



# Jean Monnet Saar

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**Lukas Werle**

Coup d'état in Niger –  
What Reactions Does International Law Permit?

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## Preface

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## **A. Timeline of events and actors**

### **I. Where, when, and who?**

Most, when asked, are unable to correctly place the state of Niger on a globe. This is unfortunate but may indicate a need to question its status on the global playing field. Considering this fact implores the naïve observer to uncover new knowledge about this unknown part of the world and perceive Niger's sociopolitical history in a new light. Niger's current situation is a topical case-study of intersecting concepts, ideas, and problems of public international law and African states. It touches upon regional organizations and their respective relationships to the UN, sanctions and their effectiveness, the contrast between legitimate and effective government and the connected issues of democratic intervention, and intervention through invitation. Without any historical context, it is impossible to understand the motivations behind the events of July 2023 and what can be done to elucidate the international community about the ongoing effects of its history of coup d'états in the future.

#### **1. An abridged history of Niger**

Niger is a landlocked state in Middle-West Africa neighboring Nigeria, Burkina Faso, Chad and Benin. Its precolonial history had been determined by the tense relationship between the indigenous nomadic peoples, such as the Tuareg, in the north and the agriculturalists in the Centre, East and West of the region.<sup>1</sup> As is the case for many states in Africa, Niger's predecessor was formed by the colonial empire of France. After completing its conquests, France established its first regular administration under civilian control in 1922. In the mid-1940s and after a wave of decolonization all around the world, France granted the inhabitants of Niger full French citizenship.<sup>2</sup> The former colony had now become an overseas territory of France. It was not until 1960 though that Niger declared its independence and left the French Community peacefully. Independence was followed by a series of dictatorships, from 1960-1974 a single party dictatorship under Hamani Diori then throughout 1974-1987 a military dictatorship under Seyni Kountché, followed by Ali Seibou; then a short democratic interlude from 1993 until 1996 under the Social Democrat Mahamane Ousmane followed by a 1996-1999 coup and military dictatorship under Ibrahim Baré Mainassara. After 1999, Niger returned to a democratic form of government under Tandja Mamadou.<sup>3</sup> In 2009, a constitutional crisis arose as long-time president Tandja refused to step down, in spite of reaching the two-term-limit as prescribed in the constitution. His attempts to fight for a

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<sup>1</sup> *Fuglestad*, History of Niger, <https://www.britannica.com/topic/history-of-Niger> (last accessed on 01/15/2024).

<sup>2</sup> *Ibd.*

<sup>3</sup> *Ibd.*

referendum to extend the term limit failed when the constitutional court of Niger issued a non-binding ruling that such a referendum would be unconstitutional. Tandja therefore dissolved the National Assembly. He created a committee to draft a new constitution and issued a presidential decree calling for a referendum to vote upon the document. This time, the decree was struck down by the constitutional court in a legally binding ruling. As a reaction to his loss, Tandja assumed emergency powers. His actions brought Niger into conflict with ECOWAS, the Economic Community of West African States, which revoked Niger's membership from the organization.<sup>4</sup> In 2010, Tandja was usurped by a military coup. Following his ousting, the military junta held elections from which the PDNS, the Parti Nigérien pour la Démocratie et le Socialisme, emerged as the victor. Mahamadou Issoufou, frontrunner of the PND, was elected again as the president of Niger in 2016 but stepped down in 2020 due to his two-term-limit being reached. Mohamed Bazoum, another incumbent of the PND, was elected as the next president, but not before a potential coup-attempt had been foiled.<sup>5</sup> On July 26, 2023, Mohamed Bazoum was ousted from power by the head of his presidential guard, Abdourahmane Tchiani, who assumed the role of president in a newly formed military junta.<sup>6</sup>

## **2. International reactions to the coup**

Since these series of military junta-led insurrections occurred, the international community has reacted variably. While most states and organizations advocated for reinstating Bazoum, for example the High Representative on behalf of the EU and UN Secretary-General Guterres<sup>7</sup>, others also withdrew aid, such as the United States, who had stopped providing a portion of its humanitarian aid to Niger<sup>8</sup>. Some regional organizations, such as ECOWAS, brought forth threats of violence and force if Bazoum wasn't reinstated.<sup>9</sup> Among these responses, some voices have called for pragmatism and cooperation with the post-coup

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<sup>4</sup> *Ibd.*

<sup>5</sup> *Ibd.*

<sup>6</sup> *Fuglestad*; History of Niger, <https://www.britannica.com/topic/history-of-Niger> (last accessed on 01/15/2024); *Hammady*, Assessing the Legality of ECOWAS planned Intervention in Niger, <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> (last accessed on 01/15/2024).

<sup>7</sup> *Council of the EU*, Niger Statement by the High Representative on behalf of the EU <https://www.consilium.europa.eu/en/press/press-releases/2023/08/12/niger-statement-by-the-high-representative-on-behalf-of-the-eu/> (last accessed on 01/15/2024); *UN News*, Guterres condemns apparent coup attempt in Niger, <https://news.un.org/en/story/2023/07/1139127> (last accessed on 01/15/2024).

<sup>8</sup> *U.S. Department of State*, Military Coup d'Etat in Niger, <https://www.state.gov/military-coup-detat-in-niger/> (last accessed on 01/15/2024).

<sup>9</sup> *Taylor*, Why a bloc of West African countries is threatening to invade Niger, <https://www.washingtonpost.com/world/2023/08/22/niger-invasion-intervention-ecowas/> (last accessed on 01/15/2024).

government.<sup>10</sup> In return, Niger and two neighboring states, Mali and Burkina Faso, have formed the Alliance of Sahel States (ASS), which serves as a mutual defense pact. The new regime also recently repealed a national law against migrant smuggling, which was supposed to stop the influx of refugees from Africa to Europe. This exacerbated its tensions with the EU, whose policy of isolationism regarding migrants may be threatened by this decision.<sup>11</sup>

The UN Security Council (UNSC) released a press statement condemning the ousting of Bazoum and supporting measures to reinstate democracy.<sup>12</sup> In December of 2023 ECOWAS acknowledged the military junta as the de facto government of Niger, while still holding onto its sanctions.<sup>13</sup> This move signals an end to the possibility for military intervention through ECOWAS. Additionally, Bazoum has appealed to the ECOWAS court for Niger to free him.<sup>14</sup> In December 2023, the court granted the motion and ordered the military junta to free Bazoum and restore democracy.<sup>15</sup> On January the 28<sup>th</sup> 2024, Mali, Niger and Burkina Faso announced their decision to leave ECOWAS.<sup>16</sup> This decision will have no immediate effect yet. According to Art. 91 (1) ECOWAS Treaty “[a]ny Member State wishing to withdraw from the Community shall give to the Executive Secretary one year's notice in writing who shall inform Member States thereof. At the expiration of this period, if such notice is not withdrawn, such a State shall cease to be a member of the Community.” If they don’t withdraw their decision, the three states will officially cease to be members of ECOWAS in January 2025. During this time-period they will still be obliged to follow the rules of ECOWAS according to Art. 91 (2) ECOWAS Treaty.

This quick glance at the international community’s reactions also reveal the several relevant actors on the international stage and possible future responses, ranging from political condemnation to threats of use of force, in order to mitigate the situation in Niger.

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<sup>10</sup> Chughtai/Murphy, A necessary trade-off: Why the EU needs to cooperate with Niger’s post-coup government on counter-terrorism, <https://ecfr.eu/article/a-necessary-trade-off-why-the-eu-needs-to-cooperate-with-nigers-post-coup-government-on-counter-terrorism/> (last accessed on 01/15/2024).

<sup>11</sup> Ewokor/Hancock, Niger coup leader repeal law against migrant smuggling, <https://www.bbc.com/news/world-africa-67550481> (last accessed on 01/15/2024).

<sup>12</sup> United Nations Security Council, SC/15372, Security Council Press Statement on Situation in Niger, 28<sup>th</sup> of July 2023.

<sup>13</sup> Deutschlandfunk, ECOWAS erkennt Militärjunta in Niger an, <https://www.deutschlandfunk.de/ecowas-erkennt-militaerjunta-in-niger-an-104.html> (last accessed on 01/15/2024).

<sup>14</sup> Aljazeera, Niger’s ousted Bazoum appeals to West Africa bloc court to free him, <https://www.aljazeera.com/news/2023/9/21/nigers-ousted-bazoum-appeals-to-west-africa-bloc-court-to-free-him> (last accessed on 01/15/2024).

<sup>15</sup> Aljazeera, ECOWAS court orders reinstatement of Niger’s ousted Bazoum, <https://www.aljazeera.com/news/2023/12/15/ecowas-court-orders-reinstatement-of-nigers-ousted-bazoum> (last accessed on 01/16/2024).

<sup>16</sup> Spiegel, Mali, Niger und Burkina Faso treten aus ECOWAS aus, <https://www.spiegel.de/ausland/mali-niger-und-burkina-faso-treten-aus-ecowas-aus-a-5f7914ac-6e36-4fd7-b06a-a1bef5f43dcb> (last accessed on 02/19/2024).

## II. Who is ECOWAS?

ECOWAS is a group of states whose self-proclaimed ultimate goal is to foster the ideal of collective West African self-sufficiency.<sup>17</sup> ECOWAS was founded in 1975 under the Treaty of the Economic Community of West African States and encompasses 15 member states, like Ghana, Nigeria and Mali.<sup>18</sup> Its objectives resemble many of those belonging to the European Union: establishment of a common market, the abolition of tariff barriers, and the free movement of people within the region.<sup>19</sup> During its development in the 1980s it became clear that ECOWAS would act within the field of infrastructure improvement, indicating a pull towards a politization of the organization.<sup>20</sup> The body of ECOWAS has many individual organs resembling those of the EU.<sup>21</sup> It has involved itself in multiple interventions in West African states to restore order and legitimately appointed heads of states.<sup>22</sup> It is especially noteworthy that ECOWAS was the first regional organization to intervene within an armed non-international conflict, in this case Liberia, after the Cold War.<sup>23</sup>

## III. Who is the African Union?

The African Union (AU) is the successor to the Organization of African Unity (OAU), founded in 1963.<sup>24</sup> Its original goal was to safeguard the newly independent African states against interference of the old colonial empires<sup>25</sup> and foster the ideals of Pan-Africanism.<sup>26</sup> In 2002, the OAU succeeded the AU, of which 55 African states are members.<sup>27</sup> This move was motivated by a perceived inability of the West and the UN to solve emerging human rights violations and genocides in Africa.<sup>28</sup> Most importantly for this case, the AU introduced a

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<sup>17</sup> ECOWAS, About ECOWAS, <https://ecowas.int/about-ecowas/> (last accessed on 01/15/2024).

<sup>18</sup> *Wissenschaftliche Dienste*, p. 4; Berger/Hamady, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 2 (last accessed on 01/15/2024).

<sup>19</sup> *Wissenschaftliche Dienste*, p. 5.; Berger/Hamady, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 5 (last accessed on 01/15/2024).

<sup>20</sup> *Wissenschaftliche Dienste*, p. 4.

<sup>21</sup> *Wissenschaftliche Dienste*, p. 6 ff.; Berger/Hamady, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 25 ff. (last accessed on 01/15/2024).

<sup>22</sup> See references in E.

<sup>23</sup> *Wissenschaftliche Dienste*, p. 10; Berger/Hamady, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 8 (last accessed on 01/15/2024).

<sup>24</sup> Herdegen, p. 390; *Ntombizozuko*, BJIL 2012, p. 1 (2).

<sup>25</sup> *Ntombizozuko*, BJIL 2012, p. 1 (3); Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 2 (last accessed on 01/15/2024).

<sup>26</sup> Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 2 (last accessed on 01/15/2024).

<sup>27</sup> Herdegen, p. 390; *Ntombizozuko*, BJIL 2012, p. 1 (9).

<sup>28</sup> *Ntombizozuko*, BJIL 2012, p. 1 (2).

mechanism against an unconstitutional change of government in its member states in Art. 4 (h) Constitutive Act through the Protocol on Amendments to the Constitutive Act of the African Union, which would, if ratified by enough member states, add the right to intervene in a member state in case of a “serious threat to the legitimate order”.<sup>29</sup> These measures are determined by the Assembly and the Peace and Security Council of the AU according to the respective articles in the Constitutive Act, Art. 46 African Charter on Democracy, Elections and Governance and the Peace and Security Protocol.

#### IV. Who is the Alliance of Sahel States?

The Alliance of Sahel States is a mutual defense pact between Niger, Mali, and Burkina Faso and was formed on 16<sup>th</sup> of September 2023.<sup>30</sup> The ASS proports to secure order in a region plagued by instability and terrorism. The ASS mainly serves as a reassurance policy for the newly established authoritarian governments of Mali, which witnessed two coups in 2020 and 2021 and Burkina Faso, which faced two coups in 2022 alone, in the so-called coup-belt, a West and Central African region gaining its name from amounting up to 9 coups since 2020.<sup>31</sup>

After this preliminary account of Nigers history and important actors in the region the question arises which specific actions could be taken to tackle the coup.

#### B. Peaceful settlement, diplomatic pressure, and aid

The first possibility to respond to the coup would be by negotiation or peaceful settlement, diplomatic pressure, and diplomatic sanctions due to being the least intense measures. These can consist of the application of the UN settlement mechanism, the cancelation of aid, and internal sanctions in regional organizations like the AU and ECOWAS.

#### I. Peaceful conflict settlement through UN-mechanisms

The obligation for peaceful conflict settlement is codified in Art. 2 (3) UN-Charter. This obligation constitutes a complementary principle to the principle of the non-use of force.<sup>32</sup> The Articles 33ff. UN-Charta specify the possibilities of peaceful conflict settlement.

<sup>29</sup> Herdegen, p. 392; Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 5 (last accessed on 01/15/2024).

<sup>30</sup> Diallo/Felix/Neely, Mali, Niger and Burkina Faso sign Sahel security pact, <https://www.reuters.com/world/africa/mali-niger-burkina-faso-sign-sahel-security-pact-2023-09-16/> (last accessed on 01/15/2024).

<sup>31</sup> Guardian, Explainer: Niger a linchpin for stability in Africa’s “coup belt”, <https://www.theguardian.com/world/2023/jul/27/explainer-niger-a-linchpin-for-stability-in-africas-coup-belt> (last accessed on 01/15/2024); Holland, Recent Coups in West and Central Africa, <https://www.reuters.com/world/africa/recent-coups-west-central-africa-2023-08-30/> (last accessed on 01/15/2024).

<sup>32</sup> Herdegen, p. 354 f.; Ruffert/Walter, p. 151.



Art. 33 (1) UN-Charter urges the member states to first seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement in the context of regional agencies or arrangements or other peaceful means of their own. Moreover, Art. 33 (2) and Art. 34 UN-Charter give the UN Security Council the possibility to call upon the parties to settle their dispute by such means or start its own investigations. It is questionable if Art. 33 (1) UN-Charter is applicable in purely intrastate conflicts. The wording of Art. 33 (1) UN-Charter speaks of “international peace and security”, which could imply that national disputes are not encompassed. As a multilateral treaty, the UN-Charter primarily binds its member states, although de facto regimes or national liberation movements are included too.<sup>33</sup> “Disputes” in the sense of Art. 33 (1) UN-Charter can not be of a purely national nature, while disputes endangering international peace are by definition not purely domestic.<sup>34</sup>

Considering this, there are two conclusions to be drawn: (1) The UN-mechanism is not applicable to settle a dispute between Bazoum and the new military junta. ECOWAS has acknowledged the junta as the new government, leaving Bazoum at the sidelines. He is neither a de facto regime nor an actual government official anymore. (2) Following the acknowledgment of the junta, there could be a dispute settlement between ECOWAS and AU member states and Niger as members of the UN. ECOWAS and AU sanctions signal an inter-state conflict which would make Art. 33ff. UN-Charter applicable.

Although these mechanisms are a useful tool for settling interstate conflicts, they seem less likely to succeed in the case of a coup. It is highly unlikely that the military junta will voluntarily concede. The common goal of most of the international community, ECOWAS and AU member states is the restoration of a democratic government. This alludes to the only possibility of a peaceful settlement involving a self-imposed military junta concession of power, which would run contrary to its original goal. While the use of these UN-mechanisms is desirable, they do not have the strength to sanction the actions of the junta and lack teeth in the case of an intrastate conflict. Recently, ECOWAS has abandoned the task of forcing the junta out of power. In the 64<sup>th</sup> Ordinary Session of the Authority of Heads of State and Government, it was agreed upon to deploy and develop a short transitional governmental roadmap in cooperation with the military junta.<sup>35</sup> While this could be perceived as a success for peaceful settlement, it is rather a *fait accompli* for the proponents of Bazoum. After being

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<sup>33</sup> Tomuschat, in: UN-Charter Simma (ed.), p. 1072 para. 7 ff.

<sup>34</sup> Tomuschat, in: UN-Charter Simma (ed.), p. 1072 para. 10.

<sup>35</sup> The Final Communiqué can be found under [https://ecowas.int/wp-content/uploads/2023/12/EN-Final-64th-Summit-Final-Communique-vs-11-Dec-20\\_231211\\_114815.pdf](https://ecowas.int/wp-content/uploads/2023/12/EN-Final-64th-Summit-Final-Communique-vs-11-Dec-20_231211_114815.pdf) (last accessed on 02/28/2024).

unsuccessful in convincing the junta to step down, this concession signals ECOWAS' effort to mitigate the damage done.

## II. Cancellation of aid

Furthermore, states disapproving of Bazoums disposal could bar financial aid to Niger. Generally, the cancelation of aid does not constitute a violation of the principle of non-intervention.<sup>36</sup> The United States has made an active effort to pressure the new regime in Niger to step down and return power to Bazoum. They withdrew Niger's eligibility to participate in the African Growth and Opportunity Act, which gives certain sub-African states duty-free access to the US for more than 1800 products.<sup>37</sup> Following that, the United States suspended over \$500 million in aid in October 2023.<sup>38</sup> Immediately after the coup, the EU suspended its budget support and security cooperation towards Niger.<sup>39</sup> In contrast, the United Nations have confirmed the continuation of their aid to the nation.<sup>40</sup> Niger's budget is highly reliant on aid, indicating that these cuts will cripple Niger's economic growth and development. The incumbent junta announced a 40% spending cut in 2023 following the sanctions.<sup>41</sup> This reduction in spending may result in two adverse effects: Either the standard of living drops to an unsustainably inhospitable level<sup>42</sup>, confronting the junta with a desolate and angered population that demands a change in regime or these "foreign actions" could bind the population of Niger closer to the new regime.

## III. AU and ECOWAS

Additionally, the AU and ECOWAS have mechanisms to react to unconstitutional government change on a diplomatic level. Similarly to the UN, the AU promotes a "peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be

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<sup>36</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 126; in agreement *Kunig*, *Intervention, Prohibition of*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=XkJmeU&result=2&prd=MPIL>, para. 26 (last accessed 01/17/2024).

<sup>37</sup> *Aradi*, US to remove Uganda and three other African countries from Agoa trade deal, <https://www.bbc.com/news/world-africa-67236251> (last accessed on 01/15/2024).

<sup>38</sup> *France24*, US cuts Niger aid by more than \$500 million as France starts troop pullout, <https://www.france24.com/en/live-news/20231010-france-turns-a-page-as-troops-begin-leaving-coup-hit-niger> (last accessed on 01/15/2024).

<sup>39</sup> *The Diplomatic Service of the European Union*, Niger: Statement by High Representative Josep Borrell on the latest developments, [https://www.eeas.europa.eu/eeas/niger-statement-high-representative-josep-borrell-latest-developments\\_en](https://www.eeas.europa.eu/eeas/niger-statement-high-representative-josep-borrell-latest-developments_en) (last accessed on 01/15/2024).

<sup>40</sup> *OCHA*, United Nations confirms the continuation of humanitarian, development, and peace programs in Niger, <https://www.unocha.org/publications/report/niger/united-nations-confirms-continuation-humanitarian-development-and-peace-programmes-niger> (last accessed on 01/15/2024).

<sup>41</sup> *Mazou/McAllister*, Niger cuts 2023 budget by 40% as post-coup sanctions bite, <https://www.reuters.com/world/africa/niger-cuts-2023-budget-by-40-post-coup-sanctions-bite-2023-10-07/> (last accessed on 01/15/2024).

<sup>42</sup> In the World-Hunger-Index Niger ranks at number 101 out of 117, *Welthunger-Index*, Niger – Eine eingehendere Betrachtung von Hunger und Unterernährung, <https://www.globalhungerindex.org/de/case-studies/2019-niger.html> (last accessed on 01/15/2024).

decided upon by the assembly” in Art. 4 (e) Constitutive act and the “condemnation and rejection of unconstitutional changes of government” in Art. 4 (p) Constitutive Act. Furthermore, the AU suspended Niger from all activities regarding its operations on the 14<sup>th</sup> of August 2023.<sup>43</sup> This is made possible by Art. 30 Constitutive Act and Art. 25 (1) African Charter on Democracy, Elections and Governance, an AU treaty. Supplementary to this, “[t]he perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State” according to Art. 25 (4) African Charter on Democracy, Elections and Governance. Consequently, if the junta is to surrender political power in the future, all its members would be barred from holding any political responsibility. Article 25 (8) also includes a ban on harboring such perpetrators, while (9) and (10) prepare the necessary legal framework to extradite them if necessary. The implementation of such measures depends on the prerogative of the Assembly and the Peace and Security Council. Art. 23 African Charter on Democracy, Elections and Governance defines different modalities of an unconstitutional change of government, most of them consistent with the first adapted Lomé Declaration.<sup>44</sup>

These protective ECOWAS mechanisms function similarly to those of the AU. According to Art. 77 (1) of the revised ECOWAS Treaty, if “a Member State fails to fulfil its obligations to the Community, the Authority may decide to impose sanctions on that Member State.” Art. 77 (2) ECOWAS Treaty defines the range of actions. The list includes the “suspension of new Community loans or assistance, suspension of disbursement on on-going Community projects or assistance programs, exclusion from presenting candidates for statutory and professional posts, suspension of voting rights and suspension from participating in the activities of the Community.” Such a failure could be seen in the violation of Art. 1 b) of the ECOWAS Protocol on Democracy and Good Governance, which is a complementary protocol to the Lomé Protocol from 1999, which postulates that “[e]very accession to power must be made through free, fair and transparent elections.” Art. 1 c) additionally adds a zero-tolerance policy towards “power obtained by unconstitutional means.” Art. 45 (1) of the protocol provides the possibility to sanction any event, in which democracy is “abruptly brought to an end by any means”. Considering the violent overthrow of Bazoum, this is clearly the case regarding Niger and the junta. Art. 45 (2) sketches out three levels of escalation. Firstly, a

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<sup>43</sup> The Communiqué can be found under <https://www.peaceau.org/en/article/communique-of-the-1168th-meeting-of-the-psc-held-on-14-august-2023-on-updated-briefing-on-the-situation-in-niger> (last accessed on 02/28/2024).

<sup>44</sup> Brunner, Un autre coup d’État en Afrique, <https://verfassungsblog.de/zum-putsch-in-niger-und-zur-demokratieschutzarchitektur-der-afrikanischen-union/> (last accessed on 01/15/2024).

refusal of ECOWAS to “support the candidates presented by the Member State concerned for elective posts in international organisations”, secondly “[r]efusal to organise ECOWAS meetings in the Member State concerned”, and lastly the “suspension of the Member State concerned from all ECOWAS decisionmaking bodies.” Nigers membership was effectively suspended on the 10<sup>th</sup> of December with the acknowledgment that Bazoums government had been overthrown, which leads to the application of the measures mentioned in Art. 77 ECOWAS Treaty.<sup>45</sup>

Until now the suspension of Niger’s membership rights in both organizations has failed to pressure the junta into stepping down and proven inefficient.

#### **IV. Failure of Preventive Measures and EU Missions**

##### **1. EU Military Partnership Mission**

The EUMPM to Niger was launched by the European Union on February the 20<sup>th</sup> 2023, going back to Council Decision (CFSP) 2022/2044 and Council Decision 2023/389 (CFSP), for a period of three years under the leadership of Vice-Admiral Hervé Blejean, with a budget of 27.3 million Euros. It mostly focused on the “support on enabling logistics and communications capabilities”<sup>46</sup>. According to Art. 1 of Council Decision (CFSP) 2022/2044 the main focus of the mission would be supporting Niger against armed terrorist activities. To achieve this goal the establishment and build-up of a Centre for the Training of the Technicians of the Armed Forces was to be facilitated, special forces in Niger’s army were to be developed and supported and a communication and command support battalion was to be created by training and mentoring its units. The mission left only a marginal footprint.<sup>47</sup> Which of course is a euphemism for failure. The mission was suspended on December the 5<sup>th</sup> of 2023.<sup>48</sup> It seems telling, that the website introducing EUMPM hasn’t been updated and still displays pictures and articles portraying a supposed success story. Ironically the coup originated in the military and the presidential guard. Two conclusions could be drawn from this. Firstly, the EU mission didn’t have enough time to have an actual influence on the inner workings of the military and secondly, the scope of the mission was too narrow. Only supporting the army of Niger in fighting terrorist activities by enabling better logistics and communications will not suffice to bind the military to a democratic state. If there are to be

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<sup>45</sup> Communiqué of the ECOWAS Commission on the 14<sup>th</sup> of December 2023.

<sup>46</sup> *Strategic Communications*, Former EUMPM Niger commander praises integrated approach, [https://www.eeas.europa.eu/eeas/former-eumpm-niger-commander-praises-mission%E2%80%99s-integrated-approach\\_en?s=410280](https://www.eeas.europa.eu/eeas/former-eumpm-niger-commander-praises-mission%E2%80%99s-integrated-approach_en?s=410280) (last accessed on 02/19/2024).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ehlert*, Niger kündigt Sicherheitsabkommen mit der EU auf, <https://www.tagesschau.de/ausland/afrika/niger-eu-hilfsprojekte-absage-100.html> (last accessed on 02/19/2024).

EU backed military partnerships, they need to be interlinked with explicit preconditions of a democratic mustering of the respective military.

## **2. EU Capacity Building Mission**

The EU Capacity Building Mission (EUCAP) was launched in 2012 by Council Decision 2012/392 (CFSP). It established an EU CSDP mission to support the capacity building of the Nigerien security actors to fight terrorism and organized crime, according to Art. 1 of the decision, setting out to enable local actors to fight those security threats on their own. This was to be accomplished by advising and assisting in the implementation of the security dimension of the Nigerien Strategy for Security and Development at national level, complementary to other actors, supporting the development of comprehensive regional and international coordination in the fight against terrorism and organized crime, strengthening the rule of law through the development of the criminal investigation capacities, and in this context develop and implement adequate training programs, supporting the development of Nigerien Security Forces' sustainability, contributing to the identification, planning and implementation of projects in the security field, in accord with Art. 3 of the decision. This decision also does not contain the goal to train the Nigerien army in a democratic framework.

## **3. Lessons from the Failed Missions**

Considering the failure and suspension of both EU missions<sup>49</sup>, the EU will need to readjust its focus and approach on humanitarian and military aid. The apathy or even approval of Niger's population towards the coup and reproachment towards Russia indicates a severe miscalculation. There are multiple explanations for this. On one hand, French imperialism has tainted the EU's name in the eyes of many in the region. On the other, it is apparent that the aid given hasn't managed to change the population's mind about the West. Considering how desolate the conditions in Niger are the conclusion could be drawn that a security and military focused approach independent of humanitarian aid and democratic governance does not work. What would be of use, would be an integrated approach, tying security and military partnership to democratic training of the armed and security forces. If possible, armed and security forces should also be integrated in humanitarian aid operations, building trust to local communities in Niger, by for example facilitating civilian projects. This bears the risk of dramatically increasing the popularity of the military, but not the civilian government, marking the importance of a democratic framework and schooling during military training. The end goal would be to have a military, that is tightly bound and loyal to a democratic

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<sup>49</sup> *Ibd.*

government and local communities that would, for example in this case, protest and fight for democracy.

As seen above, there are a multitude of possible actions that could and have been taken. Considering the failure to reinstate Bazoum or even in the case of the EU-missions to prevent coups in the first place, the past months have not reflected well upon the internal mechanisms of the AU, ECOWAS, and the effectiveness of the international community.

### **C. Economic Sanctions**

#### **I. General permissibility**

A second option would be to issue sanctions to apply pressure onto the military junta to step down. Sanctions can apply to several activities.<sup>50</sup> There is no uncontested definition of a sanction, but most refer to measures intended as a response to violations of international law to compel the responsible state to cease violating international law through its behavior.<sup>51</sup> “Sanctions” as a concept can therefore include unilateral and multilateral actions by singular states or international organizations.<sup>52</sup>

The extent to which sanctions are allowed to be used to pressure the military junta only arises insofar as sanctions are restricted by international law. The application of sanctions is type-dependent. So far as sanctions do not intervene in the rights of states, there is no ground on which to forbid or restrict their implementation in international law. There is, for example, no right to trade or “*ius commercii*”.<sup>53</sup> In the case of the US-Embargo against Cuba for example, the General Assembly advocated for the removal of those measures, which implies limits to the extent of legitimate sanctions.<sup>54</sup> If principles and rights which arise from international law, especially the principles of non-intervention, are affected, conditions and consequences of such sanctions must be defined.<sup>55</sup> The principle of non-intervention, enshrined in Art 2 (7) UN-Charter, derives from the equivalent sovereignty of states and forbids to interfere in the internal sovereign rights of other states<sup>56</sup>, in particular their *domaine réservé*.<sup>57</sup> The principle

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<sup>50</sup> Hafner, ZaöRV 2016, p. 391 (396); Vitzthun/Proelß, p. 745.

<sup>51</sup> Evans, p. 535; Hafner, ZaöRV 2016, p. 391 (397-398); Vitzthun/Proelß, p. 745.

<sup>52</sup> Pellet/Miron, Sanctions, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?rskey=vheOxT&result=1&prd=MPIL#>, para. 5 (last accessed on 01/17/2024).

<sup>53</sup> Vitzthun/Proelß, p. 751.

<sup>54</sup> Evans, p. 536 with a list of all GA resolutions.

<sup>55</sup> Evans, p. 535; Hafner, ZaöRV 2016, p. 391 (398).

<sup>56</sup> Herdegen, p. 303; Ipsen, p. 1149; Kunig, Intervention, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=XkJmeU&result=2&prd=MPIL#>, para. 14 ff. (last accessed 01/17/2024).

<sup>57</sup> Herdegen, p. 304; Ipsen, p. 1150.

of non-intervention encompasses the choice of political, economic, social and cultural systems and the formulation of foreign policy.<sup>58</sup> The most commonly used and known sanctions tend to be economic. Limits to economic sanctions are difficult to define. Literature seems to be divided and inconclusive.<sup>59</sup> Determining if economic sanctions violate the non-intervention principle could be dependent on the goal and intensity of beforementioned sanctions<sup>60</sup>, while the ICJ ruled in *Nicaragua v. United States of America*, that it was unable to determine a breach of the non-intervention principle through an embargo by the US against Nicaragua.<sup>61</sup> Considering state praxis, literature and scattered treaties, the restrictions on economic sanctions are rather vague and not far-reaching.

## II. Permissibility under the UN-Charter

It is questionable if the protection of democratic structures also constitutes a threat to the peace according to Art. 39 UN-Charter, which would unlock the mechanism of Art. 41 UN-Charter. The definition for a threat to peace is fluid and has changed over time.<sup>62</sup> The UNSC would, according to Art. 39 UN-Charter, need to determine the existence of any threat to the peace, breach of the peace, or act of aggression. While the UNSC enjoys “considerable discretion”<sup>63</sup> in terms of determining if the prerequisites of Art. 39 UN-Charter are fulfilled there are contours which indicate the meaning of the concepts used.<sup>64</sup> Peace can be defined as the absence of organized use of force<sup>65</sup>, while the phrasing of Art. 39 UN-Charter, “international peace and security”, could signal that Art. 39 UN-Charter does not encompass purely national breaches of security. UNSC practice<sup>66</sup> has illustrated though that such determinations can also be made for internal situations, which is based on an explicit exemption to Art. 2 (7) UN-Charter.<sup>67</sup> The most prominent examples for internal affairs

<sup>58</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 205.

<sup>59</sup> v. *Arnauld*, p. 157; *Carter*, Economic Sanctions, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=YoyuYu&result=1&prd=MPIL> (last accessed on 02/21/2024); *Stein/von Buttlar/Kotzur*, p. 242 f.; *Vitzthun/Proelß*, p. 752.

<sup>60</sup> v. *Arnauld*, p. 157; *Kunig*, Intervention, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=XkJmeU&result=2&prd=MPIL>, para. 25 (last accessed 01/17/2024).

<sup>61</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 126.

<sup>62</sup> v. *Arnauld*, p. 465; *De Wet/Wood*, Peace, Threat to the, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e374?rskey=HN3ALV&result=1&prd=MPIL>, para. 34 ff. (last accessed on 01/17/2024).

<sup>63</sup> *Frowein/Krisch*, in: Simma (ed.), p. 719 para. 4; similar *Henderson*, p. 94.

<sup>64</sup> *Frowein/Krisch*, in: Simma (ed.), p. 719 para. 5.

<sup>65</sup> *Frowein/Krisch*, in: Simma (ed.), p. 720 para. 6; *Stein/von Buttlar/Kotzur*, p. 324.

<sup>66</sup> See *De Wet/Wood*, Peace, Threat of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?rskey=vheOxT&result=1&prd=MPIL>, para. 7 ff. (last accessed 01/17/2024); *Stein/von Buttlar/Kotzur*, p. 324; *Wippman*, *HJIL* 1997, 659 (672).

<sup>67</sup> *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (134).



deemed a threat to peace were the apartheid regime of South Africa and the white ethno-state of South Rhodesia.<sup>68</sup> This was based upon the assumption that the internal affairs of those states would have a destabilizing effect on neighboring states and could lead to an inter-state-conflict.<sup>69</sup> Further examples are Sierra Leone, Liberia, and Somalia in the 1990s and 2000s.<sup>70</sup> The meaning of peace also must be interpreted in a wider way, including, for example, violations of human rights, humanitarian law, terrorist activities and violations of democratic principles.<sup>71</sup> The latter options in Art. 39 UN-Charter need to be interpreted in narrower ways, presuming that armed force has already been used.<sup>72</sup>

Considering the effects the coup has had on the region, it is fair to assume that it could spiral into an inter-state conflict and destabilize the region. The strong reaction it evoked from surrounding states also points in such a direction. States do not establish defensive alliances if they would not need them. At this point it is unlikely that ECOWAS, in particular, will take military steps. Although this signals no better relationship between the countries involved. Even if one is to disagree with that assessment the early stages of the coup would have warranted a threat to international peace and Art. 39 UN-Charter would have been applicable.

If the UNSC would also consider these conditions fulfilled Art. 41 UN-Charter would be applicable. Art. 41 UN-Charter allows the UNSC to implement non-armed measures. According to Art. 41 “[t]hese may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” Until now, the UNSC has not implemented such measures yet.

### III. Permissibility under the rules of regional organizations

#### 1. ECOWAS

As seen above<sup>73</sup> ECOWAS possesses a far-reaching sanctioning mechanism for the unconstitutional change for government. This mechanism also applies to economic sanctions against Niger, for example through Art. 45 of the Lomé Protocol. Following the coup the Authority determined the closure of land and air borders between ECOWAS and Niger, the

<sup>68</sup> *De Wet/Wood*, Peace, Threat of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?rskey=vheOxT&result=1&prd=MPIL>, para. 34 (last accessed 02/21/2024).

<sup>69</sup> *De Wet/Wood*, Peace, Threat of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?rskey=vheOxT&result=1&prd=MPIL>, para. 35 (last accessed 02/21/2024).

<sup>70</sup> *Krisch*, in: UN-Charter Simma (ed.), p. 1279 para. 14.

<sup>71</sup> *Crawford*, p. 734; *De Wet/Woods*, Peace, Threat to the, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e374?rskey=HN3ALV&result=1&prd=MPIL>, para. 7 ff. (last accessed on 01/17/2024); *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (134); *Stein/von Buttlar/Kotzur*, p. 324.

<sup>72</sup> *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (134).

<sup>73</sup> B. III.



implementation of a no-fly zone on all commercial flights from and to Niger, the suspension of all commercial and financial transactions between ECOWAS member states and Niger, the freeze of all service transaction including utility services, the freeze of assets of the Republic of Niger in ECOWAS Central Banks, the freeze of assets of the Niger State and the State Enterprises and Parastatals in Commercial Banks, the suspension of Niger from all financial assistance and transactions with all financial institutions, particularly, EBID and BOAD, a travel ban and asset freeze for the military officials involved in the coup attempt, which also applies to their families and the civilians who accepted to participate in any institutions or government established by these military officials.<sup>74</sup>

## **2. African Union**

The anti-coup instruments of the AU have progressed significantly since the 20<sup>th</sup> century. The development reaches from the establishment of a guideline in response to unconstitutional changes of government in 1975 to the actual establishment of anti-coup measures in the Constitutive Act in 2000.<sup>75</sup> Regarding sanctions, Art. 23 (2) Constitutive Act determines that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” This means that the Assembly could impose economic and political sanctions upon Niger if it fails to comply with the decisions and policies of the Union. A more specific possibility to pressure the junta members and Niger in general arises out of Art. 25 (7) African Charter on Democracy, Elections and Governance, allowing the Assembly to sanction “perpetrators of unconstitutional change of government including punitive economic measures.” In addition the AU Peace and Security Protocol empowers the Peace and Security council to “institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration“ in Art. 7 (g).

## **3. EU**

On the 23<sup>rd</sup> of October 2023, the Council of the European Union approved a framework of restrictive measures to pressure the junta in Niger.<sup>76</sup> Generally, the external actions in regards to restrictive measures of the EU must “be guided by the principles, pursue the objectives and

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<sup>74</sup> Final Communiqué of the 51<sup>st</sup> Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Political Situation in Niger, 30<sup>th</sup> July 2023.

<sup>75</sup> For a more detailed breakdown see *Brunner*, Un autre coup d’État en Afrique, <https://verfassungsblog.de/zum-putsch-in-niger-und-zur-demokratieschutzarchitektur-der-afrikanischen-union/> (last accessed on 01/15/2024).

<sup>76</sup> *Rat der Europäischen Union*, Niger: EU schafft Rahmen für eigenständige restriktive Maßnahmen, <https://www.consilium.europa.eu/de/press/press-releases/2023/10/23/niger-eu-sets-up-an-autonomous-framework-for-restrictive-measures/> (last accessed on 01/15/2024).

be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union”, according to Art. 215 TFEU. These restrictive measures can take the form embargos, the prohibition of the trade in certain goods and services and a ban on investments.<sup>77</sup> Economic sanctions by the EU itself are adopted by the Council itself based upon the initiative of Member States or the High Representative in accord with Art. 29 TEU.<sup>78</sup> These measures are either executed by member states directly, like arms embargos or restrictions on admission, while others are implemented by a Regulation adopted by the Council and are applicable directly in all EU member states. The EU explicitly states that such measures must be implemented in accordance with international law, human rights, and the obligations under Art. 6 (3) Treaty on European Union and additionally be consistent with the objectives of Art. 21 CFSP.<sup>79</sup>

Regarding Niger the EU restrictive measures consist of an asset freeze and prohibition to make funds available for individuals and entities, as well as a travel ban for individuals. More specifically the Council adopted measures to bar natural persons responsible for the coup from transit through EU Member States and an immediate asset freeze of economic resources belonging to, owned, held, or controlled by natural or legal persons, entities or bodies responsible for the coup in Decision 2023/2287 of 23<sup>rd</sup> October 2023, although the Annex meant to list natural and legal persons the restrictive measures are imposed upon stays vacant.<sup>80</sup>

#### **IV. The effectiveness of sanctions**

The usefulness of sanctions is contested, politically and economically.<sup>81</sup> While sanctions often aim to reduce support for the leaders of the sanctioned state, they can often have the opposite effect. They act as a scapegoat for bad economic policies and poverty, which can be blamed on “foreign forces” and pushes the population back into the arms of the respective regime.

Targets of sanctions, mostly state leaders, and the integrity of their respective regimes, are seldom affected. Rather than weakening the intended targets, sanctions particularly affect the poor and middle class of the state and have potential to foment civil unrest and perpetuate

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<sup>77</sup> Erlbacher, in: Kellerbauer (ed.) et al., p. 1636; Krüger, Wirtschaftssanktionen nach Art. 215 AEUV – Ein scharfes Schwert?!, [https://infopoint-europa.de/de/articles/wirtschaftssanktionen-nach-art-215-aeuv-ein-scharfes-schwert#\\_ftn1](https://infopoint-europa.de/de/articles/wirtschaftssanktionen-nach-art-215-aeuv-ein-scharfes-schwert#_ftn1) (last accessed on 01/17/2024); Schröder, p. 396 ff.

<sup>78</sup> Erlbacher, in: Kellerbauer (ed.) et al., p. 1634; Herdegen, Europarecht, p. 536; Krüger, Wirtschaftssanktionen nach Art. 215 AEUV – Ein scharfes Schwert?!, [https://infopoint-europa.de/de/articles/wirtschaftssanktionen-nach-art-215-aeuv-ein-scharfes-schwert#\\_ftn1](https://infopoint-europa.de/de/articles/wirtschaftssanktionen-nach-art-215-aeuv-ein-scharfes-schwert#_ftn1) (last accessed on 01/17/2024).

<sup>79</sup> General Secretariat of the Council, Sanctions Guideline – update, p. 5 ff.

<sup>80</sup> Last checked on 02/14/2024.

<sup>81</sup> Ruys, in: Wouters/De Man/Verlinden (eds.), p. 107 (136); Thakur, in: Weller (ed.), p. 180 (188).

destitution of the population. Consequently, this leads to greater dependence of the population on the government, in regard to economic stimuli and social security.<sup>82</sup> Recently, Niger appealed to the court of ECOWAS to lift the sanctions, citing extreme hardships on its population, the effects of which are unlikely to invoke significant change.<sup>83</sup> This request was denied on the 7<sup>th</sup> of December 2023, citing that an “entity resulting from an unconstitutional change of government, and not acknowledged by ECOWAS as a government of a member state, inherently lacks the capacity to initiate a case before the court with the aim of obtaining benefits or reprieve.”<sup>84</sup> Naturally, the military junta has an interest in lifting the sanctions to stabilize its rule and legitimize its own government and for example blocked the entry of humanitarian aid from Benin.<sup>85</sup> However, UN officials on the ground report that Niger has lost 70% of its power supply, mainly provided by Nigeria, and struggles with agricultural and pharmaceutical shortages, which has emboldened the military junta and rendered Niger more dependent upon it.<sup>86</sup> Unlike in Mali in 2021 ECOWAS didn’t exclude electricity from its sanctions, forcing the population to suffer from regular power outages and to rely on power generators.<sup>87</sup> The World Food Program estimated in September 2023 that the closure of borders put 90.000 moderately malnourished children at risk, because they were cut off from necessary aid.<sup>88</sup> While around 3.3 million people in Niger are food insecure, food prices soared by 21% in August 2023.<sup>89</sup> Furthermore the sanctions are expected to deepen terrorist threats and slow down infrastructure projects.<sup>90</sup> From the perspective of an ordinary

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<sup>82</sup> *Ibd.*, p. 189.

<sup>83</sup> *Aljazeera*, Niger government asks court to force ECOWAS to lift coup sanctions, <https://www.aljazeera.com/news/2023/11/22/niger-asks-west-africas-court-to-compel-neighbors-to-lift-coup-sanctions-citing-hardship> (last accessed on 01/15/2024).

<sup>84</sup> *ECOWAS*, ECOWAS Court declines to grant request for interim measures in suit brought by Niger against the ECOWAS Authority of Heads of State and Government, <http://www.courtecowas.org/2023/12/07/ecowas-court-declines-to-grant-request-for-interim-measures-in-suit-brought-by-niger-against-the-ecowas-authority-of-heads-of-state-and-government/> (last accessed on 01/19/2024).

<sup>85</sup> *Obasi*, ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate, <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate> (last accessed on 02/19/2024).

<sup>86</sup> *Mamane/Asadu*, Many in Niger are suffering under coup-related sanctions. Junta backers call it a worthy sacrifice, <https://apnews.com/article/niger-bazoum-coup-sanctions-ecowas-c7bdfd06559f1cfbf856bea5b11a55f> (last accessed on 01/15/2024).

<sup>87</sup> *Obasi*, ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate, <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate> (last accessed on 02/19/2024).

<sup>88</sup> *World Food Programme*, Thousands of children in Niger at risk of severe nutritional crisis as border closure leaves trucks stranded, <https://www.wfp.org/news/thousands-children-niger-risk-severe-nutritional-crisis-border-closures-leave-trucks-stranded> (last accessed on 02/19/2024).

<sup>89</sup> *World Food Programme*, Sustained financial support and access are urgently needed to save lives in Niger and Sahel region, <https://www.wfp.org/news/sustained-financial-support-and-access-are-urgently-needed-save-lives-niger-and-sahel-region> (last accessed on 02/19/2024).

<sup>90</sup> *Obasi*, ECOWAS, Nigeria and the Niger Coup Sanctions: Time to Recalibrate, <https://www.crisisgroup.org/africa/sahel/niger/ecowas-nigeria-and-niger-coup-sanctions-time-recalibrate> (last accessed on 02/19/2024).

inhabitant of Niger, the “well-meaning” sanctions only provide denizens of the region with even more hardship. Considering this, economic sanctions deployed by ECOWAS, the EU and the AU will fail to reach their goal of reinstating Bazoum and will make the task for potentially democratic governments in the future even harder.

#### **D. Military action and threat of violence**

Retrospection of ECOWAS strategies in recent years reveals a striking similarity between the threat of force by ECOWAS states against Niger and the case of The Gambia in 2016, along with similar situations in the past decades.<sup>91</sup> Prior to these cases, in 1990, ECOWAS led an intervention into the Liberian Civil War, which was contested within its member states.<sup>92</sup> The member states of ECOWAS supporting the intervention acted without UN Security Council approval and based the legality upon the invitation of the ousted president of Liberia, and brutal dictator, Samuel Doe. Subsequently, the UN Security Council retroactively approved of the intervention.<sup>93</sup> Another case, this time with UN Security Council approval, took place in Sierra Leone from 1997 until 1999 after the legitimate president Ahmad Tejan Kabbah was overthrown.<sup>94</sup>

ECOWAS’s response to undemocratic changes in government has proven consistent in the last decades. The responses mostly consisted of diplomatic pressure, sanctions, but especially threats of violence, and interventions. Furthermore, the validity of the last two options’ permissibility under international law needs to be investigated, not just for ECOWAS, but for all possible actors. Considering that the member states of both ECOWAS and the AU are the most likely to use force, special focus will be laid on them. While ECOWAS has changed its stance on the use of force regarding Niger, it is nonetheless important to examine if the use of force would be legitimate in future cases.

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<sup>91</sup> For a short summarization of the situation in 2016 *Helal*, in: Ruys/Corten/Hofer (eds), p. 912 (920); also, for Côte D'Ivoire in 2011 see *Gagnon*, JICL 2013, p. 51 (52-55).

<sup>92</sup> *Berger/Hamady*, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 8 (last accessed on 01/15/2024).

<sup>93</sup> *Berger/Hamady*, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 9 (last accessed on 01/15/2024).

<sup>94</sup> *Berger/Hamady*, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 10 (last accessed on 01/15/2024).

## I. General permissibility

The principle of the non-use of force is considered a “cornerstone”<sup>95</sup> of the modern international law regime and is universally accepted as international customary law and a *jus cogens* norm.<sup>96</sup> It is also laid down in Art. 2 (4) of the UN-Charter, which encompasses only the use of armed force, while economic and political force were excluded.<sup>97</sup> Both Art. 2 (4) UN-Charter and the principle of non-use of force generally have the same content, while some differences can exist.<sup>98</sup> Force in the sense of Art. 2 (4) UN-Charter can generally be defined as the use of conventional weapons and regular troops by a state against another state.<sup>99</sup> This definition is rudimentary and gets qualified through various means like the Friendly Relations Declaration and the definition of “aggression” by the GA.<sup>100</sup> The principle of the non-use of force can also be applicable to other physical actions as long as they are coercive and inflict “*vis compulsiva*” upon the target.<sup>101</sup> Additionally there have been attempts to narrow down the applicability of Art. 2 (4) UN-Charter to allow the use of force, if it doesn’t conflict “with the Purposes of the United Nations” according to Art. 2 (4) UN Charter, as in the case of reconquest of unlawfully occupied territory or pro-democratic intervention.<sup>102</sup> Another exception to Art. 2 (4) UN-Charter could be an invitation to intervention.<sup>103</sup> Presuming that none of the exceptions apply, it would be a breach of Art. 2 (4) UN-Charter to launch a military intervention to reinstate Bazoum. Through a breach of Art. 2 (4) UN-Charter, it could be justified under international law, especially by exceptions contained in the Charter itself.

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<sup>95</sup> *Buchan/Tsagourias*, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); *Crawford*, p. 718; *Dörr*, Use of Force, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=B4MgOv&result=1&prd=MPIL>, para. 1 (last accessed on 01/15/2024); *Henderson*, p. 17; *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (110).

<sup>96</sup> *Buchan/Tsagourias*, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); *Dörr*, Use of Force, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=B4MgOv&result=1&prd=MPIL>, para. 1 (last accessed on 01/15/2024); *Evans*, p. 603; *Henderson*, p. 17; *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (110).

<sup>97</sup> *Crawford*, p. 720; *Dörr*, Use of Force, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=B4MgOv&result=1&prd=MPIL>, para. 12 (last accessed on 01/15/2024); *Evans*, p. 604; *Henderson*, p. 53; *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (110).

<sup>98</sup> *Dörr*, Use of Force, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=B4MgOv&result=1&prd=MPIL>, para 9 f. (last accessed on 01/15/2024); *Ipsen*, pp. 1147 ff.

<sup>99</sup> *Ipsen*, p. 1139; v. *Arnauld*, p. 457.

<sup>100</sup> *Ipsen*, pp. 1139 ff.; v. *Arnauld*, p. 459.

<sup>101</sup> v. *Arnauld*, p. 457.

<sup>102</sup> *Ipsen*, p. 1146; for further exceptions see *Dörr*, Use of Force, Prohibition of, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e427?rskey=B4MgOv&result=1&prd=MPIL>, para 36 ff. (last accessed on 01/15/2024).

<sup>103</sup> See E. III.

## **II. Right to intervene through the UN-Charta**

### **1. UNSC authorization**

States may be eligible to intervene under the UN-Charta. The UN-system of collective security is influenced by three main principles: the obligation of member states to refrain from the use of violence or the threat of violence and to use peaceful methods of conflict prevention and settlement, a collective enforcement mechanism, and the possibility of military action with the consent of the involved parties to secure peace and security.<sup>104</sup> Given those principles, the cases in which the use of force is allowed are heavily restricted. Art. 51 UN-Charter acknowledges the “inherent right of individual or collective self-defense” which is part of international customary law<sup>105</sup> and Art. 42 UN-Charter allows the UN-Security-Council to authorize the use force in case measures of Art. 41 UN-Charter fail to reach their goal.<sup>106</sup> Neither of both is applicable in this case. Niger hasn’t indicated intentions of using force against other states up to the standards of an armed attack, which would even eliminate the possibility of preemptive self-defense<sup>107</sup>, and none of the ECOWAS member states or ECOWAS or any other possible actor itself has reached out for security council authorization.

As seen, the requirements of Art. 39 UN-Charter regarding economic sanctions would be fulfilled. Considering all of this, the UNSC could theoretically authorize measures under Art. 42 UN-Charter. Neither the internal nature of the coup nor the absence of violence is a hindrance in assuming that the coup could be considered a threat to peace according to Art. 39 UN-Charter.

### **2. Implied authorization**

States could also act upon the concept of “implied authorization”. This term was coined by states claiming to enforce UNSC resolutions<sup>108</sup> but is heavily criticized.<sup>109</sup> It relies on the assumption that past UNSC resolutions in similar contexts or even current resolutions approve the use of force not explicitly but implicitly. If a state or especially ECOWAS were to rely on this doctrine, they would need to prove such implicit authorization by the UNSC and that such a doctrine exists. The UNSC released a press statement on the 07/28/2023 condemning the unconstitutional change of government and expressing their support for ECOWAS and the

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<sup>104</sup> *Ruffert/Walter*, Rn. 399.

<sup>105</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 174.

<sup>106</sup> *v. Arnould*, p. 462.

<sup>107</sup> For a breakdown of scholarly debate see *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (116 f.).

<sup>108</sup> *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (139); *Stein/von Buttlar/Kotzur*, p. 329.

<sup>109</sup> See just *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (139 f.).

AU.<sup>110</sup> Such a press statement certainly can not qualify as an implicit authorization. For once it is a far too weak of an indicator and lacks any intention of the UNSC to approve the use of force. It therefore cannot replace an actual resolution. Any other reading would open the door for abuse. States determining the supposed will of the UNSC would undermine the authority of the UNSC and create legal uncertainty on a not tolerable scale. A justification through implied consent is therefore not possible.

### III. Intervention by Invitation

An intervention could be justified through an ad-hoc invitation. International law generally recognizes the right of a government to invite foreign armed intervention within the territory of the state<sup>111</sup>, because “consent by the ‘owner’ of a legal good is said to foreclose any infringement of that legal good”<sup>112</sup>. In this case intervention would not infringe upon Art. 2 (4) UN-Charter.<sup>113</sup> An opposing view still considers such an intervention a breach of Art. 2 (4) UN-Charter while being justified at the same time.<sup>114</sup> This dispute doesn’t affect the legality of a potential intervention in Niger. If such a right exists, consent must be explicitly given prior to intervention<sup>115</sup> and by the highest available state organ.<sup>116</sup>

In early August 2023, Mohamed Bazoum wrote an op-ed in the Washington Post, an American news publisher, in which he called upon the international community to “restore our constitutional order.”<sup>117</sup> Bazoum’s publication could be seen as such an invitation to intervention. The preconditions are twofold: Bazoum must be eligible to give consent and the op-ed must qualify as consent to intervention.

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<sup>110</sup> *United Nations Security Council*, SC/15372, Security Council Press Statement on Situation in Niger, 28<sup>th</sup> of July 2023.

<sup>111</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 246; ICJ, *Armed Activities on the Territory of the Congo*, Judgement [2005] para. 42-54; *Buchan/Tsagourias*, *The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal*, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); *Helal*, in: Ruys/Corten/Hofer (eds.), p. 912 (920); *Ipsen*, p. 1146; *Crawford*, p. 743; *Fox*, in: Weller (ed.), p. 816 (816); *Henderson*, p. 19; *Raube*, *An International Law Assessment of ECOWAS’ Threat to Use Force in Niger*, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024).

<sup>112</sup> *Kritsiotis/Corten/Fox*, p. 4; similar ILC’s Draft Articles on State Responsibility.

<sup>113</sup> *Henderson*, p. 349; *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (113); v. *Arnould*, p. 460.

<sup>114</sup> *De Wet*, EJIL 2016, p. 979 (980).

<sup>115</sup> *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (113)

<sup>116</sup> ICJ, *Armed Activities on the Territory of the Congo*, Judgement [2005] para. 45-53, *Nolte*, *Intervention by Invitation*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=GsrIAr&result=1&prd=MPIL>, para. 23 (last accessed on 01/15/2024).

<sup>117</sup> *Badoum*, President of Niger: My country is under attack and I’ve been taken hostage, <https://www.washingtonpost.com/opinions/2023/08/03/mohamed-bazoum-coup-niger-democracy/> (last accessed on 01/15/2024).



Who may impart this consent, if multiple parties claim to be the rightful government at the same time, is contested. The fault line runs between the proponents of effective<sup>118</sup>, legitimate control<sup>119</sup> of a state and an emerging view, which tries to link both elements<sup>120</sup>. While legitimate control implies that the rightfulness of a government in a constitutional sense is the determining factor for the right to give consent, factual or effective control only concerns the actual degree of control a government can exercise over state territory. This distinction lies on a spectrum and may be unclear to define and descriptions are often somewhat vague.<sup>121</sup>

On the side favoring effective control, it is unclear which extend this control needs to reach.<sup>122</sup> In multiple cases, state practice varied considerably.<sup>123</sup> In recent decades it has become practice, especially of Western states, to support non-state actors who don't control sizeable parts of a territory.<sup>124</sup> Although, this opinion has state praxis, scholarly and judicial opinion to back up its claim to be dominant in international law.<sup>125</sup> The ICJ has used the effective control doctrine in the cases *Nicaragua v. United States of America*<sup>126</sup> in a different context, namely in state responsibility for certain actors.

The argument for legitimacy runs into its own problems. Such a doctrine could significantly weaken the doctrine of non-intervention and the non-use of force. Some also consider the burden of proof to be on the side of those advocating for the element of legitimate control, that international customary law has swung into that direction, which to their opinion, is yet to happen.<sup>127</sup> If one is to follow the legitimacy argument, several complicated follow-up questions must be considered. Especially if legitimacy only concerns itself with the origin of a governments rule or if factors of how it governs need to be considered too.<sup>128</sup> Such considerations could lead to the conclusion that an effective government could lose its

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<sup>118</sup> *Villani*, p. 450; only in lack of a better alternative *Roth*, MJIL 2010, p. 393 (439 f.); also, not without limitation *Kritsiotis*, EJIL 2016, 999; *Nolte*, Intervention by Invitation, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=GsrIAr&result=1&prd=MPIL>, para. 17 f. (last accessed on 01/15/2024).

<sup>119</sup> *Gagnon*, JICL 2013, p. 51 (67); *Levitt*, WILJ 2006, 785 (793).

<sup>120</sup> *Ruys*, in: *Wouters/De Man/Verlinden* (eds.), p. 107 (133) „de facto” control and “generally recognized as the legitimate government”; *Raube*, An International Law Assessment of ECOWAS’ Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024); carefully *Fox*, in: *Weller* (ed.), p. 816 (836 f.).

<sup>121</sup> *Fox*, in: *Weller* p. 816 (821); *Hartwig*, ZaöRV 2019, p. 703 ff.; *Kritsiotis/Corten/Fox*, p. 7 ff.

<sup>122</sup> See *De Wet*, EJIL 2016, 979 (990).

<sup>123</sup> *Henderson*, p. 355 f.

<sup>124</sup> See examples provided by *De Wet*, EJIL 2016, p. 979 (982 f.).

<sup>125</sup> *Giacco*, ZaöRV 2019, p. 663.

<sup>126</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, [1986] para. 246.

<sup>127</sup> *Henderson*, p. 922; in the case of *Gambia*, ECOWAS seems to have been aware of the weakness of relying on the consent of a person who never exercised any effective control, see *Kritsiotis/Corten/Fox*, p. 168.

<sup>128</sup> *Kritsiotis/Corten/Fox*, p. 8.



capability to consent if it violates certain rules of international law.<sup>129</sup> Furthermore, international recognition is an important factor in regards on who may impart consent to an intervention.<sup>130</sup> Also considering this, except for the EU and ECOWAS, most states are careful to not go too far in their support and their recognition of him as the legitimate president.<sup>131</sup> A overly liberal use of such a principle would also open the door for bad faith actors to use invitation by a supposedly democratic government to intervene.

This indicates that Bazoum has lost the authority extending an invitation to ECOWAS. He has lost complete effective control over Niger and the international community is careful in terms of recognizing as the legitimate leader. Additionally, ECOWAS has de facto recognized the junta as the new government. By accepting Bazoums invitation ECOWAS would contradict itself. Both theories would lead to the same result.

#### **IV. Right to intervene through regional organizations**

Another consideration could be that the international organizations present in the region could intervene militarily. Niger is both a member of ECOWAS and the AU. The fact that both memberships are currently suspended does not impede upon the fact that Niger is still part of both organizations and therefore their treaties and has to fulfill its obligations regarding the AU according to Art 25 (2) African Charter on Democracy, Elections and Governance.<sup>132</sup> Insofar ECOWAS and the AU have mechanisms which allow them to intervene in member states, an intervention could be justified on the ground that Niger gave its ex-ante consent in form of ratifying the respective treaties.

##### **1. Intervention under the rules of ECOWAS**

ECOWAS has developed its framework of rules to guarantee security, peace and democracy significantly in the last decades.<sup>133</sup> The culmination of those efforts is the Lomé Protocol, or Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, ratified in 1999. It introduced the possibility of the use of force in the case of an undemocratic change of government in Article 25. It lists multiple instances in

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<sup>129</sup> Kritsiotis/Corten/Fox, p. 9.

<sup>130</sup> De Wet, EJIL 2016, p. 979 (1998).

<sup>131</sup> Hammady, Assessing the Legality of ECOWAS planned Intervention in Niger, <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> (last accessed on 01/15/2024).

<sup>132</sup> Mednick, The African Union suspends Niger until “the effective restoration of constitutional order”, <https://apnews.com/article/niger-coup-african-union-suspends-206360382e68f9df52402824029b6f82> (last accessed on 01/15/2024).

<sup>133</sup> Berger/Hamady, Economic Community of West African States (ECOWAS), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e610?rskey=vm12Kq&result=1&prd=MPIL>, para. 11 ff. (last accessed on 01/15/2024).

which ECOWAS could intervene militarily, including e.g. aggression or conflict in any member state or threat thereof, a case of conflict between two or several member states and most importantly and lastly “in the event of an overthrow or attempted overthrow of a democratically elected government”. This treaty was ratified and is still in force. It also established the Mediation and Security Council (MSC) who is responsible for enforcing the protocol in cooperation with the Authority.<sup>134</sup> Decisions, if and how certain measures are to be taken, needs to be sanctioned by a two third majority of the MSC according to Art. 9 (2) of the protocol.

Currently, there is no necessary majority and consensus regarding an intervention between the member states of ECOWAS, although the possibility, at least purely based on the Lomé Protocol still persists, because Bazoum was clearly democratically elected and violently overthrown. After the decision to create a roadmap in cooperation with the junta, it seems ever so unlikely that ECOWAS will make use of Art. 25 of the Protocol.

## 2. Intervention under the rules of the AU

The AU created a mechanism to react to unconstitutional changes of government in member states.<sup>135</sup> The AU created a Security Council, consisting of 15 members elected by the member states. Art. 4 h) Constitutive Act of the African Union allows its member states 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”. In such a case, the Peace and Security Council would recommend the implementation of said measures to the assembly according to Art. 7 (1. e.) Protocol Relating to the Establishment of the peace and Security Council of the African Union. The Protocol on the Amendment of the Constitutive Act of the African Union adopted by the assembly in 2003 expands the list of “grave circumstances” to “a serious threat to legitimate order”. This amendment of the Constitutive Act has yet to enter into force.<sup>136</sup> This means that the AU would need to rely on the requirement of “grave circumstances”. The addition of “a serious threat to legitimate order”

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<sup>134</sup> *Wissenschaftliche Dienste*, p. 8.

<sup>135</sup> Herdegen, p. 392; Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 5 (last accessed on 01/15/2024).

<sup>136</sup> Only 30 of 55 states have ratified and deposited the amendment, see Protocol on the amendments to the Constitutive Act of the African Union, see here: <https://au.int/sites/default/files/treaties/35423-sl-> (last accessed 02/28/2024); Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 5 (last accessed on 01/15/2024); Brunner, Un autre coup d’État en Afrique, <https://verfassungsblog.de/zum-putsch-in-niger-und-zur-demokratieschutzarchitektur-der-afrikanischen-union/> (last accessed on 01/15/2024).

to Art. 4 (h) Constitutive Act indicates that the article's purpose wasn't originally designed to cover cases of a coup. Similarly, the listed cases like war crimes, genocide, and crimes against humanity are encompassed in a specific category of human suffering. While a threat of the legitimate order can entail war crimes, genocide, and crimes against humanity, it doesn't necessarily need to. A coup, such as the one in Niger, can unfold without any significant bloodshed. Historically, the use of the original Art. 4 (h) Constitutive Act has been limited.<sup>137</sup> With this considered, the AU could not rely on Art. 4 (h) Constitutive Act to intervene in Niger, even if there was a majority in the Assembly.

### 3. Normative concerns

ECOWAS possesses a mechanism through which it could intervene in Niger, while the AU mechanism isn't applicable in this case. Even if one was to consider an intervention by the AU possible, it would run into a similar problem as ECOWAS.

A use of force may not violate Art. 2 (4) UN-Charter because it would be based on Niger's consent upon entering the treaties of ECOWAS and, hypothetically, the AU.<sup>138</sup> If one is to take a closer look, concerns arise that such a view may lead to normative conflicts with the UN-Charter. Art. 103 UN-Charter states that "[i]n the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Although Art. 52 (1) UN-Charter allows regional arrangements, a label under which both organizations are included<sup>139</sup>, to deal "with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations", for enforcement actions Art. 53 (1) UN-Charter further states, that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". Some argue that this leads to the conclusion that regional arrangement which permit intervention in and

<sup>137</sup> Viljoen, African Union (AU), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e452?rskey=GSZEE1&result=1&prd=MPIL>, para. 55 (last accessed on 01/15/2024).

<sup>138</sup> Buchan/Tsagourias, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); Raube, An International Law Assessment of ECOWAS' Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024); Ipsen, p. 1172.

<sup>139</sup> De Wet, LJIL 2014, 353 (356), specifically for the AU De Wet, in: Weller (ed.), p. 316.

through member states violate the UN-Charter.<sup>140</sup> Others seem to favor the primacy of consent of member states into such mechanisms over the UN-Charter.<sup>141</sup>

As a form of intervention by invitation, proponents argue, it would only be stringent if abstract treaty-based consent would also not violate the UN-Charter and be independent of it.<sup>142</sup> Even if one would favor the second view the question would remain, if anticipatory intervention clauses would be overwritten by ad-hoc consent, which could “still be decisive and therefore required”<sup>143</sup>. Some argue that even with those concerns considered that anticipatory consent is a viable legal framework for intervention. Raube, for example, argues that if agreements like those of the AU and ECOWAS wouldn’t allow intervention, they would have no legal meaning at all.<sup>144</sup> Furthermore, so long as those giving anticipatory consent are able to retract it, it would quell some concerns and be a legitimate legal framework for intervention.<sup>145</sup>

Others<sup>146</sup> raise concerns about abstract treaty-based consent. Both mechanisms of the AU and ECOWAS need to be interpreted in the light of the UN-Charter. Additionally, as Hammady points out, the only intervention since the ratification of the Lomé Protocol by ECOWAS was conducted on the ground of ad-hoc consent of the legitimate Gambian President back in 2017.<sup>147</sup> The same goes for the AU. They didn’t rely on abstract treaty-based consent.<sup>148</sup> Responding to Raube, Hammady also correctly points out that the treaties of the AU and

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<sup>140</sup> *De Wet*, LJIL 2014, p. 353 (369); Hammady, Assessing the Legality of ECOWAS planned Intervention in Niger, <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> (last accessed on 01/15/2024); Henderson, p. 118 f.; Stein/von Buttlar/Kotzur, p. 333; v. Arnould, p. 474; ambivalent and considers a future applicability Nolte, Intervention by Invitation, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rskey=GsRIAr&result=1&prd=MPIL>, para. 24 (last accessed on 01/15/2024); Wippman, in Weller (ed.), p. 809 and 812 ff.

<sup>141</sup> Buchan/Tsagourias, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); Raube, An International Law Assessment of ECOWAS’ Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024); Herdegen, p. 279.

<sup>142</sup> Raube, An International Law Assessment of ECOWAS’ Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024).

<sup>143</sup> Raube, An International Law Assessment of ECOWAS’ Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024) describing this view.

<sup>144</sup> Raube, An International Law Assessment of ECOWAS’ Threat to Use Force in Niger, <https://www.justsecurity.org/87659/an-international-law-assessment-of-ecowas-threat-to-use-force-in-niger/> (last accessed on 01/15/2024).

<sup>145</sup> *Ibd.*

<sup>146</sup> Hammady, Assessing the Legality of ECOWAS planned Intervention in Niger, <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> (last accessed on 01/15/2024).

<sup>147</sup> *Ibd.*

<sup>148</sup> *De Wet*, in: Weller (ed.), p. 327 f.

ECOWAS wouldn't lose their relevance. They would rather add an additional safeguard against abuse of ad-hoc consent.<sup>149</sup> The precedents of ECOWAS intervention before the ratification of the Lomé Protocol also don't lend themselves as an example of regional organizations gaining autonomy through regional customary law from the UN-Charter. In all these cases, as De Wet points out, ECOWAS relied on either ex-post authorization of the UNSC or ad-hoc consent of the head of state it was intervening in.<sup>150</sup> In this case the UN-Charter also does not lend itself to much interpretation. As mentioned above it states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council". It would lose its meaning if it could be overridden by a simple regional agreement.

Considering this, ex-ante treaty-based consent can't override the primacy of the UN-Charter and the need for ad-hoc consent. An intervention based on Art. 25 of the Lomé Protocol or Art. 4 (h) Constitutive Act of the African Union would be unlawful.

## V. Pro-democratic intervention

Independently of UNSC authorization, contractual ex-ante consent or intervention by invitation, some authors argue for a doctrine of pro-democratic intervention<sup>151</sup>, not to be confused with humanitarian intervention<sup>152</sup>, based in international customary law and regional customary law. The doctrine is based on an understanding of democracy as a right<sup>153</sup> and proposes the idea that a state or group of states are legitimized to intervene in another state to restore the legitimate democratic order.<sup>154</sup> Though, this doctrine is heavily criticized.<sup>155</sup>

Many authors claim that there is no basis that pro-democratic interventions have entered the domain of customary international law.<sup>156</sup> For example, in the analogous case of ECOWAS' intervention in Gambia the acting states first sought to obtain authorization from the UNSC

<sup>149</sup> Hammady, Assessing the Legality of ECOWAS planned Intervention in Niger, <https://www.ejiltalk.org/assessing-the-legality-of-ecowas-planned-military-intervention-in-niger/> (last accessed on 01/15/2024).

<sup>150</sup> De Wet, LJIL 2014, p. 353 (369).

<sup>151</sup> Levitt, WILJ 2006, 785.

<sup>152</sup> Levitt, WILJ 2006, 785 (792 ff.); Ruys, in: Wouters/De Man/Verlinden (eds), p. 107 (127-132).

<sup>153</sup> Franck, AJIL 1992, 46 (90 f.), although he argued against the use of force based on this right.

<sup>154</sup> Levitt, WILJ 2006, 785 (789); Reisman, AJIL 1984, p. 642 (642 ff.).

<sup>155</sup> Buchan/Tsagourias, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); D'Aspremont, UPJIL, 1089 (1110); Gagnon, JICL 2013, p. 51 (57) makes a quite sarcastic remark; Henderson, p. 359 f.; Nowrot/Schbacker, AUJIL 1998, p. 312 (378 ff.); Wippman, HJIL 1997, 659 (663); Schachter, AJIL 1984, 645 (645 ff.).

<sup>156</sup> Buchan/Tsagourias, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); Helal, in: Ruys/Corten/Hofer (eds.), p. 912 (924); Henderson, p. 359; Ruys, in: Wouters/De Man/Verlinden (eds.), p. 107 (132); Wippman, in: Weller (ed.), p. 801.

and never mentioned a pro-democratic intervention, which would indicate that their recognition of pro-democratic interventions has failed to reach customary international law.

Proponents frequently cite the cases of Panama, Grenada, Haiti, Sierra Leone, and Gambia as examples for state praxis relying on the doctrine.<sup>157</sup> The interventions by ECOWAS in Sierra Leone and Liberia especially are examples frequently cited by scholars who argue that the Security Council approved the interventions ex post facto, thus contributing to the emerging regional norm.<sup>158</sup> In the case of Panama, the US did not justify the operation with the doctrine of pro-democratic intervention, which indicates that, even in cases supposedly proving the rule, there are no grounds.<sup>159</sup> The authorization of the UNSC in Haiti indicates that the intervention could not or did not want to rely on the doctrine of democratic intervention alone and needed further approval, calling into question the legitimacy of claims of state practice<sup>160</sup>, while the intervention in Sierra Leone was largely justified with the consent of the democratically elected president.<sup>161</sup>

There are also multiple teleological considerations to be made. Though many do not translate into international law, the absence of a teleological reading of such a principle would make it ripe for abuse. Multiple objections surface: (1) Definitional problems: If such a principle would enter international customary law, it would inevitably cause chaos. There is no clear definition of democracy. Such a discrepancy in terminology could lead either to unachievably high standards for intervention or to an at-will use of the principle. Without any somewhat objective standards such a doctrine rally potential for abuse.<sup>162</sup> Unilateral action and self-made definitions may leave interpretation open for the term ‘undemocratic’ to be slanted by organizational bias.<sup>163</sup> (2) Even though a change of government may be unconstitutional and undemocratic an intervention may not be justified. The population of a state may be opposed to a coup but simultaneously opposed to foreign military intervention. Similarly, the implementation of sanctions undergoes this same dilemma. Something may be considered within general interest, such as dissolution of a military junta, without being in the interest of its citizens. A pro-democratic intervention would clash with the right to self-determination

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<sup>157</sup> See the examples listed in *Helal*, in: Ruys/Corten/Hofer (eds.), p. 912 (930); critical *Gagnon*, JICL 2013, p. 51 (60).

<sup>158</sup> *Gagnon*, JICL 2013 p. 51 (61-62); *Levitt*, WILJ 2006, 785 (796 and 799).

<sup>159</sup> *Buchan/Tsagourias*, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024).

<sup>160</sup> *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (133); *Wippman*, in Weller (ed.), p. 806.

<sup>161</sup> *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (133); *Wippman*, in Weller (ed.), p. 808.

<sup>162</sup> *Stein/von Buttlar/Kotzur*, p. 288 f.; *Wippman*, in: Weller (ed.), p. 801 f.

<sup>163</sup> Already recognized by *Wippman*, HJIL 1997, 659 (663).



and undermine it heavily. (3) The cause of democratic interventionism may be abused for ulterior motives. One can intervene in a country in the name of human rights without having the interests of a state's constituents in mind.<sup>164</sup> (4) A further reaching question might be where pro-democratic intervention might lead to regarding the justification of statehood in general. If an intervention during an unconstitutional change government is justified, the consideration follows that an intervention into a standing undemocratic government could be justified. This inevitably leads back to the definitional problems of democracy.<sup>165</sup> The second question in that regard would also be if a non-democratic state could lead a pro democratic intervention or if the intervening state would need to meet a certain threshold of "democracy". This would circle back once more to the definitional problem.

While at first glance on moral grounds a pro-democratic intervention seems straightforward, there is no indication that the principle has entered international law or international customary law at all. It runs into multiple definitional and teleological problems which would make its application difficult at best and paradoxical at worst. In the cases listed by proponents, none of the states relied on such a doctrine and rather sought UNSC approval or had ad-hoc consent from a head of state. An intervention couldn't be justified with the principle of pro-democratic intervention.

## VI. Threats of violence

The threat of use of force also falls under Art. 2 (4) UN-Charter and the prohibition of the use of force in general.<sup>166</sup> Thus, threats of the use of force are permissible under Art. 2 (4) UN-Charter insofar as use of force would be permitted in that case in general.<sup>167</sup> There are numerous definitions concerning if something constitutes a threat to use force, which disagree with each other.<sup>168</sup> A more narrow definition would for example demand a "more than verbal and symbolic pressure, e.g. the deployment of troops on the border, substituted with explicit

<sup>164</sup> Similar position: *Helal*, in: Ruys/Corten/Hofer (eds.), p. 912 (924); *Wippman*, in Weller (ed.), p. 812.

<sup>165</sup> One could e.g. ask if a presidential system (or a parliamentary system and so on) is "democratic enough". This would lead down the rabbit hole of democratic theory or the theory of the state in general. Here both main traditions of Hobbes and Rousseau run into fundamental problems, mainly concerning consent and actuality. And if one is inclined to follow more left-leaning figures in that regard the doctrine of pro-democratic intervention would be all-applicable.

<sup>166</sup> *Henderson*, p. 26; *Ipsen*, p. 1142; v. *Arnauld*, p. 461.

<sup>167</sup> *Buchan/Tsagourias*, The Niger Coup and the Prospect of ECOWAS Military Intervention: An International Law Appraisal, <https://lieber.westpoint.edu/niger-coup-ecowas-military-intervention-international-law-appraisal/> (last accessed on 01/15/2024); *Helal*, in: Ruys/Corten/Hofer (eds.), p. 912 (928 f.); *Henderson*, p. 29; *Ipsen*, p. 1142; ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, [1996] para. 47; *Ruys*, in: Wouters/De Man/Verlinden (eds.), p. 107 (112).

<sup>168</sup> See *Wood*, Use of Force, Prohibition of Threat, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e428?rskey=4HHKxZ&result=1&prd=MPIL>, para. 6 ff. (last accessed on 01/15/2024).

or implicit threat of force.<sup>169</sup> In this case ECOWAS announced direct military intervention if the junta doesn't step down, which would qualify as a clear-cut threat under any definition.

As we have seen so far, an intervention could not be justified in international law. Therefore, threats of violence can't be justified either and ECOWAS threats to invade Niger violate Art. 2 (4) UN-Charter.

### **E. Conclusion**

As seen, there exists a variety of responses to the coup in Niger. In some cases, the legality of such measures is vehemently debated, especially around the discussions of ex-ante treaty-based and ad-hoc consent, which cannot be resolved quickly. The doctrine of pro-democratic intervention has not established itself in international law and probably never will, although its theoretical implications about the legitimacy of government and states in general will have a long shelf-life. Such intellectual debates shouldn't obscure the view on the objectively real suffering of the people in Niger. Furthermore, the legal issues touched upon are theoretical in another nature. State praxis has varied considerably and swayed with political convenience and not with an accurate legal framework. The anti-coup framework of the AU and ECOWAS have proven remarkably ineffective. Considering that the region has suffered 9 coups since 2020, it seems idealistic to assume that a simple amendment to Art. 4 (h) Constitutive Act of the African Union could ameliorate the situation. As seen in the case of ECOWAS, even if the instruments to counter coups exist, the organizations are too divided to act decisively. Actors like the EU seemed equally as helpless even though the last years had seen increased cooperation with Niger. One might also cynically add that this focus on Niger was not and is not motivated by a concern about the sanctity of democratic governance in Africa, but a fear of so-called "irregular migration". It would not be surprising if the EU continued to condemn the Coup against Bazoum in the future but at the same time tried to reestablish ties with the new government to further an isolationist policy approach towards those fleeing hunger, poverty, and certain death at the same time, for example by trying to convince Niger to reinstate the beforementioned law against migrant smuggling. This approach is isolationist in so far as it would prevent migrants from reaching Europe, because they rely on the geographical knowledge of smugglers to guide them through the desert towards the Mediterranean. In Niger for example 20% of refugees and migrants stated that smugglers had

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<sup>169</sup> v. *Arnauld*, p. 461.



helped to start their journey.<sup>170</sup> Such a rapprochement was exemplified by the visit of the German Minister of Defense Boris Pistorius. In his words the meeting with his Nigerian counterpart was hopeful regarding continuing the good relations between Germany and Niger under the “given circumstances”.<sup>171</sup> While some would describe such intentions as a wise move to stabilize the region and regain a strategic partner, the reality of the situation is a stone-cold betrayal of the people of Niger and Democracy in favor of “Realpolitik”. Some approaches are more deleterious. Nathalie Loiseau, Chair of the European Parliament's subcommittee on security and defence (SEDE), wrote in an article in 2023: “African coups are first and foremost the Africans' concern, and therefore their failure” regarding the coup in Niger.<sup>172</sup> It is remarkable that a high-ranking member of the European Parliament can be ignorant on the history of imperialism and its still lingering effects, economics, and systematic issues this openly. The naïve observer might wonder how EU foreign policy might have been shaped in the last years by people willing to associate with right-wing-extremists<sup>173</sup> and prone to insulting political allies and opponents.<sup>174</sup> If EU foreign policy regarding Africa will be shaped in a more isolationist direction by people like Loiseau, Niger and other countries in the region will certainly lose their last lifeline out of political and economic turmoil. With racial undertones even creeping into the discourse of nominally liberal politicians like Loiseau, an improvement of the EU's strategy seems out of sight.

Tackling coups from a legislative and international law perspective is putting the cart before the horse. Coups don't happen because of weak legal frameworks. They are a product of material conditions prevailing in the respective societies. Changing those conditions is the first step towards mitigating coups. Legal frameworks can be a helpful tool in this project but are not an exhaustive answer. If it is the withdrawal of aid, economic sanctions, or the use of force, each response will have grave effects on an already suffering, isolated population. While political and economic stability can only be achieved under a legitimate democratic government, the short-term consequences, especially the use of force, would only destabilize the region further. Terror groups, which run rampant in the region, will act with even more

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<sup>170</sup> Golovko, *Players of many parts: The evolving role of smugglers in West Africa's migration economy*, UNHCR, p. 5.

<sup>171</sup> Küstner, *Im Gespräch bleiben*, <https://www.tagesschau.de/ausland/pistorius-niger-102.html> (last accessed on 02/19/2024).

<sup>172</sup> Quoted in *European Parliament Briefing*, *The coup in Niger – Consequences for EU policies in the Sahel*, p. 7.

<sup>173</sup> Pantel, *Mut zur Gedächtnislücke*, <https://www.sueddeutsche.de/politik/frankreich-mut-zur-gedaechtnisluecke-1.4418738> (last accessed on 02/20/2024).

<sup>174</sup> Stone, *Macron's EU ambitions slipping away after top ally's bizarre rant*, <https://www.independent.co.uk/news/world/europe/macron-eu-france-nathalie-loiseau-verhofstadt-european-parliament-a8956771.html> (last accessed on 02/20/2024).

impunity. Deaths from terrorism in the Sahel region in 2022 made up 43 % of the global total in comparison to 1% in 2007.<sup>175</sup> The region has seen an increase of terrorism death by 2.000% from 2007 to 2022.<sup>176</sup> The Global Terrorism Index further notes:

“The underlying drivers are complex and systemic including weak governance, ethnic polarisation, ecological insecurity, abuses by state security, pastoral conflict, the growth of transnational Salafi-Islam ideology, political instability, transnational crime, food insecurity and geopolitical competition.”<sup>177</sup>

Even worse: “Governments in the state’s worst affected by terrorism have experienced multiple coups and coup attempts.”<sup>178</sup> It is a feedback loop. Weak governance leads to more terrorism. More terrorism leads to less support for the current government. Less support for the current government leads to a higher likelihood of a coup. The obvious answer would be that there needs to be a strong stable government, which could introduce social welfare, a systematic answer to the challenge to terrorism and establish political stability. But we have been there before. Bazoum was considered by the west to be a promising candidate and as seen above cooperation between the EU and Niger had increased in the last years.

Maybe it is time to start from scratch and from the bottom. It doesn’t suffice to fund a state apparatus with at best questionable reliability. Niger for example ranked 125 out 180 in the Corruption Perceptions Index in 2023<sup>179</sup> with no trend for betterment in the last decade<sup>180</sup>, while the Anti-Corruption Resource Center points out that:

“Corruption is a serious problem in Niger. Major governance indicators point to systemic levels of corruption permeating all levels of society, as reflected in 2015 World Bank worldwide governance indicators.”<sup>181</sup>

A serious approach would start at the grassroots of local communities. Building up resilience against poverty, terrorism and establishing democratic education. Coups are harder to execute if there is civil resistance against them and people are committed to democratic governance. With sympathy towards Russia being expressed by Niger’s citizens, such an approach is more

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<sup>175</sup> *Institut for Economics and Peace*, Global Terrorism Index 2023, p. 4.

<sup>176</sup> *Ibd.*, p. 5.

<sup>177</sup> *Ibd.*, p. 5.

<sup>178</sup> *Ibd.*, p. 5.

<sup>179</sup> Ranking can be found on: <https://www.transparency.org/en/countries/niger>.

<sup>180</sup> The development of Nigers rank in the Corruption Perceptions Index can be found on: <https://de.statista.com/statistik/daten/studie/594689/umfrage/wahrgenommene-korruption-in-niger/>.

<sup>181</sup> *Transparency International*, Niger: Overview of corruption and anti-corruption, <https://www.u4.no/publications/niger-overview-of-corruption-and-anti-corruption.pdf> p. 2 (last accessed on 02/20/2024).

necessary than ever. An easy step would be to actively incorporate requirements like democratic education in military missions and demand strict anti-corruption guidelines if aid is to be given directly to the government.

For those committed to a democratic and humanitarian cause, choosing one of the measures elaborated on is a zero-sum-game. Asking if international law is up to its challenges might pose the wrong question. The question presupposes a wrong premise, namely that international law ever was a suitable solution to such a complex issue like a coup to begin with.

One might reply that such a pessimistic view of international law is defeatist. Democratic systems need to be protected to ensure better conditions of life. But then again, is democracy the precondition for development or just a result? I would argue for the latter. The idea of democracy exists within a dialectic relationship between material conditions and people's ideals. As Murray Boockchin once wrote about the Russian Revolution:

“Abject misery alone does not produce revolutions; more often than not, it produces an aimless demoralization, or worse, a private, personalized struggle to survive.”<sup>182</sup>

He thought that political progress did not just result out the population finding the current situation intolerable, but out of tension between the actual and possible. Continuing this train of thought, we may arrive at the conclusion that abject misery does not produce revolutions and it certainly does not lend itself for producing and maintaining democracy. As a result of those conditions, we see the hope of the people being misplaced into Russia. This is no surprise, as western politicians do not seem to mind the change in furniture of the state. To return to Boockchin, such a reorientation is not an expression of sympathy towards Russian fascism and nationalism. It served as an aimless, demoralized lashing out in the face of poverty.

A serious approach towards establishing and defending democracy in Africa would rely upon an earnest believe in the value of such a system. Such a belief would need to override the dictates of “Realpolitik” and establish itself as the starting point for aid that is focused on the needs of the poor and building up resilient local communities. While aid in form of food programs is necessary to counteract the suffering of the population,

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<sup>182</sup> Boockchin, Listen, Marxist!, <https://www.marxists.org/archive/bookchin/1969/listen-marxist.htm> (last accessed 02/23/2024).

it should serve as the bare minimum. It is emblematic that only \$1.9 million out of the roughly \$262 million provided in aid by the US to Niger in 2022 fed into projects concerning democratic participation and civil society.<sup>183</sup>

The economy of most western countries was highly developed at the time liberal democracy made its entrance. For African states, the challenge consists in building the boat of democracy while swimming in an ocean of poverty, terrorism, and authoritarianism.

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<sup>183</sup> The statistics can be found under: <https://www.foreignassistance.gov/cd/niger/> (last accessed 02/23/2024).

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