/564 (28 February 2006) para 48 ('While a State may validly consent to a specific intervention by another State, a general consent given to another State that would allow the latter State to intervene militarily on its own initiative would have to be taken as inconsistent with the peremptory norm').

[59]Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*) (2022) annex. See also Buchan and Tsagourias (n 23) 36–8; James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215.

[60]VCLT (n 39) Article 53. See also the Articles on State Responsibility (n 22) Article 26, Commentary, 85 ('in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose'). This indicates that even if the principle of non-use of force is a *jus cogens* norm, consent can be provided.

[61]Gaja (n 58) para 45.

[62]Corten (n 25) 256.

Seventh, treaty-based consent does not constrain state sovereignty but is a manifestation of it. As the Permanent Court of International Justice (PCIJ) held, 'the right of entering into international engagements is an attribute of State sovereignty'.[63] States can limit their sovereignty, and this is what they do when they become members of international organisations. Furthermore, treaty-based consent does not breach the principle of state equality to the extent that consent is freely given, bearing also in mind that all member states of ECOWAS are subject to the same provision. Finally, it does not breach the UN Charter and its principles because it refers to lawful military action.

Eighth, the argument that supplementary *ad hoc* consent is needed because, in its absence the intervention will breach Article 53(1) of the UN Charter,[64] is not legally sound. Article 53(1) states that no enforcement action should be taken by regional organisations without Security Council authorisation. However, Security Council authorisation is not required in cases where states have given their consent to intervention in a treaty establishing an international organisation because such intervention is lawful *ab initio* and is not caught by the principle of non-use of force. Article 52 of the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping, and Security attest to this view by not imposing an obligation on ECOWAS to obtain Security Council authorisation but only to inform the UN of any military intervention undertaken in accordance with the Protocol. That said, one may invoke Article 10 of the AU's Roadmap for the Operationalization of the African Standby Force which says the following:

> At the strategic level, and in terms of the provisions of the Protocol establishing the PSC, the AU constitutes a legitimate mandating authority under Chapter VIII of the UN Charter. In this regard, the AU will seek UN Security Council authorisation of its enforcements actions. Similarly, the RECs/Regions will seek AU authorisation of their interventions.[65]

In our opinion, not only is the wording confusing but also the provision comes under the heading 'legitimate political capacity to mandate a mission', which means that it refers to political rather than legal capacity. More critically though, the document is not legally binding. The legally binding documents – which are the ECOWAS Treaty and the 1999 Protocol – do not require Security Council authorisation.

[63] *S.S. "WIMBLEDON" Judgment of 17 August 1923* (Series A, No. 1) 25. In the same vein, the Security Council recalled 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States': UNSC Res 387, UN Doc S/RES/387 (31 March 1976).

[64] Corten (n 25) 253, 341–51.

[65] The AU's Roadmap for the Operationalization of the African Standby Force, EXP/AU-RECs/ASF/4(I) ADDIS ABABA (22–23 March 2005).

That said, if ECOWAS is not able to take military action due to opposition by certain member states,[66] it can appeal to the Security Council for authorisation. ECOWAS has legal personality[67] and the Security Council can thus authorise ECOWAS notwithstanding the fact that some of its member states oppose the intervention. If ECOWAS acts on the Security Council's authorisation, it can rely on Article 103 of the UN Charter according to which UN obligations prevail over all other obligations in order to counter member states' charges that it acted *ultra vires* its constitution. However, even if the authorisation and subsequent intervention would be legal, it will be politically controversial if ECOWAS acts against the wishes of certain of its member states. For this reason, the wiser course of action is for the Security Council to issue an authorisation to states which would allow a coalition of the willing to form and intervene in Niger.

If ECOWAS were to use force in Niger in contravention of the voting requirements introduced in the treaty, the action would be unlawful. It will amount to a breach of the treaty as well as Article 2(4) of the UN Charter unless ECOWAS acts under Security Council authorisation as we just explained.

It should also be noted that AU authorisation is not needed for ECOWAS military action. The relations between the AU, ECOWAS, and other African sub-regional organisations are defined by the principle of subsidiarity and the principle of primacy of the AU and its institutions.[68] ECOWAS does not need AU authorisation because the competence to take military action is provided for in its constitutive treaty. ECOWAS can of course appeal to the AU to take charge of the situation or the AU can be seized of the matter on its own accord. Article 4(h) of the AU's Constitutive Act[69] (as amended) provides for:

> the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.[70]

The interpretation of what constitutes a serious threat to the legitimate order and whether the situation in Niger meets this threshold is determined by AU

[66]'Burkina Faso, Mali warn against military intervention in Niger' (n 8).
[67]ECOWAS Treaty (n 16) Article 88.
[68]PSC Protocol (n 52) Article 16; Memorandum of Understanding on Cooperation in the Area of Peace and Security Between the African Union, The Regional Economic Communities and the Coordinating Mechanisms of the Regional Standy Brigades of Eastern Africa and Northern Africa (MoU) (June 2008) https://issafrica.s3.amazonaws.com/site/uploads/AUMOURECSJUN08.PDF.
[69]AU Constitutive Act (n 33).
[70]Protocol on Amendments to the Constitutive Act of the African Union (2003) https://au.int/sites/default/files/treaties/35423-treaty-0025_-_PROTOCOL_ON_THE_AMENDMENTS_TO_THE_CONSTITUTIVE_ACT_OF_THE_AFRICAN_UNION_E.pdf.

organs, mainly the PSC and the Assembly of Heads of State and Government.[71] Regardless of whether the 'serious threat to the legitimate order' refers to the constitutional government or the government that is in power irrespective of its democratic legitimacy (as the AU's position towards the Gaddafi regime demonstrates),[72] it covers the case of Niger. The AU can thus take military action on the basis of Article 4(h).

In conclusion, the prior consent to military intervention that Niger granted to ECOWAS when it became a member of this organisation can justify ECOWAS's intervention without the need for supplementary *ad hoc* consent or Security Council or AU authorisation. The junta's statement opposing the action does not amount to withdrawal of consent because it is not consistent with the relevant treaty rules. It is a political gimmick designed to prevent intervention and this bluff should be called out.

2.2. Ad hoc consent and legitimate authority

In this section we consider the question of which state authority can issue *ad hoc* consent to external military intervention and under what circumstances. Article 4(j) of the AU's Constitutive Act for example recognises 'the right of Member States to request intervention from the Union in order to restore peace and security'.

In order for such consent to justify external military intervention it should be valid, free, precede the action, and be specific.[73] Consent is valid if it is granted by an authority that can express the will of the state for international law purposes which is in principle the incumbent government. State practice is quite rich in this regard, such as the United States' (US) military action in Iraq against ISIS at the request of the Iraqi government[74] and the French-led military intervention in Mali in 2012–2013 to support the Malian government in its fight against Islamists.[75]

Traditionally, international law has given prominence to the factual criterion of effective control in that only the government that exercises effective control over a state's territory and people can speak on behalf of the state and issue a request for invitation.[76] This test is politically neutral insofar as it applies

[71] Protocol Relating to the Establishing the Peace and Security Council of the African Union (2022) www.peaceau.org/uploads/psc-protocol-en.pdf, Articles 4–7.

[72] Assembly of the African Union, Decision on the Situation in Libya, Assembly/Au/Dec.385(xvl) (30 June 2011).

[73] *Armed Activities* (n 13) paras 42–54, 92–105.

[74] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014).

[75] Identical letters dated 11 January 2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2013/17 (14 January 2013).

[76] Montevideo Convention on Rights and Duties of States (1933) 165 UNTS 19, Article I; *Tinoco Claims Arbitration* (*Great Britain v Costa Rica*) (1923) 1 RIAA 369, 381–2; *Nicaragua* (n 12) para 246. See

regardless of the government's representative or democratic character. In the case of Niger, such authority will be the military junta because it exercises effective control over the territory and people, but it will not, of course, invite foreign intervention. The view that only the incumbent government can issue an invitation is however modulated by other considerations and this is particularly the case where there is internal turmoil. One such consideration may be the degree of external recognition of the government,[77] which the new Niger regime does not enjoy.

More importantly though, over time, international practice and doctrine have placed greater emphasis on the democratic legitimacy of the government that issued the invitation.[78] This is due to the problems the reliance on effective control can cause. For example, the constellation of power is not always clear-cut in times of civil unrest. Also, permitting an authority in effective control of a state to request external intervention without a consideration of its political legitimacy may lead to outcomes incompatible with the values of the international community – for instance, dictators can call on foreign powers to help prop up their regimes even where they are engaged in severe human rights abuses against the local population. More critically, privileging the democratic legitimacy of the inviting authority reflects changes in the international political culture which stresses the importance of democratic governance as a prerequisite to internal as well as international peace.

In the case of ECOWAS, the promotion of democracy is one of the objectives mentioned in the constitutive treaty and Protocol, but the 2001 Supplementary Protocol on Democracy and Good Governance should also be mentioned in this context. The 2001 Protocol avows ECOWAS member states' adherence to constitutional and democratic norms, declares '[z]ero tolerance for power obtained or maintained by unconstitutional means', and requires that member states' 'armed forces, the police and other security agencies shall be under the authority of legally constituted civilian authorities'.[79] These pledges were repeated in the 2008 ECOWAS Conflict Prevention Framework[80] and the 2019 Plans of Action for the 15 Components of the ECOWAS Conflict Prevention Framework.[81]

further Brad R Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 *Melbourne Journal of International Law* 393; Doswald-Beck (n 34).

[77] Henderson (n 24) 357.

[78] Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart, 2013) 73–95.

[79] Protocol on Democracy and Good Governance (A/SP1/12/01) https://www2.ohchr.org/english/law/compilation_democracy/ecowasprot.htm.

[80] Regulation MSC/REG.1/01/08, *The ECOWAS Conflict Prevention Framework*, https://au.int/sites/default/files/documents/39184-doc-140._the_ecowas_conflict_prevention_framework.pdf.

[81] Plans of Action for the 15 Components of the ECOWAS Conflict Prevention Framework, https://wpsfocalpointsnetwork.org/wp-content/uploads/2021/07/ECPF-Action-Plans-2018-2020-ENG-1.pdf.

Turning to international practice, during apartheid the government of South Africa was not allowed to invite foreign states to intervene in the territory because of its internal political system even though it exercised effective control over the territory.[82] Conversely, in 1997 Ahmed Tejan Kabbah – the democratically elected president of Sierra Leone – was overthrown in a military coup.[83] President Kabbah fled the country to Guinea and called on ECOWAS to intervene and restore him to power.[84] At the time, Nigerian troops were already stationed in Sierra Leone as part of ECOMOG. ECOMOG's presence in Sierra Leone was sanctioned by a pre-existing treaty, although it did not contain any provision that authorised ECOMOG to reverse a coup.[85] This notwithstanding, Nigeria used force in Sierra Leone and, by March 1998, President Kabbah was returned to power. The Security Council, which had condemned the coup and determined that the situation constituted a threat to international peace and security,[86] 'commended the important role that the Economic Community of West African States (ECOWAS) had continued to play towards the peaceful resolution of the crisis'.[87] President Kabbah did not exercise effective control in Sierra Leone at the time of the request (indeed, as said, he had fled the country) but could invite intervention because of his democratic credentials. Nigeria therefore intervened in Sierra Leone at the invitation of a deposed democratic president,[88] even if it also relied on the right of self-defence to provide overlapping justification for its action.[89]

Similarly, the Malian government could lawfully request outside intervention from France because of its democratic character even though it did not exercise effective control over large parts of its territory and actually invited foreign troops to help re-establish such control. The French intervention was widely accepted in the international community, including by the Security Council.[90] We have already seen that, in 2017, Senegal intervened in The

[82]Nolte (n 24) para 17.
[83]UNSC Verbatim Record, UN Doc S/PV.3822 (8 October 1997) 3–4.
[84]Press Conference by Permanent Representative of Sierra Leone, UN Press Briefing (27 May 1997) https://press.un.org/en/1997/19970527.sleone27.may.html.
[85]'Nigeria imperatrix', *The Economist* (5 June 1997) www.economist.com/international/1997/06/05/nigeria-imperatrix.
[86]UNSC Res 1132, UN Doc S/RES/1132 (8 October 1997) paras 1, 3, 8.
[87]Statement by the President of the Security Council, UN Doc S/PRST/1998/5 (26 February 1998).
[88]Press Conference by Nigeria (19 March 1998) https://press.un.org/en/1998/19980319.nigeria.html. See generally Karsten Nowrot and Emily W Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *American University International Law Review* 321, 386–402.
[89]Press Conference by Nigeria (n 88). Corten, however, claims that Nigeria relied exclusively on the right of self-defence to justify its military intervention in Sierra Leone. Corten does not therefore see Sierra Leone as a *bona fida* example of intervention by invitation: Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council' in Dino Kritsiotis, Olivier Corten, and Gregory H Fox (eds), *Armed Intervention and Consent* (Cambridge University Press, 2023) 162.
[90]UNSC Res 2100, UN Doc S/RES/2100 (25 April 2103) ('*Welcoming* the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali').

Gambia at the request of the democratically elected president even though the sitting president (who had lost the election) refused to relinquish power and exercised effective control over the territory and people. In this case, the Security Council passed a resolution recognising Adama Barrow as the President-elect, endorsing similar statements by ECOWAS and the AU.[91]

With regard to Niger, on 28 July 2023 the Security Council issued a press statement condemning the efforts to unconstitutionally change the legitimate government in Niger referring to President Bazoum's administration as the 'legitimate government of the Republic of Niger' and praised ECOWAS's and the AU's opposition to the coup.[92] According thus to the UN, ECOWAS and the AU, the authority that represents Niger is not the one that exercises effective control but the one that has democratic legitimacy. On this view, President Bazoum as the legitimate authority in Niger can invite external intervention from the AU on the basis of Article 4(j) or from any other state or international organisation.

On 3 August 2023, President Bazoum wrote an op-ed for *The Washington Post* and said: 'I call on the U.S. government and the entire international community to help us restore our constitutional order'.[93] As explained, for consent to provide a valid legal basis for force it must be specific, namely, there must be a specific request to use force to achieve a particular objective. It is apparent from the op-ed that President Bazoum did not specifically request external actors to use force to restore constitutional order. Yet, can it be argued that if this statement is assessed in context it amounts to an implicit invitation to use force? The ICJ, for example, interpreted a statement included in an agreement between the Democratic Republic of the Congo (DRC) and Uganda to 'co-operate in order to insure security and peace along the common border' as amounting to consent to military intervention even though the words 'force' or 'military intervention' were not used.[94] President Bazoum's statement can be also compared with The Gambia's President-elect Barrow's request to ECOWAS, the AU, and the UN to support the people of The Gambia in enforcing and installing the democratically elected government.[95]

[91] UNSC Res 2337, UN Doc S/RES/2337 (19 January 2017).
[92] Press Statement by the Security Council: The Situation in the Republic of Niger (28 July 2023) www.un.org/securitycouncil/content/security-council-press-statement-situation-republic-niger.
[93] 'President of Niger: my country is under attack and I've been taken hostage', *The Washington Post* (3 August 2023) www.washingtonpost.com/opinions/2023/08/03/mohamed-bazoum-coup-niger-democracy/.
[94] *Armed Activities* (n 13) para 46.
[95] 'Troops enter The Gambia after Adama Barrow is inaugurated in Senegal', *The Guardian* (19 January 2017) www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal.

Be that as it may, the next question is whether another official from President Bazoum's administration can issue the invitation. As the International Law Association's (ILA) Use of Force Committee explains, the key question is how domestic and constitutional law apportions power across the government and whether the request comes from 'authorised representatives of the government'.[96] The ILA states that this does not include 'military/intelligence services'[97] and, with regard to the US's military intervention in Grenada in 1983, the request from Grenada's Governor-General was not sufficient because this was a ceremonial position without executive powers.[98] Niger's Foreign Minister – currently in exile and critical of the junta's actions – may have such a power but, again, the critical issue is whether his office has the constitutional authority to make such a request.

Incidentally, if an authorised Nigerien official does request intervention but the military junta pressurises President Bazoum into declaring that such actors *should not* intervene, this would not be binding because it would not be given freely, that is, it would be the product of pressure, coercion, or intimidation.[99] The situation may be different if President Bazoum rejects by his own volition such an invitation. Being the highest authority, his opinion will prevail.

3. Conclusion

The overthrow of democracy in Niger represents a threat to the push to democratise the African continent. ECOWAS has rightly come out in favour of returning President Bazoum to power, as has the UN's Secretary-General who 'strongly condemns the unconstitutional change of government in Niger'.[100] The military junta, however, shows no signs of heeding international demands and the immediate question is what can the international community do to restore constitutional order in Niger.

ECOWAS has threatened to use force in Niger and this article has assessed its legality under international law. First, it considered whether treaty-based consent can provide a legal basis for the use of force. Niger is a member of ECOWAS which has the power under its constitutive treaty and related instruments to intervene militarily to restore constitutional order in member states. At present, there are disagreements within ECOWAS as to whether to set this mechanism in motion. Second, we considered *ad hoc*

[96] *Final Report on Aggression and the Use of Force* (n 24) 19.
[97] *Ibid*.
[98] Doswald-Beck (n 34).
[99] See VCLT (n 39) Article 51. See further Ashley Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 *Harvard International Law Journal* 1.
[100] 'Secretary-General Strongly Condemns Unconstitutional Change of Government in Niger', *UN Press Release*, SG/SM/21891 (26 July 2023) https://press.un.org/en/2023/sgsm21891.doc.htm.

consent by authorised state officials to request intervention. We made the case that such authority resides with President Bazoum.

In the alternative, the Security Council can authorise force by engaging its mandatory powers, although this is unlikely to transpire in the current political climate given that the Council's permanent veto-wielding members are engaged in a bitter and multifaceted competition. The AU is another institution which can authorise the use of force but there are disagreements among its members.

In our opinion, remaining idle in the face of undemocratic changes of government is a major setback. That having been said, we also recognise that ECOWAS's legal, political, and institutional culture fails to provide a coherent approach to the relationship between sovereignty, intervention, democracy and human rights which explains why debates about intervention have been difficult and inconclusive. These dilemmas need to be addressed and the permissive legal framework provided in ECOWAS's constitutive treaty should be matched by the necessary political will.

Acknowledgements

This article develops a post that was previously published on the *Articles of War* blog: https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/. We thank the editors of *Articles of War* for allowing us to develop the post into this article.

Disclosure statement

No potential conflict of interest was reported by the author(s).