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Notes From Editor-In-Chief

The Plateau State University, Boko was established in 2007 pursuant to the Plateau State University Law, 2005. It commenced academic activities with four Faculties namely (a) Arts (b) Social Sciences (c) Natural and Applied Sciences and (d) Management Sciences. In order to upgrade the University to a 21st Century University, the Senate of the University in its wisdom, later approved the establishment of four additional Faculties and a Postgraduate School. The four Faculties are (a) Health Sciences (b) Environmental Sciences (c) Education and (d) Law.

In 2022, the National Universities Commission carried out a resource verification exercise with a view to determining whether the University was prepared, and had on ground the needed resources, for smooth take off of the new faculties. The Commission granted approval to all the new faculties to commence academic activities for the 2023/2024 academic session. Consequently, the first set of students was admitted into the law programme of the University and the students are currently in 200 level.

Immediately we came in as pioneer lecturers, the dream of publishing a flagship Journal of the Faculty became imminent. Therefore, with great zeal and determination and coupled with the efforts of all the lecturers in the faculty and that of our lecturer and mentor, Professor Alphonsus Okoh Alubo, SAN, who is with us on sabbatical leave, we were propelled to move this dream to fruition. It was agreed at the Faculty Board Meeting that the name of the journal would be: PLATEAU STATE UNIVERSITY LAW JOURNAL VOL. 1 No. 1. Call for Papers was sent out sometime in June, 2024 with a deadline of 25th August, 2024. To our utter amazement, subscriptions for the journal came from across different faculties of law in all the six geo-political zones of Nigeria, thereby giving the journal semblance of national spread and balance.

I like to appreciate most sincerely, the lecturers of the Faculty for not resting on their oars to ensure the fulfilment of this flagship journal, which shall remain a bi-annual journal of the Faculty of Law of the University. In a similar vein, I also thank immeasurably all academics, legal titans and practitioners from across Nigeria who, not only believe in this Journal, but also quickly responded with subscriptions and contributions to ensure its success.

The management of the University, ably led by the Acting Vice Chancellor, Professor Shedrack Gaya Best, also deserves commendation for the support given to us in all facets towards the realisation of this herculean task. I am equally highly indebted to our crew of Editorial Board of the Faculty Journal and our reviewers for the dedication, commitment and resilience exhibited in ensuring the realisation of this project. Our team of Editorial Advisory Council, which is made up of very senior and experienced Professors of varying lengths of experience and exposure in different fields of law is also deserving of commendation. Without their wisdom, counsel and guidance, this project would not have been feasible and realizable. I thank them tremendously.

Finally, to God Almighty, who is the ultimate director and determiner of all things on earth and in heaven, is the glory!

Mark Yilkaghan Danung Ph.D., BL, MCI Arb. (UK), Notary Public Editor-in-Chief

From The Editor's Desk

It is axiomatic to say that we are elated at the Plateau State University as the Maiden Edition of the Law Journal rolled off the press. It looked like a mirage when the idea of establishing the Journal was conceived, long before I joined Plateau State University on sabbatical leave. The Faculty of Law reconstituted Editorial Board hit the ground running with call for articles for two months, ending on the 25th August, 2024. Indeed, a gumbo of materials came in, long before the expiration of the deadline. Such articles were immediately sent out for peer-review and pedantically and fastidiously evaluated. Being a young faculty, staff were pleasantly nonplussed and flummoxed that the contributions were oversubscribed, with over 30 articles. Most of the articles were on different subjects ranging from inflation, rape, ECOWAS, matrimonial causes, etc, made successful entry into the Journal. The diversity of contributions must be accentuated. Articles came in from Delta State, Oyo, Ibadan, Kwara, Zaria, Abuja, Jos, Benue, the Law School and a bouquet of states. The Editorial Committee and the Editor, are extremely grateful to contributors. May the good Lord keep them and bless them beyond measure. Indeed, articles have also been written on a farrago of areas: Admiralty: Debottlenecking the Law to restrain and Suppress the Abuse of Lasses in Nigeria; Beyond the Present: Contemporary Examination of Rule of Law, Democratic Governance, etc.; Electoral Act and the Test of Admissibility of Evidence; Medical Confidentiality; *Locus Standi*; Juvenile and Criminal Justice Administration; Revisiting Good and Old Positivism; Small Arms and Light Weapons: Desensitization of Legislative Inflation, Rape, ECOWAS, Matrimonial Conflicts and Choice, Banditry, Maritime and Admiralty Issues, Right to or access to Mediocres, etc.

Under the able leadership of the young, dynamic, effervescent and ebullient Dean of Law, it is ennobling to have the Journal, in fact.

We look forward to receiving your new contributions when the next call for papers is made.

Prof. Alphonsus Okoh Alubo, SAN Editor

Note to Contributors

Manuscripts could include articles, case comments/reviews and book reviews. Manuscripts should not normally exceed **6000 words**.

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The language of the manuscript must be English (British standard).

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Publication Policy

Opinions expressed in the Journal are those of the authors and do not reflect the views of the publisher essentially.

Please accept our warmest regards.

Table Of Contents

The ECOWAS And The Legality Of The Use Of Force: The Niger
Republic Coup Case Study

Mark Y. Danung, Ponfa J. Miner Esq. And Paul Y. Izam 1

Evaluation Of Nigeria's Legal Framework For Combating Cybercrimes
Chakaam N. Dalan, Sarah R. Garba & Rinyen M. Donglong 24

Appraisal Of The Legal Framework Of The Nigerian Correctional Service
Obaje Enemaku & Samuel I. Ikutanwa 61

Evaluating Non-Custodial Punishment As Alternative Measures To Custodian
Punishment In Combating Crimes
Jesutola Ikeoluwapo Tobi-Mulero 97

The Correctional Service Act And Rights Of Prisoners In Nigeria
William W. Longpoe 115

Reflections On The Legal Framework On The Offence Of Rape In Nigeria And India
Appolos Dimas 135

Matrimonial Conflicts And Choice Of Law Situations In The
Nigerian
Legal System
Ritji Timothy Yilwatda Esq. & Dauda Iliya Gusnung Esq 160

Reinstating Legal Positivism: Foundation, Philosophy And Criteria *Nelson, E. Chegwe
& Michael, C. Ogwezzu* 186

Maritime And Admiralty Practice In Nigeria And United States Of
America: A Comparison
Prince Pius Imiera 205

Examination Of International Labour Standards And The Role Of
Supervisory Bodies
Madaki, Adamu Izang 228

An Analysis Of The Convention On The Registration Of objects
Launched Into Outer Space 1975

Wukatwe Charles Wakji Esq. & Ritji Timothy Yilwatda Esq. 259

Evaluation Of The Right Of Referral Proceedings Under The Trade Dispute Act, 2004
Barr. Dogari, Iliya Joshua 281

Small Arms And Light Weapons Proliferation In West Africa: An
Inquiry Into The Role Of The Economic Community Of West African
States (ECOWAS) In Silencing The Guns
Amos Nanbol Samuel 311

Desensitising Legislative Inflation: Rethinking Senate Bill 347 In
The
Context Of Quest For Good Governance
Ayuba Iliya Gongu & Morgan Innocent Dung 339

Appraisal Of The Enforcement Of Fundamental Human Rights
Against Public Officers Under Section 308 Of The Constitution Of
The Federal Republic Of Nigeria, 1999(As Amended)
Joseph Rengkat 372

Brain Death And Euthanasia: Helping Other Patients Live
Mosunmola Imasogie 398

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THE ECOWAS AND THE LEGALITY OF THE USE OF FORCE: THE NIGER REPUBLIC COUP CASE STUDY

Mark Y. Danung¹ Ponfa J. Miner Esq^{2*} Paul Y. Izam^{**3}

Abstract

This research examined the international human rights implications of the use of force in the Republic of Niger that witnessed the forceful and undemocratic removal of the democratically elected President Mohamed Bazoum and his replacement with the Junta Military Leaders on the 26th of July 2023. It examined the covenants that promote democracy and peaceful coexistence and sought to find the causative factors for coup de tats in the African countries of Niger, Mali, Burkina Faso and recently Gabon. It briefly analysed the legality of the use of force by the Economic Community of West African States. The research finally made recommendation to the effect that the unilateral use of force to restore democracy is not firmly established in international law. The paper noted that the restoration of democracy is worth pursuing by using peaceful means, but be that as it may, the case of using force in Niger is not only illegitimate, but also unlawful, unwarrantable and offends the established tenets of international law. The doctrinal research methodology was employed for the purpose of driving this research.

Key Words: Legality, Force, Coup, Case Study

Introduction

The recent coup in Niger, during which members of the presidential guard detained President Mohamed Bazoum and other political leaders, keeping them in military custody, highlights the fading rays of democracy in Africa and foreshadows a complex tragedy of democratisation in the continent.⁴ The coup, orchestrated on the 26th of July, 2023, not only poses uncertainty for the country's inhabitants, but it also deeply undermines strategic investments made by different stakeholders in their quest to silence the guns in the continent, especially in the Sahel.⁵ Niger, known for production of uranium, is a hub for military and humanitarian activities. It is a strategic partner, with other countries, in the fight against insurgency and terrorism in the Sahel.

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Niger's importance in the fight against terrorism has earned significant support from various development partners, such as the United States, which has praised Niger as a model of democracy.³ The coup comes just two years after the country's first civilian to civilian transition, following completion of president Mohamadou Issoufou two terms in office, handing over to Bazoum. The event takes a similar pattern of military adventurism in Mali, Guinea, Burkina Faso where elite military groups seized political power justifying their actions to insecurity, economic woes and corruption.⁴

The Leader of the Presidential Guard, General Omar Tchiani has been announced as the new head of Government. In a televised broadcast, Tchiani said he and his colleagues in the National Council for the Safeguarding of the Country, the group of soldiers who staged the takeover acted in national interest. He said: The action of the CNSP is motivated by the sole preoccupation of preserving our dear country, faced in part with the degradation of the security situation in our country and for which our authorities didn't leave a real solution for a way out of the crisis, and the other part is for the bad economic and social governance... "I reiterate the appeal of the National Council for the Safeguarding of the Country for serenity, calm, vigilance and patriotism for together in unison we can overcome the security, economic, and social challenges mentioned before. To the international community, the National Council for the Safeguarding

of the Country reaffirms its willingness to respect all international engagements to which the Republic of Niger subscribes, including to human rights.⁴ The coup, no doubt, caused several breaches on the rights of citizens/nationals of the Republic of Niger: from the suspension of the country's constitution, closure of borders with neighboring nations, imposition of curfew, suspension of all institutions of the republic to the unlawful detention of the democratically elected president of the republic. The international community responded with widespread condemnation, with the Economic Community of West African States (ECOWAS), the African Union (AU), and the United Nations (UN) all denouncing the military's actions. These organisations have called for the immediate and unconditional release of the democratically-elected President and have warned that those involved in the coup will be held responsible for the safety of the President, government officials, and the public.

⁴ Wealth Dickson Ominabo, 'Niger Coup and its Implications to West Africa,' The Cable (Nigeria, 1st September 2023) 3

⁵ Ibid.

⁶ Ben Fishman, Anna Borshchevskaya, 'Niger Coup Threatens U. S. Strategy on Counterterrorism and Russia' (2023) *The Washington Institute for Near East Policy* <<https://www.washingtoninstitute.org/policy-analysis/niger-coup-threatens-us-strategy-counterterrorism-and-russia>> accessed on the 10th March, 2024.

⁷ 'Niger Coup Leader Calls for Calm' < <https://von.gov.ng/niger-coup-leadercallsforcalm/>> accessed on the 10th March, 2024.

Covenants Under International Law Bordering On Promotion Of Democracy

Generally, International human rights law lays down the obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.⁵ One of the great achievements of the United Nations is the creation of a comprehensive body of human rights law - a universal and internationally protected code to which all nations can subscribe and all people aspire. The United Nations has defined a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights. It has also established mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities. The foundations of this body of law are the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the General Assembly in 1945 and 1948, respectively. Niger, no doubt, being a party to the treaties mentioned

above, is supposed to also enjoy the guaranteed rights which are evident and contained in those treaties. It is also worthy of note to, at this point, state that Niger is party to several treaties which protect and promote democratic values and peaceful co-existence. A few of these treaties are highlighted below:

The Universal Declaration of Human Rights (UDHR), which Niger is a signatory to, is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on the 10th of December 1948, by General Assembly Resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. Since its adoption in 1948, the UDHR has been translated into more than 500 languages - the most translated document in the world - and has inspired the constitutions of many newly independent States and many new democracies. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, form the so-called International Bill of Human Rights.⁷

The International Covenant on Economic, Social and Cultural Rights entered into force in 1976. The human rights that the Covenant seeks to promote and protect include; the right to work in just and favourable conditions; the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being; the right to education and the enjoyment of benefits of cultural freedom and scientific progress.⁸

⁸ 'Global Issues: Human Rights' <<https://www.un.org/en/global-issues/human-rights>> accessed on the 25th April, 2024.

The International Covenant on Civil and Political Rights and its First Optional Protocol entered into force in 1976. The Second Optional Protocol was adopted in 1989. The Covenant deals with such rights as freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections;

and protection of minority rights.⁶ It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred.

The second and third treaties considered are relevant to this research as the right to self-determination is derived from the said treaties. The right to self-determination is contained in article 1 of the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the International Covenant on Economic, Social and Cultural Rights. This right is also contained in Article 3 of the Declaration on the Rights of Indigenous Peoples. The Declaration does not create legally binding obligations, but informs the way governments engage with and protect the rights of Indigenous people.

The African Charter on Democracy, Elections and Governance is another relevant treaty that promotes democracy. The document adopted by member states of the African Union on 30th January, 2007, in order to promote liberal democracy and human rights in Africa.⁷ It is the first binding document adopted by members of the African Union. Among its provisions are several aimed at combating unconstitutional regime changes, including the first legal instrument adopted by the AU acknowledging that constitutional coups are a form of unconstitutional regime change.⁸ The African Charter on Democracy was also preceded by a number of AU

⁹ 'What Is the Universal Declaration of Human Rights and Why Was It Created?' *Amnesty International*, <<https://www.amnesty.org/en/what-we-do/universaldeclarationofhuman-rights/>> accessed on the 25th April, 2024.

¹⁰ Rabia-Tus-Saleha, 'International Covenant on Social and Cultural Rights' <https://www.academia.edu/10349496/International_Covenant_On_Economic_Social_And_Cultural_Rights> accessed on the 26th April, 2024.

¹¹ Sarah Joseph, Melissa Castan, *The International Covenant on Civil and Political Rights; Cases, Materials and Commentaries* (3rd Edn, Oxford University Press: 2014) 8.

¹² Elvy, Stacy-Ann. "Towards A New Democratic Africa: The African Charter on Democracy, Elections and Governance" *Emory International Law Review*. 27: 41–117.

¹³ 11 Ibid.

instruments which had similar goals of promoting democracy, protecting human rights, and preventing unconstitutional regime changes.⁹

At this juncture, the question which begs for an answer is whether there has been disregard with the principle of international human rights by the junta? The foregoing question is in the affirmative. The announced decision by coup leaders to prosecute President Mohamed Bazoum and others working with him for high treason is not only politically motivated against a democratically elected President but has no legal basis as the normal functioning of democratic institutions have been cast aside. A clampdown on civic space, including allegations of intimidation against journalists, bans on international media outlets and other restrictions impacting freedom of expression and public assembly, is also very worrying. The foregoing has caused the Human Rights Watch to call on the military coup leaders of Niger to ensure the safety and well-being of ousted “President Mohamed Bazoum, his family, and others arbitrarily detained. The human rights group also urged the military to show that they respect fundamental human rights by releasing the “arbitrarily detained” and “bring about a swift transition to civilian democratic rule.”¹⁰ The Coup no doubt has brought with it flagrant disregard to the rules, principles and covenants that touch of international human rights.

Causative Factors In The Coup In Niger, Mali, Burkina Faso And Gabon

Having considered some of the covenants which promote democracy, human rights and peaceful co-existence, it is germane to discuss extensively the causative factors of the coups in Niger, Burkina Faso, Mali and recently Gabon. State sovereignty is a term that refers to the legal authority and responsibility of an independent state to govern and regulate its political affairs without foreign interference.¹¹¹² Sovereign states have supreme authority over their territory. In other words, under the concept of state sovereignty, no state has the authority to tell another state how to control its internal affairs. Sovereignty both grants and limits power: it gives states complete control over their own territory while restricting the influence that states have on one another. The principle of sovereignty regulates interstate relations. It is a fundamental rule that promotes pacific coexistence. It was sanctified by the Charter of the UN, which states that the organization is based on the “sovereign equality” of all Member States.¹³ Hence, all States must respect the prerogatives of all other States in their policies over their own population and their own territory. It follows from this principle that no State may “intervene in matters which are essentially within the domestic jurisdiction of any other State.”¹⁴

¹⁴ Among these are the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights, the Declaration on the Principles Governing Democratic Elections in Africa, and the AU Convention on Preventing and Combating Corruption.

¹⁵ ‘HRW Urges Nigerien Coup Leaders to Respect Human Rights of Ousted President’

<<https://www.voanews.com/a/hrw-urges-nigerien-coup-leaders-to-respecthumanrights-of-ousted-president/7220962.html>> accessed on the 17th March, 2024.

¹⁶ Vaughan Lowe, *International Law: Avery Short Introduction* (Oxford University Press: 26.

¹⁷ Article 2(1) of the UN Charter.

¹⁸ Article 2(7) of the UN Charter.

The common causative factor seems to be the interference of France in the internal affairs of these nations. This interference exists, notwithstanding the sovereignty of these nations. France has managed to control the government and even the natural resources. All the seven countries in Africa where coups have occurred in the last two years have one marked similarity: they all were former French colonies. Many commentators have asked if France or the legacy of the French colonialism is to blame for the range of instabilities in the region. Anti-French vitriol has flourished across the Sahel region, where a number of French companies have had controlling stakes over mining resources.¹⁵ One of such commentators is William Miles¹⁹ who identifies this causation factor and opine thus:

Gabon is joining Niger and Mali and Burkina Faso and Guinea to say that we too have been taken advantage of by France and we're no longer going to abide by the French/Western model of governance, "You know the expression of hopping on the bandwagon? This is more of a convoy — different military regimes of former French West Africa."¹⁶

It is obvious that the interference of France in the governance and control of the resources of Niger and its counterparts constitute the immediate cause of the coups in the former French colonies. There is total non-adherence of the principle of state sovereignty on the part of France. No wonder that the Niger military junta expelled French forces and officials in the republic. This interference in the internal affairs of the republic forms one of the remote causes of the coup.

The Justification Of The Use Of Force By The Economic Community Of West African States Viz-A-Viz International Law

Questions have been asked as to whether the use of force by the Economic Community of West African States (ECOWAS) is justifiable and in accordance with international rules and

¹⁹ Mukul Sharma, 'After Niger, this is why coup in Gabon is receiving public support'

<<https://www.wionews.com/world/explained-after-niger-this-is-why-coup-ingabonisreceiving-public-support-630612>> accessed on the 16th April, 2024. ¹⁹ A professor of political science at Northeastern University whose areas of expertise include West African politics and postcolonial identity.

<<https://news.northeastern.edu/2023/08/31/gabon-coup/>> accessed on the 16th April, 2024.

²⁰ Gift Habib, 'Nigeria's Dilemma as ECOWAS threaten War against Niger Junta' The Punch (Nigeria, 27th August, 2023) <<https://punchng.com/nigerias-dilemma-as-ecowasthreatens-war-against-nigers-junta>> accessed on the 17th April, 2024.

²¹ 23 Ibid.

²² 'Yahya Jammeh calls ECOWAS deployment 'an act of war'

<<https://www.aljazeera.com/news/2017/1/1/yahya-jammeh>

[jammeYahya%20Jammeh%20calls%20ECOWAS%20deployment%20%E2%80%98an%20act%20of%20war%E2%80%99-calls-ecowas-deployment-an-act-of-war](https://www.aljazeera.com/news/2017/1/1/yahya-jammeh)> accessed on the 20th April, 2024.

²⁵ The 1996 advisory opinion of the International Court of Justice (ICJ) was the culmination of a decades-long debate on the legality of nuclear weapons. In recent years, it has shaped how international law is invoked by the initiative focused on the humanitarian impacts of nuclear weapons use and served as a foundation for the nuclear disarmament cases brought by the Marshall Islands in the court. ²⁶ Paragraph 47.

principles. On 30th of July, 2023, the Economic Community of West African States (ECOWAS) imposed sanctions against the military junta and gave it a one week ultimatum to reinstate President Bazoum or face military intervention. On 1st of August, 2023, 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.²⁰ With its ultimatum passing, on the 10th of August, 2023, 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.” This seems to amount to a threat of force; there appears to be an intention to use force if the demands are not met.²¹ In a similar incident in 2016, ECOWAS threatened to use force in The Gambia after the sitting president Yahya Jammeh refused to accept that he lost the presidential election to Adama Barrow. Subsequently, Senegal (an ECOWAS member) used force in The Gambia, which precipitated a transfer of power from Jammeh to Barrow. The military junta in Niger, however, appeared to brush off ECOWAS’s threat when, on 10 August, it declared a new government in Niger and insisted that the ousted president would be prosecuted for “high treason.”²²

The prohibition on the threat or use of force (the principle of nonuse of force) is a “cornerstone” of international law and enshrined in Article 2(4) of the 1945 UN Charter and customary international law (*Armed Activities*, para. 148). The customary iteration of this principle binds international organizations (including regional and sub-regional ones) as international legal persons or through their member States. This means that ECOWAS as an international organization with legal personality 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.

The Legality Of ECOWAS’s Threat Of Force

This section, addresses whether the threat of force by ECOWAS to restore constitutional order in Niger is lawful under international law. This depends on whether the projected use of force is lawful. As the International Court of Justice (ICJ) opined in its *Nuclear Weapons* Advisory Opinion;²⁵ 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.²⁶

The UN Charter provides for two exceptions to the prohibition on the use of force: the use of force by way of self-defense (art. 51 of the UN Charter); and Security Council (SC) authorization to use force (Chapter VII of the UN Charter), which also extends to regional organizations (UN Charter, art. 53(1)). Neither of the above possibilities applies to the case at hand. There was no armed attack to trigger the right of individual or collective self-defense and, while the SC has authorized regional organizations to use military force before, it has yet to be seized of the situation in Niger let alone authorize the use of force. This leaves two possible international legal bases on which ECOWAS can threaten or use force in Niger to wit; (i) consent; and (ii) the doctrine of prodemocratic intervention. We shall hereunder consider each considered in turn. a.

Consent

Consensual interventions (military or otherwise) do not violate Article 2(4) of the UN Charter; they are lawful *ab initio*. Consent to intervene can be treaty based or *ad hoc*.¹⁶ We consider the two possibilities in turn:

i. Treaty-based Consent

Since Niger is a member of ECOWAS and the African Union (AU), we first consider whether their constitutive treaties and related legal instruments empower them to intervene militarily within their member States. If this is the case, Niger would be deemed to have granted its consent to intervention by signing and ratifying the respective treaties or instruments. With regard to ECOWAS, the constitutive treaty signed in 1975 and revised in 1991 does not provide for such a right. In 1978, a Protocol on Non-Aggression was signed according to which ECOWAS member States vow not to use force or aggression against other member States.¹⁷ The 1981 Protocol Relating to the Mutual Assistance on Defence provides for collective self-defence in cases of armed threat or aggression directed against any ECOWAS member State.¹⁸ The 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security establishes a collective security system. It lays down the guiding principles of the mechanism¹⁹ and lists the circumstances which set it in motion among which is the overthrow or attempted overthrow of a democratically elected government.²⁰ Among the organs established to implement ECOWAS's peace and security mandate are the nine-member Mediation and Security Council and ECOMOG (ECOWAS's Cease-Fire Monitoring Group). The Mediation and Security Council can make decisions by a two-thirds majority on all matters relating to peace and security including the authorization of all forms of intervention and the deployment of political and military missions.²¹ ECOMOG consists of civilian and military standby forces charged, among others, with the following missions: peacekeeping and restoration of peace; humanitarian intervention in support of humanitarian disaster; enforcement of sanctions; peace building, disarmament, and demobilization; policing activities; and any other operations as may be mandated by the Mediation and Security Council²²

It follows that ECOWAS has the power to intervene militarily in a member State where a democratically elected government is overthrown. Niger has signed and ratified the above

²³ Anwesh Laskar, 'Use of Force Under Article 51 of the UN Charter' *TERI School of Advanced Studies*, <[7abbArticle-XI \(Page 72-76\).pdf \(amity.edu\)](#)> accessed on the 21st April, 2024.

²⁴ Bola Akinterinwa, 'ECOWAS Protocols and Regional Insecurity: Right of Establishment versus Armed Banditry in Nigeria' *This Day* <<https://www.thisdaylive.com/index.php/2021/02/28/ecowas-protocols-and-regionalinsecurity-rightofestablishment-versus-armed-banditry-in-nigeria>> accessed on the 23rd April, 2024.

²⁵ Articles 2 and 3.

²⁶ Articles 2 and 3.

²⁷ Article 25.

²⁸ Article 10.

²⁹ Article 22.

instruments and therefore has consented to such intervention. Consequently, ECOWAS's threat to use force is lawful because it is based on a treaty right. Any decision to actually use force should be taken by the Mediation and Security Council with the requisite majority. However, as noted earlier, there is opposition to such a course of action. If ECOWAS or certain member States acting on its behalf were to use force to restore the previous government in contravention of the voting requirements, the action would be unlawful. The stalemate could be overcome by seeking Security Council authorization under Article 53(1) of the UN Charter. If the Security Council authorized ECOWAS or any of its member States to use force to restore the deposed government, the action would be lawful. This raises the question of the relationship between ECOWAS and the Security Council. Article 52 of the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security does not impose an obligation on ECOWAS to obtain Security Council authorization but only to inform the UN of any military intervention undertaken in accordance with the Protocol. The reason that such interventions are lawful is because member States have given their prior consent. However, if ECOWAS is unable to make such a decision due to disagreement among its member States, it can appeal to the SC. Moreover, Security Council authorisation will bring into play Article 103 of the UN Charter according to which UN obligations prevail over all others.²³

Regarding the AU, revised Article 4(h) of the AU's Constitutive Act 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. Article 4(h) plays a dual role: it empowers the AU to intervene militarily within member States in cases where the internal legitimate order is threatened; and is also an expression of the consent of AU member States to intervention by the AU. Consequently, AU interventions do not require prior SC authorization but are lawful on the basis of treaty-based consent. There are, however, a number of issues that require further explanation. First, Article 4(h) justifies military intervention to protect the legitimate order against threats. The legitimate order may refer to the constitutional government regardless of whether it is democratic according to western liberal notions of democracy or the government that is in power, as the AU's reluctance to act against the Gaddafi regime demonstrates.

However it is interpreted, it covers the case of Niger. Second, there is the question of whether Niger's consent to intervention by becoming a member of the AU is perpetual or should be granted *de novo*. In our opinion, such consent granted in a constitutional treaty is perpetual until Niger withdraws from the AU. Third, there is the question of the relationship between ECOWAS and the AU regarding military intervention.

ECOWAS, other African sub-regional organizations, and the AU form the African Peace and Security Architecture (APSA). The relations between sub-regional organizations and the AU

³⁰ Russell Buchan, 'The Niger Coup and the Prospect of Military Intervention: An International Law appraisal' Articles of War <<https://lieber.westpoint.edu/niger-coupecowas-military-intervention-internationallawappraisal/>> accessed on the 22nd April, 2024.

are characterized by the principle of subsidiarity and the principle of primacy of the AU and its institutions. The AU's primacy is recognized in Article 16 of the Protocol Establishing the Peace and Security Council and the Memorandum of Understanding with regional communities. With regard to the AU, decisions to intervene are taken by the AU's Peace and Security Council (PSC) on the basis of consensus or in the absence of consensus by a two-thirds majority.²⁴ Under the Protocol Establishing the Peace and Security Council of the AU, the intervention is performed by the African Standby Force (ASF), which consists of contingents from AU regional economic communities including ECOWAS.²⁵ This means that ECOWAS can appeal to the AU but the AU can also be seized of the matter of its own accord. The AU can authorize any member State or coalitions of States to use force to restore democracy. It can also authorize ECOWAS or ECOWAS member States to do so. These options are quite remote due to a reported lack of consensus within the AU on military action. If consensus is somehow achieved and the AU decides to intervene militarily by deploying the ASF, one issue that may arise is whether States opposed to the use of force should consent to their troops participating in the operation.

i. Ad Hoc Consent

International law accepts interventions at the invitation of host governments because the invitation is an expression of the State's sovereign will. State practice is quite rich in this regard, such as the United States' military action in Iraq against ISIL at the request of the Iraqi government and the French and Chadian military intervention in Mali in 2012-2013 to support the Malian government in its fight against Islamists. The AU's Constitutive Act also recognizes in Article 4(j) "the right of Member States to request intervention from the Union in order to restore peace and security." In order for host State consent to justify external military intervention it should be valid, free, precede the action, and be specific.²⁶ Consent is valid if it is granted by an authority that can express the will of the State for international law purposes. Traditionally, international law has given prominence to the factual criterion of effective control in that only the government or authority that exercises effective control over a state's territory and people can issue such an invitation, a test that applies regardless of its representative or democratic character.³⁶ In the case of Niger, this appears to be the military junta which will not, of course, invite foreign intervention. Over time, international practice seems to have moved

³¹ Article 8(13)

³² Articles 4, 6, 7 and 13.

³³ Perisic Petra, 'Intervention by Invitation - When Can Consent from A Host State Justify Foreign Military Intervention?' <<https://cyberleninka.ru/article/n/intervention-byinvitation-when-can-consent-from-ahoststate-justify-foreign-militaryintervention>>accessed on the 24th April, 2024.

³⁶ Ibid.

³⁷³⁷ Russell Buchan, 'The Niger Coup and the Prospect of Military Intervention: An International Law appraisal' Articles of War <<https://lieber.westpoint.edu/niger-coupecowas-military-intervention-internationallawappraisal/>>accessed on the 23rd April, 2024.

away from the effective control test because the constellation of power is not always clear-cut in times of civil unrest and, perhaps more importantly, the political attitude of States has changed by placing greater emphasis on the democratic legitimacy of governments³⁷. For example, the Malian government could lawfully request outside intervention because of its democratic credentials 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. With regard to Niger, on 26th of July, 2023, the Security Council issued a press release referring to President Bazoum's administration as the 'legitimate government of the Republic of Niger.' If this view is followed, Niger's deposed President Bazoum possesses the constitutional authority to invite external intervention from the AU on the basis of Article 4(j) or from any other State or international organization. On 3rd of 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." 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.²⁷ As is apparent from the op-ed, 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 International Court of Justice, for example, interpreted the statement included in an agreement between the Democratic Republic of the Congo and Uganda to "cooperate in order to ensure security and peace along the common border" as amounting to consent to military intervention even if the words "force" or "military intervention" were not used.²⁸ However, the Court reached this conclusion by considering the subsequent practice of the two States and the lack of complaint. President Bazoum's statement can also be 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, which is more evocative.³⁶

We shall consider whether ECOWAS can intervene lawfully to restore democracy even if it acts without Security Council authorization or beyond its constitution. This brings to the fore the legal status of the right of unilateral pro-democratic intervention. Although democracy may be emerging or perhaps has emerged as a fundamental human right, the right to use force to restore democracy has gained little support among States and international law scholars, albeit with certain exceptions.²⁹ There is little, if any, evidence of State practice to support the legality of pro-democratic intervention under international law but there is certainly widespread condemnation of such a right. An often-cited example of pro-democratic intervention is the United States' use of military force in Panama in 1989 to remove Manuel Noriega from power

³⁸ 34 Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Simon Chesterman, *Unilateral Intervention to Promote Democracy* (Oxford University

Press: 2002) <<https://academic.oup.com/book/9945/chapterabstract/157290733?redirectedFrom=fulltext>> accessed on the 25th April, 2024. ⁴² Ibid.

after he lost the presidential election but refused to step down. However, the United States justified its use of force on the basis of the right of self-defence rather than the doctrine of prodemocratic intervention, with the UN General

Assembly condemning the operation.⁴² In 2016, the sitting president of the Gambia refused to accept defeat after he lost the presidential election. The AU and ECOWAS made it clear that they would only accept Barrow as the democratically elected president and determined to take “all necessary measures” to guarantee the will of the Gambian people. ECOWAS went even further and stated “If he [Jammeh] is not going, we have stand-by forces already alerted and these stand-by forces have to be able to intervene to restore the people’s wish.” Senegalese forces briefly intervened in the Gambia and, shortly thereafter, power was ceded to Barrow. While this may look like an example of State practice in favor of pro-democratic intervention, Senegal did not justify its use of force on this basis. In fact, Senegal maintained that its forces entered The Gambia by mistake, citing their lack of knowledge of the terrain and the various borders. While Senegal breached Article 2(4) of the UN Charter even if the intervention was a mistake, the critical point is that it did not justify its use of force on the basis of a right to pro-democratic intervention. In 1998, Nigerian-led ECOMOG intervened in Sierra Leone to restore the ousted president without SC or AU authorization or the consent of the local government. Although ECOWAS made a number of declarations vowing the return of the democratically elected president with peaceful means or even the use of force, the legal basis of the intervention remains ambiguous.³⁰ The SC did not authorize the intervention but called upon the junta to step down and demanded States to enforce the sanctions. It has been argued that the Security Council retroactively authorized the intervention with Resolution 1162 (1998) but that is not legally correct since Security Council authorization should be granted prior to the action and be explicit.

It can thus be said with reason that a unilateral right to prodemocratic intervention has not been established. Instead, prodemocratic intervention can take many forms; it can involve peaceful measures of capacity building, electoral assistance, agreements to restore democracy and forcible means under the auspices of the UN, such as the intervention in Haiti in 1994. That said, unilateral and forcible pro-democratic interventions may be tolerated by considering factors such as the aims of the intervention, the multinational character of the intervening force, the level of domestic and international support for the intervention or the ousted government, external recognition of the ousted government, and the prior exhaustion of peaceful remedies. There is thus no clear answer as to whether the international community would condemn any unauthorized ECOWAS military intervention.

Conclusion

The overthrow of democracy in Niger represents a threat to the AU’s push to democratize the continent as well to the UN system more generally. ECOWAS has rightly come out in favor of

⁴² Ibid

returning President Bazoum to power, as has the UN's Secretary General who "strongly condemns the unconstitutional change of government in Niger." 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 post has assessed its legality under international law. If the projected force is lawful, the threat of force is also lawful. It appears that there are two possible legal bases for the threat or use of force in Niger. First, consent can provide a legal basis for the use of force. Niger is a member of ECOWAS and the AU, which have the power under their constitutions and related instruments to use all means including the use of force to restore constitutional order in member States. At present, there are disagreements within ECOWAS and the AU to set this mechanism in motion. Consent can be also provided *ad hoc* where an authorized governmental official requests or invites foreign intervention. We made the case that such authority resides with President Bazoum but an important question is whether the Nigerien constitution empowers other government officials to invite outside assistance. 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.

Beyond these two options, the unilateral use of force to restore democracy is not firmly established in international law. The restoration of democracy is worth pursuing by using peaceful means but it may be the case that using force in Niger would be legitimate, if strictly speaking unlawful.