

# STATE PRACTICE EVIDENCE OF THE HUMANITARIAN INTERVENTION DOCTRINE: THE ECOWAS INTERVENTION IN SIERRA LEONE

## I. INTRODUCTION

The world is replete with humanitarian disasters, often perpetrated by governments upon their own citizens. Today, civilians in Afghanistan, Burundi, Columbia, Democratic Republic of Congo, Indonesia, Iraq, Sudan, and many other countries suffer murder, rape, and torture at the hands of government or paramilitary forces.<sup>1</sup> Unfortunately, with few exceptions,<sup>2</sup> the United Nations (U.N.) Security Council is unwilling or unable to act due to institutional and political barriers to worldwide collective action.<sup>3</sup> Despite the failure of the U.N., states still have a moral imperative to stop governments from committing large-scale atrocities against their own people. In a number of recent cases, states have engaged in unilateral<sup>4</sup> humanitarian interventions<sup>5</sup> to solve these crises. While such humanitarian interventions are good policy, are they in accordance with international law?

Treaties are a central component of international law,<sup>6</sup> and the U.N. Charter, with 189 state signatories,<sup>7</sup> is the paramount multilateral treaty.

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1. See generally AMNESTY INTERNATIONAL, REPORT 2000 (2000) (documenting humanitarian disasters and atrocities worldwide).

2. See, e.g., Res. 688, U.N. SCOR, 2982d mtg., U.N. Doc. S/RES/688 (1991) (calling for humanitarian assistance for Kurds in Iraq); Res. 794, U.N. SCOR, 3145th mtg., U.N. Doc. S/RES/794 (1991) (authorizing large and far-reaching humanitarian mission in Somalia).

3. Even in those instances where the U.N. Security Council purportedly authorized a use of force to intervene in a humanitarian crisis, it did so reluctantly. See Jeffrey Clark, *Debate in Somalia: Failure of the Collective Response*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 205, 221-22 (Lori Fisler Damrosch ed. 1993); Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS, *supra* at 77, 79.

4. Unless otherwise noted, the use of the word "unilateral" in this note indicates actions taken by a state alone or a group of states through a regional organization, as opposed to a United Nations sponsored "collective action." For similar treatment, see David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 264 (1992). "Joint action" refers to an intervention conducted by more than one nation, but without U.N. approval.

5. "Humanitarian intervention has been defined as: '[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.'" Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203-04, n.3 (1974), quoting E. STONWELL, INTERNATIONAL LAW 348 (1931).

6. See Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, at Pmb1.

7. See Information Technology Section, Department of Public Information, United

Literally interpreted,<sup>8</sup> Article 2(4) of the U.N. Charter explicitly prohibits a state from using force against another state,<sup>9</sup> except in self-defense.<sup>10</sup> However, customary international law, the common law of interstate relations, is equal in status to treaties as a source of international law.<sup>11</sup> When a treaty and customary international law conflict, the "last in time" rule applies, which states that the law that came into existence last generally prevails.<sup>12</sup> Assuming the U.N. Charter prohibits states from intervening with force in another state,<sup>13</sup> any lawful humanitarian intervention must be founded on overriding, more recently formed customary international law. Thus, for a humanitarian intervention not approved by the U.N. Security Council to be legal, customary international law allowing humanitarian interventions must have formed since the original signing of the U.N. Charter in 1945.

To prove the existence of customary international law, one must establish both historical state practice and *opinio juris*.<sup>14</sup> First, the consistent, reoccurring acts and policies of states must reflect the customary international law.<sup>15</sup> State practice, either unilateral or joint action, includes uses of force and other state policies, diplomatic acts and official statements, and even instances of state inaction.<sup>16</sup> Second, to have *opinio juris*, "it must appear that the states follow the practice from a sense of legal obligation."<sup>17</sup> To demonstrate the existence of customary law, a state must provide evidence that the act completed was due to the compulsion of, or the belief that their actions were consistent with, international law.<sup>18</sup> Evidence of *opinio juris* may include official pronouncements of states, statements of international and national judicial tribunals, and writings of scholars.<sup>19</sup> With extensive evidence of state practice and *opinio juris*, jurists can pronounce the existence of a rule of

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Nations, *Growth in United Nations Membership, 1945-2000*, available at <http://www.un.org/Overview/growth.htm> (2000).

8. See Vienna Convention on Law of Treaties, *supra* note 6, at art. 31 (interpreting treaties using the plain meaning of their texts).

9. U.N. CHARTER art. 2, para. 4.

10. *Id.* art. 51. Some jurists argue that unilateral humanitarian intervention is legal directly under the U.N. Charter, including Article 2(4). See, e.g., Laura Geissler, *The Law of Humanitarian Intervention and the Kosovo Crisis*, 23 HAMLINE L. REV. 323, 337-38 (2000). See also text accompanying *infra* notes 47-48.

11. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (1986); see also Statute of the International Court of Justice, June 26, 1945, art. 38, § 1, 59 Stat. 1055, 1060.

12. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. j (1986).

13. Many scholars do not accept the assumption that the U.N. Charter prohibits humanitarian interventions. See *infra* text accompanying notes 46-50.

14. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1986); see also J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984), reprinted in INTERNATIONAL LAW 134-36, 136 (Barry Carter & Phillip Trimble, eds., 3rd ed. 1999).

15. STARKE, *supra* note 14, at 136.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b (1986).

17. *Id.* § 102 cmt. c.

18. STARKE, *supra* note 14, at 136-37.

19. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103(2) (1986).

customary international law and states can safely act in accordance with that law.

Today, many scholars support the humanitarian intervention doctrine, a rule of customary international law providing an exception to the general prohibition on the use of force for humanitarian interventions. Unfortunately, these proponents have so far failed to accumulate enough evidence to establish the substantiality necessary to prove customary international law, due to the quantity and quality of their state practice analyses. First, while there is no fixed quantity of state practice examples required to prove customary international law, a majority of jurists are unconvinced of the existence of the humanitarian intervention doctrine because of an insufficient number of concrete cases. Recently, however, the world has seen a number of unilateral humanitarian interventions, most notably in Kosovo,<sup>20</sup> nearly overcome that lack of evidence. The doctrine will become commandingly persuasive with the addition of a few future interventions. This article will add to that quantity of state practice evidence by examining the 1998 intervention in Sierra Leone by the Economic Community of Western African States (ECOWAS), an economic union and regional security organization that includes Sierra Leone and most other nations of Western Africa.<sup>21</sup>

Second, jurists on both sides of the debate have been too quick to judge the existence of the humanitarian intervention doctrine. Proponents of the doctrine, like Jean-Pierre Fonteyne,<sup>22</sup> Michael Bazzyler,<sup>23</sup> and Ved Nanda,<sup>24</sup> arrive at the realization of the doctrine in a few pages after abbreviated

20. See Geissler, *supra* note 10, at 344-45 (arguing that Kosovo provided state practice evidence of the humanitarian intervention doctrine); *but see* Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 36 (2000) (claiming that NATO's action "in Kosovo cannot be viewed as groping toward a new international law doctrine of humanitarian intervention"); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1787 (2000) (concluding that humanitarian intervention in Kosovo was legal under international law).

21. See generally Economic Community of West African States: Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter *ECOWAS Treaty*]. Signatory nations are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. See *id.* preamble, 35 I.L.M. at 664. ECOWAS was formed in 1975.

22. See Fonteyne, *supra* note 5 (developing the humanitarian intervention doctrine and defending it against challenges of invalidity considering article 2(4) of the U.N. Charter).

23. See Michael Bazzyler, *Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia*, 23 STANFORD J. INT'L L. 547 (1987) (expounding and establishing criteria for the humanitarian intervention doctrine).

24. See Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia, and Haiti - Revisiting the Validity of Humanitarian Intervention Under International Law - Part I*, 20 DENV. J. INT'L L. & POL'Y 305 (1992) (examining the humanitarian intervention doctrine in light of contemporary interventions) [hereinafter *Tragedies I*]; Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention Under International Law - Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998) (updating his previous article with short case studies of recent state practice) [hereinafter *Tragedies II*].

examinations of former state practice and *opinio juris*. In a similar manner, opponents of the doctrine, such as Ian Brownlie,<sup>25</sup> Oscar Schachter,<sup>26</sup> and Jost Delbruck,<sup>27</sup> summarily deny its existence without thoroughly examining each example of state practice or *opinio juris*. While these scholars support their assertions with skillful analysis, because they discuss so many supporting examples, they truncate each analysis to fit concisely into a single article. Jurists cannot, however, curtail the laborious process of proving the existence of customary international law: scholars must methodically examine each piece of *opinio juris* or state practice evidence to determine its relevance, weight and true meaning. Only after a truly thorough analysis can a jurist point to the required mountain of evidence and declare the existence of the humanitarian intervention doctrine. Thus, to prove the humanitarian intervention doctrine, one must examine separately and exhaustively each piece of evidence that supports the doctrine. This article aims to examine one piece of state practice evidence with sufficient particularity.

For a state practice to give support to the existence of the humanitarian intervention doctrine, it must comply with the criteria formulated in Conditionalist theory. Conditionalists recognize the legality of humanitarian interventions, but to curb abuse "would allow the unilateral use of force for humanitarian purposes when certain objective criteria are met."<sup>28</sup> While numerous other scholars have proposed theories on the legality of humanitarian intervention,<sup>29</sup> only true Conditionalists, such as Fonteyne, Bazylar, and

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25. See Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 219 (John Norton Moore ed., 1974) (arguing self-help by states is illegal except in self-defense after enactment of article 2(4) of the U.N. Charter).

26. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) (concluding that unilateral intervention is only allowed in self-defense and possibly the rescuing of hostages); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984) (rejecting unilateral intervention on humanitarian grounds); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986) (arguing that law limits unilateral uses of force to self-defense).

27. See Jost Delbruck, *Commentary on International Law: A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887 (1992) (promoting an expanded role for U.N. humanitarian interventions while simultaneously denying the legality of any humanitarian intervention without U.N. authority).

28. Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 279 (1994).

29. See Geissler, *supra* note 10, at 333-35 (surveying modern scholars supporting humanitarian intervention); see also, e.g., Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 374 (1995) (arguing that there is a right to humanitarian intervention, for preventing atrocities and restoring democracy); Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 RECUEIL DES COURS [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9, 256-57 (1993) (permitting humanitarian intervention when there is a "genuine, immediate and dire emergency which could not be redressed" without intervention, and requiring an exhaustion of U.N. remedies); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts*:

Nanda,<sup>30</sup> present the humanitarian intervention doctrine in a useful and understandable way by employing normative criteria. Part II of this note discusses the Conditionalist theory in detail. Part III depicts the human rights disaster that enveloped Sierra Leone directly after the 1997 coup and the ECOWAS intervention that ended the crisis nine months later.<sup>31</sup> Part IV briefly reviews other theories on the legality of the ECOWAS intervention. Part V demonstrates how the ECOWAS intervention conformed to the humanitarian intervention doctrine by applying Conditionalist criteria, therefore providing evidence of state practice for the humanitarian intervention doctrine. In the words of Justice Horace Gray, this note is not a statement of "the speculations of [the author] concerning what the law ought to be, but ... trustworthy evidence of what the law really is."<sup>32</sup>

## II. CONDITIONALIST THEORY ON AN EXCEPTION TO THE PROHIBITION AGAINST USE OF FORCE FOR HUMANITARIAN INTERVENTIONS

### A. *Development of Conditionalist Theory*

Over the past thirty years, Conditionalists have described customary international law as permitting unilateral humanitarian intervention.<sup>33</sup> By relying on historical state practice and *opinio juris*, the Conditionalists argued that a right of humanitarian intervention exists and defined its scope with five criteria.<sup>34</sup> State practice and *opinio juris* from both before and after the formation of the U.N. in 1945 supported the Conditionalist theory.<sup>35</sup> Before

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*The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 336-38 (1998) (postulating three criteria so general as to be inutile).

30. See *supra* notes 22-24.

31. This note does not seek to explore the legality of ECOWAS interventions in Sierra Leone after the deposal of the coup leaders. While later humanitarian crises featured even more horrific and widespread atrocities than recounted in this note, those interventions were legal because Kabbah, firmly established by ECOWAS forces and a newly revitalized Sierra Leonean national army as the legitimate head of state, had invited ECOWAS troops to enter, thus excepting them from the prohibition on use of force and forgoing necessary reliance on the humanitarian intervention doctrine. For a discussion of intervention by invitations, see text accompanying *infra* notes 142-44.

32. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

33. See, e.g., Bazzyler, *supra* note 23; Fonteyne, *supra* note 5; *Tragedies I*, *supra* note 24.

34. Not all Conditionalists used the same criteria; however, the five basic criteria presented in this article generally reflect most authors' standards. Compare Bazzyler, *supra* note 23, at 598-607, with Burmester, *supra* note 28, at 279-83, with Fonteyne, *supra* note 5, at 258-68, with *Tragedies I*, *supra* note 24, at 330.

35. While examining evidence prior to the signing of the U.N. Charter may seem to rely on evidence that would violate the last in time rule for conflict of international law, the point of formation of customary international law is when both state practice and *opinio juris* are totally satisfied, while relying on evidence through history. See STARKE, *supra* note 14, at 134-36 (discussing when a usage becomes customary international law). Therefore, the last in time rule would still give precedence to the customary international law because it formed after the 1945 signing of the U.N. Charter.

1945, state practice and *opinio juris* hinted at the existence of the humanitarian intervention doctrine. Examples of state practice evidencing the humanitarian intervention doctrine include numerous European interventions in the Muslim Ottoman Empire to protect repressed Christians and the 1898 United States intervention in Cuba, which President William McKinley justified partly on humanitarian grounds.<sup>36</sup> Pre-World War II *opinio juris*, manifested in the writings of scholars such as St. Thomas Aquinas, Grotius, Vattel, Borchard, and Oppenheim, and Antoine Rougier, the first Conditionalist, writing in 1910, upheld this doctrine.<sup>37</sup> In the decades surrounding the turn of the twentieth century, most publicists supported some form of the humanitarian intervention doctrine.<sup>38</sup> The roots of the humanitarian doctrine were securely in place before the signing of the U.N. Charter.

After the 1945 establishment of the United Nations, state practice and *opinio juris* advanced the humanitarian intervention doctrine to the cusp of customary international law. Conditionalists cite numerous modern humanitarian interventions to lend state practice evidence to their theory. For example, in 1964, Belgium and the U.S. acted with purely humanitarian intent when deploying troops to the Congo to rescue over two thousand alien hostages.<sup>39</sup> Later, in 1971, India intervened in the Pakistani civil war to support the independence of Bangladesh. While regional geopolitics influenced India's decision to invade, the "documented facts that the West Pakistani army was engaging in mass slaughter, rape and pillage in East Bengal [Bangladesh]" was also a primary motive.<sup>40</sup> Humanitarian concern substantially motivated Tanzania's 1979 invasion of Uganda, in which Tanzanian forces ousted the brutal Amin regime responsible for the execution of 300,000 Ugandan citizens and the rape and displacement of many thousands

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36. Fonteyne, *supra* note 5, 205-13; see also Bazylar, *supra* note 23, at 582-83; but see Brownlie, *supra* note 25, at 220-21 (criticizing reliance on this state practice evidence as "ex post factoism" because it only infers the intervenors' dependence on the humanitarian intervention doctrine). European states often undertook these interventions through the Concert of Europe. See Bazylar, *supra* note 23, at 582.

37. Bazylar, *supra* note 23, at 571-73; Fonteyne, *supra* note 5, at 214-26.

38. *Tragedies I*, *supra* note 24.

39. Bazylar, *supra* note 23, at 587-88; see also Fonteyne, *supra* note 5, at 233.

40. Bazylar, *supra* note 23, at 588-89; see also Fonteyne, *supra* note 5, at 233-34; *Tragedies I*, *supra* note 24, at 315-19; but see, Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 185, 193 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) (arguing that the fact that India did not explicitly rely on the humanitarian intervention doctrine in its invasion of Bangladesh detracts from the intervention's persuasiveness as evidence of state practice). Farer seems to overlook many statement made by Indian representatives in the United Nations that indicated a humanitarian motive. Compare Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 276, 302-03 (1973) (arguing that these statements were a historical anomaly and therefore does not support the humanitarian intervention doctrine), with *Tragedies I*, *supra* note 24, 317-18 (citing the Bangladesh intervention and India's accompanying statements as strong support for the humanitarian intervention doctrine).

more.<sup>41</sup> After the Gulf War, the United States and Britain established safe havens to allow brutally oppressed Kurds safety from their Iraqi oppressors.<sup>42</sup> Finally, the North Atlantic Treaty Organization (NATO) conducted a bombing campaign in Kosovo to end the Yugoslavian government's campaign of ethnic cleansing against ethnic Albanians.<sup>43</sup> State practice after 1945 evidences nations' accordance to the humanitarian intervention doctrine.

The greatest weakness in the recognition of the humanitarian intervention doctrine is modern *opinio juris*. While numerous jurists recognize the doctrine,<sup>44</sup> there is a general dearth of explicit acknowledgement of the doctrine as customary international law by governments. However, such acknowledgement is impossible due to the self-defeating legalistic hypersensitivity of modern states. No state wants to risk accusations that their actions have violated international law. Therefore, even if they act pursuant to a rule of customary international law condoning unilateral humanitarian intervention, the state will never admit to doing so, because the very existence of the rule is in dispute. The failure of each state to admit recognition of the humanitarian intervention doctrine prevents all other states from acknowledging it. Therefore, heavy reliance on government statements to prove *opinio juris* for any emerging rule of customary international law is inherently self-defeating. Instead, to confirm the humanitarian intervention doctrine, jurists must rely on other forms of *opinio juris*, including legal scholarship,<sup>45</sup> and especially state practice.

### B. Critique of the Humanitarian Intervention Doctrine

In addition to maintaining that insufficient evidence exists to support the humanitarian intervention doctrine, some scholars believe that international

41. Bazyler, *supra* note 23, at 590-92; *Tragedies I*, *supra* note 24, at 319-21; but see Farer, *supra* note 40, at 193 (arguing that Tanzania did not rely on the humanitarian intervention doctrine in its invasion of Uganda, detracting from its persuasiveness as evidence of state practice).

42. *Tragedies I*, *supra* note 24, at 331-34.

43. See authorities cited in *supra* note 20.

44. See Bazyler, *supra* note 23, at 576-80 (detailing numerous scholarly declarations and articles supporting the humanitarian intervention doctrine); Burmester, *supra* note 28, at 278-85 (citing numerous modern proponents of the humanitarian intervention doctrine); see also, e.g., *Report of the World Conference on Human Rights*, U.N. GAOR, at 35, U.N. Doc. A/CONF.157/24 (Part I) (1993) ("The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end."); authorities cited *supra* notes 22-24, 29; but see, e.g., Vladimir Kartashkin, *Human Rights and Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, 202, 208-09 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that only the U.N. Security Council can legally intervene for humanitarian purposes); authorities cited *supra* notes 25-27.

45. See Fonteyne, *supra* note 5, at 233 ("The opinions of the leading scholars, especially in an essentially non-institutionalized structure such as that of international law, have a significant impact upon the development of the legal norm ....").

law outright forbids humanitarian interventions. Most opponents claim that Article 2(4) of the U.N. Charter prohibits all unilateral uses of force, including humanitarian interventions, except in self-defense.<sup>46</sup> However, this interpretation is needlessly broad. First, the text of the Charter only prohibits the use of force when it is inconsistent with the principles of the U.N., such as infringement upon the territorial integrity or political independence of another state.<sup>47</sup> A truly lawful humanitarian intervention, complying with the criteria examined below, does not violate these principles; instead, it supports the principles of human rights extolled in the U.N. Charter.<sup>48</sup> Second, even if the plain meaning of the text excludes humanitarian interventions, states should not interpret the Charter to prohibit such actions because of changing circumstances. The framers of the Charter originally intended that the U.N. conduct collective interventions in appropriate cases of extreme atrocities; yet, the U.N.'s involvement in this area, due to geopolitical and economic restraints, has been virtually nonexistent.<sup>49</sup> Until the U.N. can realistically perform its intended duties, its limiting features cannot bind the signatories. Finally, the "last in time" rule gives precedence to customary international law formed after the signing of the U.N. Charter in 1945.<sup>50</sup> Regardless of whether the humanitarian intervention doctrine has formed in the recent past or will form in the near future, because it came into existence after 1945, it overrides contrary language in the U.N. Charter.

Critics of the humanitarian intervention doctrine further claim it is nonfunctional because it is fraught with abuse, as disingenuous states use the cover of a legal humanitarian intervention to justify malevolent uses of force.<sup>51</sup> However, the possibility of abuse does not preclude the existence of customary international law; customary international law permitting the use of force in self-defense is undisputed, despite innumerable acts of aggression mendaciously claiming that right.<sup>52</sup> Additionally, Conditionalists differentiate

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46. See, e.g., Brownlie, *supra* note 25, at 219; Franck & Rodley, *supra* note 40, at 299.

47. *Tragedies II*, *supra* note 24, at 864.

48. U.N. CHARTER art. 1.

49. See Fonteyne, *supra* note 5, at 257.

50. See *supra* text accompanying notes 12-13.

51. See Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Rights*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, 213, 215-21 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that powerful nations can manipulate regional and collective organizations to purport humanitarian interventions while possessing "less than purely humanitarian motiv[es]"); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, *supra* note 40, at 305; Lobel, *supra* note 20, at 28.

52. Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 *RECUEIL DES COURS* [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9, 316 (1991); cf. Fonteyne, *supra* note 5, at 269 ("It is a big mistake, in general, to stop short of recognition of an inherently just principle, [merely] because of the possibility of non-genuine invocation." (quoting *Lettre de M. Arniz*, in Rolin-Jacquemyns, *Note sur la Théorie du Droit d'Intervention*, 8 *REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE* [REV. DR. INT'L & LEGISL. COMP.] 675, 679 (1876))).



genuine humanitarian interventions from inauthentic claims by utilizing definitive and substantial criteria. Detractors retort that unless criteria are so general as to be useless, narrow and inflexible criteria make legality under the humanitarian doctrine too difficult to achieve, leaving many of the worst humanitarian crises unremedied.<sup>53</sup> Answering these critiques, Conditionalists accurately state the emerging rule of customary international law of humanitarian intervention by carefully balancing the definitive with the flexible, arriving at criteria that specify when a unilateral use of force for humanitarian objectives is legitimate. The criteria are useful for analyzing legitimacy after an intervention, while also serving as an expedient standard for when a nation may and should unilaterally intervene.<sup>54</sup>

### C. *Criteria for a Legitimate Humanitarian Intervention*

To assess the legitimacy of a humanitarian intervention, Conditionalists generally apply five criteria. First, large-scale atrocities must occur or be imminent.<sup>55</sup> This criterion raises the question "who decides [which] human rights violations are so gross and massive as to warrant armed intervention."<sup>56</sup> Certainly, the threshold is met by violations of *jus cogens* norms of international law,<sup>57</sup> which include genocide, slavery, systematic murder or causing the disappearance of individuals, and torture or other cruel, inhuman, or degrading treatment.<sup>58</sup>

Second, the intervening state must have an overriding – but not necessarily pure – humanitarian motive.<sup>59</sup> To fulfill this criterion, there must be evidence supporting a benign humanitarian motive without any more substantial ulterior motive, such as territorial gain.<sup>60</sup> This criterion may often

53. See Lobel, *supra* note 20, at 32.

54. See Bazylar, *supra* note 23, at 598.

55. *Id.* at 598-601; Fonteyne, *supra* note 5, at 258-60; *Tragedies I*, *supra* note 24, at 330; see also Franck, *supra* note 29, at 257.

56. Lobel, *supra* note 20, at 30.

57. See Levitt, *supra* note 29, at 341 ("[H]umanitarian intervention should only be justified when responding to human rights abuses that are so grave that they violate the *jus cogens* norms of international law (to persecute, oppress, exterminate, enslave or deport civilian populations.)"). *Jus cogens* are "preemptory norm[s] of general international law ... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ..." Vienna Convention on the Law of Treaties, *supra* note 6, art. 53.

58. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986); see also Bazylar, *supra* note 23, at 600; see generally Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989) (surveying development of *jus cogens*). Rape is generally considered a form of torture banned by international law. See, HUMAN RIGHTS 372-79 (Louis Henkin, et. al., eds., 1999).

59. Bazylar, *supra* note 23, at 601-02; Fonteyne, *supra* note 5, at 261; see also *Tragedies I*, *supra* note 24, at 330.

60. See, e.g., Bazylar, *supra* note 23, at 608-09, 613-16, *Tragedies I*, *supra* note 24, at 320-21, 322.

be problematic, because nations usually equivocate concerning their numerous motives for an intervention.

Third, there is a preference for joint action.<sup>61</sup> Nations should first try to intervene collectively through the United Nations;<sup>62</sup> if this proves impracticable, states should act jointly with other states, preferably through a regional organization.<sup>63</sup> Regional organizations often face the problem of hegemonic domination, making their actions seem truly effectuated by a single state.<sup>64</sup> However, most regional organizations have some diversity of control, providing at least a partial check on the use of the organization for the pugnacity of a hegemon.

Fourth, the intervention should be limited in duration and magnitude to that necessary to cease the atrocities.<sup>65</sup> If required to end the human rights violations, the intervenor may remove illegitimate or pernicious leaders.<sup>66</sup> This criterion reflects closely the requirement for all allowable uses of force of necessity and proportionality.<sup>67</sup> Due to the often protracted nature of humanitarian missions, the limit on duration of the intervention includes the corollary: "whenever feasible, U.N. multilateral troops should be substituted as soon as possible for the intervening forces."<sup>68</sup>

Finally, an intervenor must exhaust all peaceful remedies before resorting to a use of force, including diplomatic appeals, international condemnation, and economic sanctions.<sup>69</sup> This criterion recognizes that in some instances the humanitarian need is so urgent or the peaceful options so

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61. See Bazylar, *supra* note 23, at 602-04; Fonteyne, *supra* note 5, at 266-67; see also *Tragedies I*, *supra* note 24, at 330.

62. See Fonteyne, *supra* note 5, at 264-65.

63. See Bazylar, *supra* note 23, at 602-03; see also Fielding, *supra* note 29, at 374-76 (arguing that customary international law permits states to intervene in a humanitarian crisis unilaterally if the U.N. Security Council fails to act).

64. See Lobel, *supra* note 20, at 30-31.

65. Bazylar, *supra* note 23, at 604-06; Fonteyne, *supra* note 5, at 262-64; *Tragedies I*, *supra* note 24, at 330; see also Geissler, *supra* note 10, at 335 (citing Nanda's concentration on the limit on purpose, duration, and force used in a humanitarian intervention); *Tragedies II*, *supra* note 24, at 864 ("For humanitarian intervention to be considered valid it is usually undertaken for a limited purpose and duration ....").

66. See Bazylar, *supra* note 23, at 604; but see Fonteyne, *supra* note 5, at 262-63 (disallowing suspect humanitarian interventions that feature the removal of abusive leaders).

67. Bazylar, *supra* note 23, at 604; Fonteyne, *supra* note 5, at 262. Well-established customary international law provides that any use of force in reprisal for the violation of international law must be related to the law violated and reasonably proportionate in intensity to the magnitude of the violation. See Sir Claud Humphrey Meredith Wadlock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 460 (1952).

68. Bazylar, *supra* note 23, at 605; see also *Tragedies I*, *supra* note 24, at 332 (supporting the U.S./British intervention in Iraq to save the Kurds by citing U.S./British efforts to replace American and British troops with U.N. peacekeepers).

69. Bazylar, *supra* note 23, at 606; Fonteyne, *supra* note 5, at 264; see also *Tragedies I*, *supra* note 24, at 334 (recommending that humanitarian intervenors use force only "as a last resort").

futile that alternatives must be forgone.<sup>70</sup> In total, failure in one criterion does not preclude legitimacy, but does require a strong showing in other areas.<sup>71</sup> Conditionalists believe that with the filter of these five criteria, jurists can determine the legitimacy of a unilateral humanitarian intervention in accordance with customary international law. By applying these criteria to the ECOWAS intervention in Sierra Leone, the evidence will demonstrate that ECOWAS complied with the humanitarian intervention doctrine, thus providing state practice evidence for the doctrine.

### III. FACTUAL BACKGROUND: THE 1998 ECOWAS INTERVENTION IN SIERRA LEONE

#### A. *Pre-1997 History*

Sierra Leone, a nation of 5.2 million people, sits on the western coast of Africa.<sup>72</sup> British philanthropists established Sierra Leone as a colony for former slaves discharged from the British military at the close of the American Revolutionary War.<sup>73</sup> Since attaining independence from Britain in 1961, Sierra Leoneans have been ruled by military dictators through successive coups d'état.<sup>74</sup> The United Nations ranks Sierra Leone as the second least developed nation in the world, with per capita income at US\$160 a year and a life expectancy at 43 years.<sup>75</sup> One out of every four children dies before the age of five.<sup>76</sup>

On March 23, 1991, a civil war erupted in Sierra Leone when the Revolutionary United Front (RUF), an unknown group of one hundred fighters led by former army sergeant and professional photographer Foday Sankoh, attacked in the south and east of the country.<sup>77</sup> Amid the chaos that followed, including heavy losses sustained by Sierra Leone's army, Captain Valentine Strasser, a youthful army paymaster, took power in Freetown on a wave of

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70. See Bazylar, *supra* note 23, at 606-07.

71. See *Tragedies I*, *supra* note 24, at 330 (balancing the factors and alternatives to maximize the outcome); see also Bazylar, *supra* note 23, at 591 (forbidding weak evidence of humanitarian motive to disqualify the Tanzanian intervention in Uganda, which "on balance...can be justified on humanitarian grounds.").

72. THE WORLD ALMANAC AND BOOK OF FACTS 857 (Robert Famighetti ed., 2000).

73. Sheldon H. Harris, *An American's Impressions of Sierra Leone in 1811*, 47 J. NEGRO HIST. 35, 35 (Jan. 1962).

74. James Rupert, *Tenuous Peace In Brutal War; Sierra Leone Sides Sign Accord*, WASH. POST, July 8, 1999, at A17 tbl.

75. *Interim Report of the Inter-Agency Mission to Sierra Leone*, U.N. SCOR, Annex ¶ 3, U.N. Doc. S/1998/155 (Feb. 25, 1998) [hereinafter *Interim Report*].

76. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 309 (1998).

77. *Special Reports: Chronology of Sierra Leone: How Diamonds Fuelled the Conflict*, AFRICA CONFIDENTIAL, at <http://www.africa-confidential.com/special.htm> (last visited Jan. 6, 2001) [hereinafter *Chronology*].

popular enthusiasm in 1992.<sup>78</sup> While the conflict raged on for many years, the government had severely damaged the RUF with the help of the South African mercenary security firm Executive Outcomes, forcing the rebels to sign a cease-fire agreement in January 1996, returning the country to civilian rule with free democratic elections.<sup>79</sup> Ahmad Kabbah, a former U.N. diplomat who had been absent from Sierra Leone while working in New York, became president in March 1996 as a result of these elections.<sup>80</sup> By the end of the year, Kabbah and Sankoh signed the Abidjan Accords. This peace agreement between the Sierra Leone government and the RUF included the disarmament of combatants, the integration of the RUF into the government's army, and the inclusion of the RUF in the government as a political entity.<sup>81</sup> Unfortunately, the Abidjan Accords failed to bring peace to the ravaged nation. The RUF did not disarm<sup>82</sup> and instead continued its attacks,<sup>83</sup> while Kabbah scarcely fended off numerous coup attempts from his own army.<sup>84</sup>

*B. The Armed Forces Revolutionary Council and the Human Rights Crisis*

On May 27, 1997, a group of low-ranking military officers headed by Major Johnny Paul Koroma, frustrated by unpaid wages and alleged ethnic favoritism,<sup>85</sup> succeeded in overthrowing the democratically elected government.<sup>86</sup> Kabbah fled the country,<sup>87</sup> while Nigerian ECOWAS forces, already present in Freetown and reinforced by additional soldiers and naval bombardments, clashed with, but ultimately failed to defend against Koroma's rebel fighters.<sup>88</sup> Within days, the victorious Koroma suspended the

78. David Pratt, *Sierra Leone: The Forgotten Crisis* 11, Sessional Paper No. 8530-361-35 (Apr. 23, 1999) (unpublished report to the Can. Minister of Foreign Affairs, on file with Can. Dept. of Foreign Affairs and Int'l Trade), available at <http://www.infoexport.gc.ca/docs/view-e.asp?did=1287>.

79. See Jim Hooper, *Peace in Sierra Leone: A Temporary Outcome?*, JANE'S INTELLIGENCE REV., Feb. 2, 1997, at 91-93.

80. See David Hecht, *Sierra Leone Changes Power Without Coup, Despite Ongoing War*, CHRISTIAN SCI. MONITOR, Apr. 1, 1996, at 6, available at 1996 WL 5040520.

81. See Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), U.N. SCOR, at art. III, V, IX, U.N. Doc. S/1996/1034 (1996).

82. Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 326 (1998).

83. See Pratt, *supra* note 78, at 14.

84. See Adeline Iziren, "Give Kabbah Democracy a Chance": *Sierra Leone Defuses Third Coup Plot in 4 Months*, THE VOICE, Jan. 20, 1997, at 15.

85. Nowrot & Schabacker, *supra* note 82, at 327.

86. See AMNESTY INTERNATIONAL, AI INDEX AFR 51/05/97, SIERRA LEONE: A DISASTROUS SET-BACK FOR HUMAN RIGHTS 3 (1997) [hereinafter DISASTROUS SET-BACK].

87. See Pratt, *supra* note 78, at 14.

88. See Nowrot & Schabacker, *supra* note 82, at 327. ECOWAS forces were present in Freetown as a base of operations for an independent intervention in Liberia. See *id.* There is

constitution<sup>89</sup> and outlawed all political parties and public demonstrations and meetings,<sup>90</sup> despite ongoing resistance from large civilian groups such as labor unions.<sup>91</sup> He then identified Sankoh as his ideological leader<sup>92</sup> and invited the rebel RUF fighters to join his junta,<sup>93</sup> forming the Armed Forces Revolutionary Council (AFRC) to rule Sierra Leone.<sup>94</sup> The U.N., Organization of African Unity (OAU), ECOWAS, the Commonwealth, and European Union swiftly condemned the AFRC coup d'état, while the OAU General Secretary denounced the coup as "unacceptable to the continent." However, the U.N. Security Council failed to take immediate action.<sup>95</sup>

### 1. *Atrocities Committed Directly Against Civilians*

The price for such inaction was substantial: under the AFRC kakistocracy,<sup>96</sup> junta henchmen exercised "a total disregard for the rule of law.... The rule of law completely collapsed and violence engulfed the country."<sup>97</sup> By choosing to bring the RUF into the fold, Koroma linked the AFRC to a rebel group notorious for random murder and mutilation of civilians, especially the crude amputation of hands, feet, ears, and genitals.<sup>98</sup> Immediately after the coup, banks, businesses, and government offices shut down, "while rape and looting became the order of the day."<sup>99</sup> John Ernest Leigh, Sierra Leonean ambassador to the U.S., narrated the crimes committed by the AFRC during testimony before the House of Representatives Subcommittee on Africa:

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disagreement over whether ECOWAS or the coup forces attacked the other first. *Compare id.* (claiming that ECOWAS forces initiated hostilities), with Levitt, *supra* note 29, at 365 (noting that Koroma's forces attacked ECOWAS first).

89. *Restructuring Sierra Leone: Hearing Before the Subcomm. on Afr. of the House Comm. on Int'l Relations*, 105th Cong. 38 (June 11, 1998) (statement of John Ernest Leigh, Sierra Leone's Ambassador to the U.S.) [hereinafter *Restructuring Sierra Leone*]; U.S. DEP'T OF STATE, *supra* note 76, at 298.

90. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, *supra* note 76, at 298.

91. See Africa Research Bulletin, June 1997, at 12735A.

92. See *Chronology*, *supra* note 77.

93. *Restructuring Sierra Leone*, *supra* note 89, at 38 (statement of John Ernest Leigh). Many believe the RUF had complete control over AFRC, with Koroma merely serving only as a figurehead. See *id.* at 1 (statement of Rep. Edward R. Royce, Chairman of the Subcommittee).

94. See DISASTROUS SET-BACK, *supra* note 86, at 1.

95. *Id.* at 8-9; see also Nowrot & Schabacker, *supra* note 82, at 328.

96. See *All Things Considered* (National Public Radio radio broadcast, Feb. 13, 1998), available at 1998 WL 3643801 ("[T]he junta...really are poorly educated, renegades, [and] criminals....").

97. AMNESTY INTERNATIONAL, AI INDEX AFR 51/22/98, SIERRA LEONE: 1998 - A YEAR OF ATROCITIES AGAINST CIVILIANS 16 (1998) [hereinafter *A YEAR OF ATROCITIES*].

98. Pratt, *supra* note 78, at 12.

99. *Id.* at 14.

Thus began the Reign of Terror ... of gang-rape, looting, beatings, jailing, killings, maiming, wounding, kidnappings, abuse of children, and starvation of civilians; the plunder of public funds and natural resources; gun-running; arson; lying; destruction of public records; destruction of private property, intimidation, sanction-busting, illicit mining, and nation-wrecking. The people of Sierra Leone never supported the Koroma coup despite their deprivations and the repeated, gross violations of their civil rights.<sup>100</sup>

During the AFRC rule, government agents committed innumerable acts violating international human rights standards.<sup>101</sup> AFRC soldiers arbitrarily detained and held incommunicado hundreds of political activists, journalists, and university students.<sup>102</sup> The junta used rape systematically as an instrument of control, raping women as punishment for their opposition to the regime.<sup>103</sup> There were countless reports of extrajudicial torture and executions, often featuring unaccountable AFRC soldiers capriciously raping, mutilating, and murdering innocent civilians.<sup>104</sup> In Kenema, an eastern province under RUF control, "terror reigned":

As in Freetown and other parts of the country, rape of girls and women was systematic and at least a hundred civilians were reported to have been deliberately and arbitrarily killed.... Every house in the town was looted. The homes of those perceived to have been supporters of [Kabbah] were destroyed.... [S]everal prominent members of the community ... were stripped and repeatedly beaten with sticks, electric cable and strips of tyres and were threatened with death. Their arms were tied tightly behind them. One of those detained sustained a serious head wound and injury to his eye after being beaten on his head with a gun. At least one of these detained died as a result of beatings.<sup>105</sup>

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100. *Restructuring Sierra Leone*, *supra* note 89, at 38.

101. U.S. DEP'T OF STATE, *supra* note 76, at 303.

102. A YEAR OF ATROCITIES, *supra* note 97, at 17-18.

103. U.S. DEP'T OF STATE, *supra* note 76, at 299, 301. Koroma also decreed that women could be subjected to female genital mutilation without hindrance. *See id.* at 309.

104. A YEAR OF ATROCITIES, *supra* note 97, at 18-20; *see also* DISASTROUS SET-BACK, *supra* note 86, at 18-23; U.S. DEP'T OF STATE, *supra* note 76, at 299-301 (listing hundreds of documented murders during the first months of AFRC rule alone).

105. A YEAR OF ATROCITIES, *supra* note 97, 20-21.

Additionally, the AFRC tortured children, especially child-combatants, and impressed many civilians into forced labor.<sup>106</sup> Finally, the AFRC allegedly planned to carry out genocide against civilians opposed to its rule.<sup>107</sup>

## 2. *Criminal Government Negligence*

Almost as heinous as the violence the AFRC junta perpetrated against the citizenry was the government's gross negligence in providing or permitting care to its people. The U.N. Secretary General reported the dire humanitarian crisis in Sierra Leone as follows:

The number of displaced persons registered with humanitarian organizations during the months of July and August stands at around 100,000. However, the actual number of new internally displaced persons is thought to be much higher. A polluted water supply and deteriorating sanitary conditions in one camp for internally displaced persons in Kenema district led to an outbreak of bloody diarrhoea which began in late September. Nutrition surveys have identified pockets of severe malnutrition in the rural areas and an increase in child malnutrition generally.... Health systems are near collapse. Consequently, a measles epidemic is accounting for a 30 per cent case mortality rate among children. In one district alone (Koinadugu), 3,000 cases were reported during the third week of September. The number of Sierra Leoneans who have registered as refugees in neighbouring countries has risen to over 60,000. A much larger number of people have moved temporarily to neighbouring countries, but they have not as yet sought refugee status.<sup>108</sup>

Instead of helping alleviate the crisis, government forces often prevented the delivery of relief supplies from international agencies to the sick and starving

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106. *Fifth Report of the Secretary-General on the Situation in Sierra Leone*, at 37, U.N. Doc. S/1998/486 (June 9, 1998) [hereinafter *Fifth Report*].

107. See Press Briefing by James O. C. Jonah, U.N. Ambassador from Sierra Leone, in New York, N.Y. at <http://www.sierra-leone.org/jonah021798.html> (last updated Feb. 17, 1998). Mr. Jonah also claimed he had evidence of lethal gas shipments to the junta for use against civilians. See *UN Press Conference by Sierra Leone*, M2 PRESSWIRE, September 15, 1997, available in 1997 WL 13655162. See also Levitt, *supra* note 29, at 369 (claiming that the civilian population, "because of their active opposition to the coup were threatened with death and suffering on a grand scale").

108. *Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, U.N. Doc. S/1997/811 (Oct. 21, 1997); see also DISASTROUS SET-BACK, *supra* note 86, at 23-24 (discussing problems of renewed refugee flows considering Sierra Leone had not yet finished resettling over 100,000 refugees from prior unrest).

population, usually commandeering the supplies for themselves.<sup>109</sup> Despite the impending famine, the AFRC even exacted a "food tax" on civilians, leaving farmers to hoard what little food they harvested instead of sending it to market.<sup>110</sup> In total, the AFRC refused to do anything to end the suffering of Sierra Leoneans and actively prevented help from reaching those in need.

### C. *ECOWAS Reacts to the Humanitarian Crisis*

#### 1. *Diplomatic Efforts*

After its initial attempt to dislodge the AFRC during the coup, ECOWAS took many measures to end the crisis peacefully. ECOWAS first tried to end the AFRC's atrocities through diplomatic efforts. ECOWAS's most laudable effort was the Conakry Accord, a six-month peace plan for Sierra Leone negotiated between members of ECOWAS and a representative of the AFRC.<sup>111</sup> This peace treaty featured an immediate end to all combat, disarmament and demobilization of all combatants within two months, guarantee of the flow of humanitarian assistance coupled with an international appeal for relief supplies, the return of refugees, restoration of Kabbah and the constitution, and amnesty for AFRC combatants and coup leaders.<sup>112</sup> Despite Koroma's initial acceptance of the Conakry Accord,<sup>113</sup> by the end of 1997 the AFRC continued to resist disarmament and attack rural dissidents.<sup>114</sup> Regardless of ECOWAS's intense diplomatic efforts, the AFRC refused to adhere to the terms of the Conakry Accord four months after signing the same.<sup>115</sup> Even from the outset of diplomatic negotiations, it seemed that Koroma was unwilling or unable to implement any negotiated end to the humanitarian crisis.<sup>116</sup> Therefore, despite ECOWAS's best endeavors, a strictly diplomatic solution to the humanitarian crisis in Sierra Leone appeared unlikely.

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109. See *Statement by the President of the Security Council*, U.N. SCOR, 3809th mtg., U.N. Doc. S/PRST/1997/42 (Aug. 6, 1997). Additionally, some food assistance may have been inadvertently detained by the United Nations/ECOWAS imposed economic embargo due to inefficiency in the ECOWAS monitoring system. See *Interim Report*, *supra* note 75, Annex ¶ 5.

110. *Third Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 52d Sess., ¶ 27, U.N. Doc. S/1998/103 (1998) [hereinafter *Third Report*].

111. *Second Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, 53d Sess., ¶ 2, U.N. Doc. S/1997/958 (1997) [hereinafter *Second Report*].

112. *Economic Community of West African States Six-Month Peace Plan for Sierra Leone (23 October 1997-22 April 1998)*, U.N. SCOR, Annex 2, U.N. Doc. S/1997/824, at 5-6 (1997).

113. *Second Report*, *supra* note 111, ¶¶ 4, 5.

114. See Nowrot & Schabacker, *supra* note 82, at 329.

115. See *Fourth Report of the Secretary-General on the Situation in Sierra Leone*, U.N. SCOR, ¶¶ 4-5, U.N. Doc. S/1998/249 (1998) [hereinafter *Fourth Report*]; see also *Restructuring Sierra Leone*, *supra* note 89, at 38 (statement of John Ernest Leigh) ("[T]he junta refused to cooperate, using various foolish ruses.").

116. *Second Report*, *supra* note 111, ¶ 15.



## 2. *Economic Embargo*

ECOWAS also attempted to implement economic sanctions to compel the AFRC to end the crisis in Sierra Leone. At its August 29, 1997 summit meeting, ECOWAS imposed a total embargo on Sierra Leone, stopping the flow of all commodities, including petroleum products, arms, and military equipment, prohibiting all international business transactions, and freezing all AFRC financial accounts.<sup>117</sup> On August 1, 1997, the OAU had authorized ECOWAS to take all "appropriate measures" to return the rule of law to Sierra Leone,<sup>118</sup> a mandate that was reaffirmed by the OAU's Secretary General at ECOWAS's August 29 summit.<sup>119</sup> Five weeks after the summit, citing the "continued violence and loss of life ... [and] the deteriorating humanitarian conditions" in Sierra Leone,<sup>120</sup> the U.N. Security Council imposed a similar embargo, supporting the ECOWAS effort by obligating all U.N. member-states to participate in the embargo.<sup>121</sup> The U.N. Security Council, however, put primary responsibility for enforcement of the embargo back on ECOWAS.<sup>122</sup> Unfortunately, the economic embargo was fraught with violations, especially concerning arms importation by the AFRC, as well as AFRC leaders and their families traveling abroad.<sup>123</sup> More than five months after its inception, it seemed that the embargo only exacerbated the suffering of civilians<sup>124</sup> instead of forcing the junta to stop atrocities or abdicate power. Like ECOWAS's diplomatic attempts, efforts to secure a peaceful resolution to the humanitarian crisis in Sierra Leone through economic sanctions failed.

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117. *Decision on Sanctions Against the Junta in Sierra Leone*, Econ. Community of W. Afr. States, Authority of Heads of St. and Gov't, 20th Sess., arts. 3-5 (Aug. 29, 1997), available at <http://www.sierra-leone.org/ecowas082999.html>. ECOWAS member-states surround Sierra Leone on all land borders and ECOWAS naval units patrolled Sierra Leonean territorial waters, making total enforcement of the embargo possible.

118. *Africa Highlights - August 1997*, AFR. NEWS SERVICE, Dec. 31, 1997, available in 1997 WL 17419813; see also U.S. DEP'T OF STATE, *supra* note 76, at 298 ("The Organization of African Unity (OAU) designated the Economic Organization [sic] of West African States (ECOWAS) to bring about [full] restoration of the constitutional government.").

119. See DISASTROUS SET-BACK, *supra* note 86, at 7.

120. U.N. SCOR Res. 1132, U.N. SCOR, 3822d mtg. at pmb., U.N. Doc. S/RES/1132 (1997).

121. See *id.* ¶¶ 3, 6, 8, 11.

122. See *id.* ¶¶ 8, 18.

123. See *Third Report*, *supra* note 110, ¶ 20; *Communiqué*, Econ. Community of W. Afr. States, Ministers of Foreign Aff. of the Community of Five on Sierra Leone, ¶ 9 (Dec. 19, 1997), at <http://www.sierra-leone.org/ecowas121997.html>; *Final Communiqué*, Econ. Cmty. of W. Afr. States, Ministers of Foreign Aff. of the Community of Five on Sierra Leone, ¶ 10 (Feb. 6, 1998), at <http://www.sierra-leone.org/ecowas020698.html> [hereinafter *Final Communiqué*].

124. See *Interim Report*, *supra* note 75, Annex ¶ 26.

### 3. *Direct Intervention*

On February 6, 1998, ECOWAS finally decided to use force to oust the AFRC<sup>125</sup> after the failure of all other measures and repeated requests from Kabbah to intervene<sup>126</sup> and to "put an end to [Sierra Leoneans'] nightmare and to enable them to recover their fundamental human rights."<sup>127</sup> Within a week of the invasion by the ECOWAS Monitoring Group (ECOMOG) forces, the AFRC government had collapsed and ECOMOG was in control of Freetown.<sup>128</sup> Even as the junta forces withdrew, AFRC combatants tortured and killed any civilian suspected of opposing them.<sup>129</sup> ECOWAS soldiers and officials entered Freetown to find government buildings looted and neglected and an enthusiastic crowd celebrating their arrival.<sup>130</sup> Kabbah returned to Sierra Leone and resumed his presidential post on March 10, 1998.<sup>131</sup>

ECOWAS received numerous commendations from the international community for its intervention in Sierra Leone. In Resolution 1162, the U.N. Security Council commended ECOWAS and ECOMOG for "the important role they are playing in support of the objectives related to the restoration of peace and security" in Sierra Leone.<sup>132</sup> Additionally, the U.N. Secretary General commended ECOWAS' intervention as "laudable" and urged U.N. member-states to contribute to its efforts.<sup>133</sup> Similarly, the OAU approved of the intervention,<sup>134</sup> while numerous individual states, through their diplomats or actions, also granted their approval.<sup>135</sup>

Today, the RUF continues its struggle against the democratically elected government, exacting a heavy humanitarian toll as it commits ever-more horrifying atrocities against civilians,<sup>136</sup> including attacking refugee camps in

125. *Final Communiqué*, *supra* note 123, ¶ 6(iii).

126. See Levitt, *supra* note 29, at 365; Nowrot & Schabacker, *supra* note 82, at 327.

127. President Ahmad Tejan Kabbah, Address at the ECOWAS Summit, ¶ 5 (Aug. 27, 1997), available at <http://www.sierra-leone.org/kabbah082797.html>.

128. *Fourth Report*, *supra* note 115, ¶ 6.

129. See Press Release, Amnesty International, *Sierra Leone: Civilians Deliberately Killed as Fighting Engulfs Freetown and Provinces*, AFR 51/006/1998 (Feb. 11, 1998), at <http://web.amnesty.org/ai.nsf/Print/AFR510061998>.

130. *Fourth Report*, *supra* note 115, ¶ 7.

131. *Id.* ¶ 10.

132. U.N. SCOR Res. 1162, U.N. SCOR, 3872d mtg. ¶ 2, U.N. Doc. S/RES/1162 (1998).

133. *Fourth Report*, *supra* note 115, ¶¶ 38, 48-49.

134. See *Sierra Leone: Putting a Country Together Again*, ECONOMIST, Feb. 21, 1998, at 44.

135. See, e.g., *Chronology*, *supra* note 77 (documenting British Minister of State for Africa Tony Lloyd stating support for the ECOWAS intervention); *Fifth Report*, *supra* note 106, ¶ 28 (evidencing U.S. contribution of US\$3.9 million to ECOWAS for military support in Sierra Leone, an action indicating U.S. approval of the ECOWAS intervention).

136. See *Government, Rebels to Discuss Ending Conflict*, SEATTLE POST-INTELLIGENCER, Nov. 4, 2000, at A4; AMNESTY INTERNATIONAL, *supra* note 1, at 209-10 (documenting incessant atrocities committed by the RUF).

neighboring Guinea<sup>137</sup> and taking hostage hundreds of peacekeepers.<sup>138</sup> Recently, the U.N. has cracked down on foreign support for the RUF.<sup>139</sup> The U.N. Security Council has imposed a travel ban and a military and diamond trade embargo on Liberia for its sheltering and support of RUF members.<sup>140</sup>

#### IV. OTHER THEORIES OF THE LEGALITY OF THE ECOWAS INTERVENTION

Often more than one legal theory will support a state action. Besides the humanitarian intervention doctrine, some scholars claim the ECOWAS use of force is lawful under two other theories: the invitation of the ECOMOG forces by Sierra Leone's head of state, and international treaties between Sierra Leone and ECOWAS members. While legality under another theory does not preclude legitimacy under the humanitarian intervention doctrine, it does mitigate its persuasiveness as evidence of state practice to support a norm of customary international law. In this case, however, neither alternative legal theory is tenable.

##### A. *Intervention at Kabbah's Invitation*

Some analysts claim that the ECOWAS intervention was legal because ECOMOG entered Sierra Leone at Kabbah's behest.<sup>141</sup> There is no violation of international law if a legitimate head of state with clear control over his nation requests military assistance from a foreign nation.<sup>142</sup> However, in most situations, a state cannot legally honor a head-of-state's request for foreign military assistance to suppress an efficacious rebellion.<sup>143</sup> A "government's authority to seek external assistance ... comes into question when the government faces internal armed opposition sufficient to cast serious doubt on the government's ability to maintain itself in power without foreign assistance."<sup>144</sup> This rule of international law reflects an inherent right of self-

137. See Douglas Farah, *For Refugees, Hazardous Haven in Guinea; As Fighting Spills Into Camps, Aid Becomes Unreliable*, WASH. POST, Nov. 6, 2000, at A24.

138. See Douglas Farah, *Liberian Pledges to Cut Sierra Leone Rebel Ties; Facing Sanctions, Taylor Agrees to U.N. Demands*, WASH. POST, Jan. 20, 2001, at A21.

139. See *id.* at A21.

140. See U.S. SCOR Res. 1343, U.N. SCOR, 4287th mtg. Para. 2, 3-7, U.N. Doc. S/RES/1343 (2001).

141. See Nowrot & Schabacker, *supra* note 82, at 378-402. Note that Nowrot and Schabacker's reliance on Kabbah's authority is framed in terms of their theory of a right of humanitarian intervention for the restoration of democracy. For a discussion of this theory, see *infra* text accompanying notes 167-73.

142. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189 (1985).

143. See *id.* at 251.

144. David Wippman, *Change And Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 446 (1996); see also LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 306 (2d ed. 1979) ("Military intervention in civil war was not acceptable under traditional international law...."); Doswald-

determination through revolution; in situations of a closely contested civil war, foreign nations cannot guarantee which regime reflects the will of the people.<sup>145</sup> If Kabbah made his request for ECOWAS's assistance before fleeing the country,<sup>146</sup> ECOWAS could not have legally fulfilled the request because Kabbah's government was unable to maintain itself without foreign assistance. A look at the brief pre-coup history of Kabbah's unfledged government, plagued with coup attempts and fighting a protracted civil war against the RUF while losing support of its own military,<sup>147</sup> shows a government perpetually on the verge of collapse. Without Kabbah clearly in control, ECOWAS cannot legally intervene at his request. Similarly, Kabbah had no control over Sierra Leone's government after the AFRC gained control of the capital and subjected the entire nation to its rule. ECOWAS could not honor Kabbah's post-flight request for assistance because he did not maintain his government without foreign assistance. Therefore, because Kabbah requested military assistance without having clear control over Sierra Leone, any reliance by ECOWAS on Kabbah's invitation would have been illegal.

*B. Intervention by Right of Treaty.*

The treaties signed with Sierra Leone did not grant ECOWAS the right to intervene in this situation. Neither the Status of Force Agreement (SOFA) between Nigeria and Sierra Leone nor the ECOWAS Charter granted ECOWAS the right to intervene in Sierra Leone's internal problems. First, ECOWAS had no right to intervene under the SOFA, a bilateral defense pact, which gave Nigeria "the right to apply force in the sustenance of the sovereignty and territorial integrity of the Republic of Sierra Leone."<sup>148</sup> While subversive forces may have imperiled Sierra Leone's democratic government, they did not threaten the state's sovereignty and territorial integrity, and therefore ECOWAS had no right under this treaty. In addition, only Nigeria was party to the SOFA, not ECOWAS. While Nigeria's influence in ECOWAS was substantial, it was not sufficient to transfer Nigeria's treaty

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Beck, *supra* note 142, at 251 (explaining doubt concerning legality of invitation for military assistance if a "rebellion is widespread and seriously aimed at the overthrow of the incumbent regime").

145. See Ruth Wedgwood, *Commentary on Intervention by Invitation*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, 135, 138 (Lori Fisler Damrosch & David J. Scheffer eds., 1991).

146. There is some factual uncertainty as to whether Kabbah first requested ECOWAS's assistance immediately before or after fleeing from power. Compare Levitt, *supra* note 29, at 365 (citing Kabbah as making the request before fleeing from power), with Nowrot & Schabacker, *supra* note 82, at 327 (claiming Kabbah requested ECOWAS intervention after fleeing the country).

147. See *supra* text accompanying notes 80-85.

148. Levitt, *supra* note 29, at 368.

rights to ECOWAS.<sup>149</sup> Therefore, ECOWAS could not rely on the SOFA for legal authority to intervene.

Second, ECOWAS could not have legitimately relied on its own charter to allow the intervention. Article 58(2) of the ECOWAS Charter, to which Sierra Leone is a signatory, states that

Member States [shall] undertake to co-operate with the Community in establishing and strengthening appropriate mechanisms for the timely prevention and resolution of intra-State and inter-State conflicts, paying particular regard to the need to ... establish a regional peace and security observation system and peace-keeping forces where appropriate.<sup>150</sup>

Jeremy Levitt argues that this language gave ECOWAS the authority to intervene, as member-states were "obligated to send peace-keeping forces to Sierra Leone to restore law and order."<sup>151</sup> However, Levitt overlooks Article 58(3), which states "provisions governing ... regional peace and stability shall be defined in the relevant Protocols."<sup>152</sup> At the time of ECOWAS's intervention in Sierra Leone, member-states had not signed a protocol relevant to Article 58, thus leaving the security mechanisms without substance.<sup>153</sup> ECOWAS could not fill this gap with the pre-Article 58 Protocol Relating to Mutual Defense, because that Protocol prohibited ECOWAS from intervening into purely internal conflicts.<sup>154</sup> While Article 58(2) arguably permits ECOWAS to establish a peacekeeping force, it does not authorize use of that force without mechanisms defined in relevant Article 58(3) Protocols. Without a pertinent protocol, ECOWAS could not use Article 58(2) to justify its intervention into Sierra Leone. Therefore, ECOWAS could rely on neither Kabbah's invitation nor any treaty language to lawfully warrant its invasion of Sierra Leone.

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149. See *infra* text accompanying notes 181-83 (discussing Nigeria's influence in the truly multilateral ECOWAS).

150. *ECOWAS Treaty*, *supra* note 21, art. LVIII, § 2, 35 I.L.M. at 687-88.

151. Levitt, *supra* note 29, at 368.

152. *ECOWAS Treaty*, *supra* note 21, at art. LVIII, § 3, 35 I.L.M. at 688.

153. The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, which created extensive mechanisms for resolving regional conflicts and humanitarian crisis within the preexisting ECOWAS structure, did not come into force until after the 1998 intervention. See The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, available at <http://www.ecowas.int/sitecedao/english/ap101299.htm> (last visited Jan. 8, 2000), also available at <http://www.alliancesforafrica.org/RegionalMechanisms/ECOWAS%20protocol.doc> (last visited Jan. 6, 2000).

154. See Protocol Relating to Mutual Assistance on Defence, May 29, 1981, art. XVIII, § 2, 1690 U.N.T.S. 51, 59.

## V. APPLYING CONDITIONALIST CRITERIA TO THE ECOWAS INTERVENTION

The ECOWAS military intervention in Sierra Leone serves as evidence of state practice supporting the humanitarian intervention doctrine, because it fulfills the Conditionalists' five criteria for a lawful humanitarian intervention. First, the AFRC government inflicted large-scale atrocities on Sierra Leonean civilians. Second, ECOWAS had an overriding humanitarian motive to intervene in Sierra Leone because ECOWAS's primary concern was to stop the humanitarian crisis. Third, the intervention was a joint action conducted through ECOWAS, a regional security organization, including troops and command from numerous countries. Fourth, the intervention was limited in scope and duration to that necessary to stop the atrocities. Fifth, ECOWAS had reasonably exhausted other peaceful remedies including diplomatic negotiations and economic sanctions. Therefore, because all the Conditionalist criteria are met, the ECOWAS intervention provides state practice evidence supporting the humanitarian intervention doctrine.

A. *The AFRC Committed Large-Scale Atrocities*

The AFRC committed gross human rights violations. As documented in *supra* Part III.B, the AFRC perpetrated innumerable and systematic atrocities against Sierra Leonean civilians, including murder, rape, mutilation, torture, forced labor, and intentional and neglectful acts leading to mass starvation and disease. Many of these cruelties violated the *jus cogens* norms of international law prohibiting a state from committing enslavement, murder, and torture of its own citizens.<sup>155</sup> Some authors, without examining this evidence or providing any explanation, claim that all of these gruesome acts did not constitute sufficient evidence of the AFRC committing mass atrocities.<sup>156</sup> Even accepting these authors' unsupported assertion, the AFRC's alleged imminent genocide against the large civilian population actively opposing the coup is adequate to warrant a humanitarian intervention.<sup>157</sup> Therefore, the ECOWAS invasion meets the first criterion for a humanitarian intervention, because the AFRC committed mass atrocities, while further gross violations of human rights were imminent.

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155. See *supra* notes 57-58 and accompanying text.

156. See Nowrot & Schabacker, *supra* note 82, at 376 (arguing that the AFRC created crisis was not a situation "where fundamental human rights are at stake" because the "dwindling food supplies ... [were] largely the creation of ECOWAS and United Nations imposed sanctions"). Nowrot and Schabacker notably fail to discuss any of the documented murder, rape, torture, mutilation, etc., discussed in *supra* Part III.B, when rejecting the notion that fundamental human rights were at stake during the AFRC rule. See *id.* at 376; see also Levitt, *supra* note 29, at 369 (claiming that "it cannot be said that... there were mass violations of human rights warranting humanitarian intervention," without citing evidence of the humanitarian situation or justifying this position).

157. *Supra* note 107 and accompanying text.

B. *ECOWAS had an Overriding Humanitarian Motive*

ECOWAS had an overriding humanitarian motive when it intervened in Sierra Leone. In considering this criterion, note that while humanitarian concern must be a primary motive, the humanitarian intervention doctrine does not require it to be the exclusive motive.<sup>158</sup> To discover the state's subjective intent, official statements and the state's record can be informative.<sup>159</sup> A number of statements by ECOWAS officials and others indicated a humanitarian motive for the intervention in Sierra Leone. For example, ECOWAS's stated objectives for the intervention were the attainment of peace, restraint of the national army, disarmament and demobilization of combatants, and the provision of humanitarian assistance.<sup>160</sup> Note that all of these objectives in some way seek to avert humanitarian disaster, either by stopping the fighting that led to civilian suffering, disempowering the forces that committed the atrocities, or directly addressing the humanitarian problem. Furthermore, in the same statement that disclosed the ECOWAS intention to use force in Sierra Leone, ECOWAS ministers expressed their concern for the humanitarian crisis.<sup>161</sup> ECOMOG's commander lamented publicly about the human rights abuses, saying that the AFRC had "carried out a lot of atrocities[;] ... they have killed so many people, they have looted so many people's houses. All they were doing was terror."<sup>162</sup> Additionally, the U.S. State Department had commented that ECOWAS's involvement in Sierra Leone "underscored the universality of human rights."<sup>163</sup> These statements shed light on ECOWAS's motive for the intervention, of which ECOWAS generally has been silent. This silence may be due to appearance of inauthenticity of the humanitarian intent, given ECOWAS Chairman Nigeria's own poor human rights record.<sup>164</sup> Critics cannot claim that ECOWAS was ignorant of the AFRC's atrocities against Sierra Leoneans because Kabbah and other exiled officials repeatedly informed ECOWAS of these human rights violations.<sup>165</sup> Unfortunately, without a decisive statement by ECOWAS on its primary motive, any determination of intent is ultimately conjecture. Yet, in the aggregate, the statements by ECOWAS and its representatives and the assessment by the

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158. See *supra* note 59 and accompanying text.

159. Without listing them explicitly, Conditionalists use these factors in their analyses of humanitarian intent. See, e.g., Bazylar, *supra* note 23, at 608-09, 613-14; *Tragedies I*, *supra* note 24, at 312, 317, 322.

160. See *Fifth Report*, *supra* note 106, ¶ 17.

161. See *Final Communiqué*, *supra* note 123, ¶ 12.

162. Anthony Morland, *Junta Leaders Flee as ECOMOG Takes Freetown*, AGENCE FR.-PRESSE, Feb. 12, 1998, available at 1998 WL 2221007.

163. U.S. DEP'T OF STATE, *supra* note 76, at xv.

164. For a discussion of such criticism, see *infra* notes 175-176 and accompanying text.

165. See, e.g., *Ousted President Demands End to Violence in Sierra Leone*, AGENCE FR.-PRESSE, July 18, 1997, available at 1997 WL 2160982.

United States, strongly suggest that stopping the humanitarian crisis was the primary motive for the ECOWAS intervention.

Critics contend that humanitarian concern was not ECOWAS's overriding motive in this intervention. For example, a motivation for ECOWAS member Nigeria was the protection of its nationals legitimately stationed in Sierra Leone.<sup>166</sup> While this was certainly a partial motivation, the intervention undertaken far exceeded that necessary and proportional to the protection of the small Nigerian contingent present in Sierra Leone at the time, suggesting the existence of a more influential motive. There was no evidence that territorial ambition motivated ECOWAS or any of its member-states to intervene in Sierra Leone. Karsten Nowrot and Emily Schabacker emphasize that ECOWAS's most often stated goal was not stopping the AFRC's atrocities, but to restore the civilian, democratically elected government to Sierra Leone.<sup>167</sup> Nowrot and Schabacker then argue that the goal to restore the civilian government reveals that ECOWAS's intent was "pro-democratic"<sup>168</sup> and subsequently conclude that this intervention was taken under a proposed rule of customary international law permitting military interventions for the restoration of democracy.<sup>169</sup> They base their conclusion on Nigeria's "self appointed role as regional defender of democracy."<sup>170</sup> However, ECOWAS's limited stated goal is insufficient to support Nowrot and Schabacker's broad claims. It does not necessarily follow that ECOWAS's objective of restoring the civilian government to power is based on the intent to support democracy. Instead, ECOWAS could want to restore Kabbah because he is friendlier to ECOWAS's policies, or as this article argues, because the restoration of the civilian government would end the humanitarian crisis. The restoration of democracy is an unlikely motive, since the majority of heads-of-state that sat on the ECOWAS Committee of Five, the ECOWAS subgroup in charge of the Sierra Leone intervention, were current or former military dictators, including ECOWAS's Nigerian chairman.<sup>171</sup> Critics retort that these same states, especially Nigeria, are regular abusers of human rights, excluding the possibility of humanitarian intent.<sup>172</sup> While this criticism does carry some

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166. See Levitt, *supra* note 29, at 368.

167. Nowrot & Schabacker, *supra* note 82, at 376, 378.

168. *Id.* at 378 ("This attempt to justify the use of force raises questions concerning the existence of a general right of pro-democratic intervention under international law....").

169. See *id.* at 412.

170. *Id.*

171. In February 1998, the time of the intervention, three of the five heads of state of the Committee of Five were current or former dictators. See James Rupert, *Nigerian Ruler Dies After Brutal Reign*, WASH. POST, June 9, 1998, at A1 (Nigeria, current dictator); THE WORLD ALMANAC AND BOOK OF FACTS 802 (Robert Famighetti et al. eds., 2000) (Ghana, former dictator); *id.* at 803 (Guinea, former dictator); *id.* at 834 (Liberia, elected president); *id.* at 789 (Cote d'Ivoire, appointed president).

172. Lobel, *supra* note 20, at 31; A *Double Standard in Nigeria*, CHI. TRIB., Mar. 21, 1998, at 24; *Leaders: Nigeria Does It Again*, THE ECONOMIST, Feb. 21, 1998, at 16-17; *This Madness in Africa*, GHANAIAN INDEPENDENT, Oct. 31, 1997, available at 1997 WL 15136107.



weight, it is important to focus on the magnitude of the human rights violations. Nigeria's record of unfair trials and imprisonment of many hundreds of political dissenters, and especially its murder of approximately sixty unarmed civilians is unjust,<sup>173</sup> but the relative magnitude of these crimes pale in comparison to the hundreds of thousands of Sierra Leoneans that suffered horrendous atrocities under AFRC subjection.<sup>174</sup> One commentator accused Nigeria, as the most powerful member of ECOWAS, of engineering the intervention to improve its standing in international opinion.<sup>175</sup> Allegedly, Nigeria hoped that conducting a humanitarian intervention "might help ease the international condemnation and isolation [Nigeria] faces."<sup>176</sup> However unintentionally, arguing that Nigeria conducted this humanitarian mission to improve its international reputation reinforces the claim that ECOWAS's motive was humanitarian. While the reason Nigeria had a humanitarian motive may have included gaining respect through an act of compassion, the basic motivation was still humanitarian in nature. Thus, despite Nigeria and its partners' unclean humanitarian records, the ECOWAS intervention still had a legitimate humanitarian motive. In total, other theories of ECOWAS's intent do not stand-up to scrutiny, leaving humanitarian intent as the most likely motive.

### C. *The ECOWAS Intervention was a Regional Joint Action*

The intervention fulfilled the preference for joint action criterion because the West African nations acted through a regional organization after the U.N. failed to take decisive action.<sup>177</sup> By February 1998, it had become increasingly obvious that the U.N. Security Council had reached the limits of its interest in Sierra Leone, unwilling to intervene in Sierra Leone beyond the economic embargo.<sup>178</sup> In lieu of collective intervention, ECOWAS took responsibility to stop the atrocities. Though the nations of West Africa originally formed ECOWAS to promote economic and monetary union, ECOWAS gradually

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173. See AMNESTY INT'L, AI INDEX NO. AFR 44/003/1996; NIGERIA: A SUMMARY OF HUMAN RIGHTS CONCERNS 1, 3, 6 (1996).

174. Sierra Leoneans are especially forgiving of Abacha's domestic humanitarian failures. "[T]hey consider [Abacha] their savior and protector from brutal savages. The United States may not have approved of President Abacha's role in Nigeria, but in Sierra Leone, General Abacha will forever remain their hero." *Restructuring Sierra Leone*, *supra* note 89, at 14 (statement of John Ernest Leigh).

175. See Atasu Evero, *Abacha Restore Nigeria's Democracy Before Sierra Leone*, N.Y. BEACON, June 25, 1997, at 32, available at 1997 WL 11707386.

176. *Id.*

177. See *supra* text accompanying notes 61-64.

178. Press Briefing by James O. C. Jonah, *supra* note 107. Despite the ongoing and worsening humanitarian crisis in Sierra Leone, the U.N. Security Council took no other action concerning the crisis beyond its October 8, 1997 reinforcement of the ECOWAS embargo until well after the ECOWAS intervention.

transformed into a regional security organization.<sup>179</sup> ECOWAS has sixteen member nations, with five of those members sitting on the committee directing the intervention in Sierra Leone.<sup>180</sup> Though Nigeria is the most powerful member of ECOWAS, it is inaccurate to say that this intervention was merely "hegemonic interest masquerading under humanitarian goals."<sup>181</sup> While Nigerians represent a majority of the 20,000 ECOMOG troops, soldiers from Gambia, Ghana, Guinea, Mali, Senegal, Sierra Leone, and Tanzania also serve in ECOMOG.<sup>182</sup> Furthermore, only the collective decision-making bodies of ECOWAS, not Nigeria alone, exercised control over ECOMOG.<sup>183</sup> Even assuming that Nigeria did dominate ECOWAS, this does not disqualify its actions as truly multilateral. U.S. interests often dominate NATO, yet actions taken by NATO are certainly multilateral and have the legitimacy of a proper regional action. Therefore, because ECOWAS is a true regional organization and the United Nations was unwilling or unable to stop the atrocities in Sierra Leone, the ECOWAS intervention fulfilled the third criterion of preference for joint action.

*D. The ECOWAS Intervention was Limited in Magnitude and Duration*

The ECOWAS invasion was a limited intervention because it was restricted in both magnitude and duration to that necessary to end the atrocities.<sup>184</sup> The intervention was limited in magnitude because ECOWAS forces did not exceed their mandate of removing the abusive AFRC and returning the civilian government to power.<sup>185</sup> As was shown by the failure of peaceful attempts to stop the humanitarian crisis,<sup>186</sup> the only way to make the junta end its murderous practices was to remove it from power. In this concern, ECOWAS's mission was limited to four objectives: attainment of peace, provision of humanitarian assistance, assimilation of combatants into society, and retraining of a civilian-led Sierra Leonean military.<sup>187</sup> Similarly, the duration of the intervention was limited to that necessary to depose the AFRC. While ECOWAS troops did remain after Kabbah's return to power, they did so only at the request of the Sierra Leone government and therefore

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179. See Matthew S. Barton, *ECOWAS and West African Security: The New Regionalism*, 4 DEPAUL INT'L L.J. 79, 91-92 (2000).

180. See *supra* note 171 and accompanying text.

181. Lobel, *supra* note 20, at 30-31.

182. *ECOMOG: A Nigerian-Led West African Military Force*, AGENCE FR.-PRESSE, Feb. 10, 1998, available at 1998 WL 2219175.

183. See Francois-Xavier Harispe, *ADDS Reax from ECOMOG Chief*, AGENCE FR.-PRESSE, Nov. 5, 1997, available at 1997 WL 13427939.

184. See *supra* text accompanying notes 65-68.

185. See *Final Communiqué*, *supra* note 123, ¶¶ 6, 8.

186. See *infra* Part V.E.

187. See *Fifth Report*, *supra* note 106, ¶ 17.

were no longer intervening.<sup>188</sup> Furthermore, after ECOWAS reinstated Kabbah, U.N. peacekeepers joined the ECOMOG soldiers, adding legitimacy to their stay.<sup>189</sup> Therefore, the ECOWAS intervention was limited in magnitude and duration, satisfying the fourth criterion for humanitarian intervention.

#### E. *ECOWAS Exhausted All Peaceful Remedies*

By exhausting all peaceful remedies before using force, ECOWAS fulfilled the fifth criterion.<sup>190</sup> Despite intense efforts, ECOWAS was unable to stop the AFRC's atrocities through diplomacy or economic sanctions, while prospects of a peaceful resolution to the crisis were grim.<sup>191</sup> Quick action was imperative because of the continued economic suffering by civilians and threat of even worse atrocities, making further attempts at diplomacy and economic solutions extremely hazardous. Therefore, ECOWAS reasonably exhausted all peaceful remedies before invading Sierra Leone, satisfying the fifth criterion for a legitimate humanitarian intervention.

The ECOWAS invasion fulfilled all five criteria under the humanitarian intervention doctrine. The AFRC committed massive atrocities against the Sierra Leoneans, and these atrocities motivated ECOWAS to intervene. ECOWAS, a regional security organization, conducted the intervention in a limited manner and only after reasonably exhausting all peaceful means of resolving the humanitarian crisis. While evidence may not be absolutely solid concerning a clear motive, evidence suggesting humanitarian intent and strong evidence in all other criteria buoy the totality of the intervention to meet the Conditionalists' requirements. By fulfilling this test, the ECOWAS intervention in Sierra Leone serves as evidence of state practice supporting a humanitarian intervention exception to the prohibition against the use of force in international law.

### VI. CONCLUSION

A single example of state practice is insufficient to conclusively prove the existence of the humanitarian intervention doctrine. However, when coupled with other recent and future examples of humanitarian interventions that conform to the Conditionalist criteria, the case for the existence of the

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188. See President Ahmad Tejan Kabbah, Address to the Nation on the Restoration of Democracy in Sierra Leone (Feb. 13, 1998), available at <http://www.sierra-leone.org/kabbah021398.html>; see also Press Briefing by James O. C. Jonah, *supra* note 107.

189. See U.N. SCOR Res. 1181, U.N. SCOR, 3902d mtg. at 6, U.N. Doc. S/RES/1181 (1998). U.N. peacekeepers eventually replaced all ECOMOG forces in Sierra Leone. See ECOWAS Executive Secretariat, *25th Anniversary Report: Regional Peace and Security*, ¶ 5, available at <http://www.ecowas.int/sitecedao/english/peace.htm> (last modified Dec. 14, 2000).

190. *Supra* text accompanying notes 69-70.

191. See *supra* parts III.C.1-III.C.2.

humanitarian intervention doctrine becomes strong. With further applications of the Conditionalist theory to past and future interventions indicating state practice support, the humanitarian intervention doctrine will become a cornerstone of customary international law.

Though laudable and lawful according to the humanitarian intervention doctrine, the ECOWAS intervention was too late to prevent the needless deaths of thousands and suffering of millions. Had the U.N. Security Council acted quickly and decisively immediately after the coup, ECOWAS would not have had to rely on the humanitarian intervention doctrine to invade because there would have been no humanitarian crisis to end. Instead, the U.N. Security Council has demonstrated a general disinterest in or disability concerning humanitarian interventions, especially in Africa.<sup>192</sup> With the development and clarification of the humanitarian intervention doctrine, regional organizations should now rely on the doctrine and intervene to prevent and resolve true humanitarian crises.

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192. See Press Briefing by James O. C. Jonah, *supra* note 107. Also, consider U.N. Security Council inaction concerning Rwanda, Burundi, Kosovo (until after unilateral NATO action), and Burma.

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