

CURRENT DEVELOPMENTS

Collectively Enforcing the Results of Democratic Elections in Africa

ECOWAS, the AU, and UN Security Council Resolution 2337 (2017) – Part I

CHRISTIAN PIPPAN — 10 February, 2017



“When [...] ECOWAS is united and the African Union is united, then it is possible for the Security Council to decide; it is possible for action to be taken, and it is possible for democracy, human rights, and the freedom of peoples to be defended.” – This was the UN Secretary-General’s upshot from the resolution of the recent electoral crisis in the The Gambia. The crisis had started to unfold towards the end of last year, following former President Yahya Jammeh’s refusal to accept the outcome of presidential elections held on 1 December 2016. Jammeh, who rose to power in 1994 by way of a coup against Gambia’s first president, Dawda Jawara, initially conceded electoral defeat to the opposition’s front-runner, Adama Barrow. Claiming ‘serious’ irregularities, he however reversed his decision a few days later and ordered the Gambian Armed Forces to take over the Independent Electoral Commission in Banjul.

Reportedly, Jammeh’s volte-face was primarily prompted by pressure from his entourage. Yet, *the times they are a-changin’* (to quote last year’s Nobel laureate in literature), even for an archetypical African autocrat, who, in 2002, had pushed the National Assembly to remove the presidential term limit from the text of the constitution and, in recent years, gradually turned from more subtle to distinctly brutal forms of repression (see e.g. the May 2016 European Parliament Resolution on The Gambia). Following his move to reject the results of the 1 December elections, the relevant regional organizations, with support from the United Nations, swiftly began to set in motion a collective machinery that eventually would compel Gambia’s long-time leader to wave good-bye not only to his republican throne but also to his country of birth for good.

First Gear: ECOWAS

The ECOWAS Authority of Heads of State and Government (the leading body of the Economic Community of West African States) rebuffed President Jammeh’s volte-face at its 50th Ordinary Summit in a Communiqué of 17 December 2016 and demanded that President-elect Barrow “must be sworn in on 19 January 2017 in conformity with the Gambian constitution”. To add flesh to its demand, ECOWAS also professed to “take all necessary measures to strictly enforce the results of the 1 December elections”. Evidently, this terminology was not chosen coincidentally. As (fingers crossed!) most law school graduates would be able to recount, the phrase “all necessary measures” has come to be understood in international law, particularly the law of international organizations, as a normative code indicating the authorization of enforcement action, including the use of force.

ECOWAS presumably relied on Article 9 of its 2001 Protocol on Democracy and Good Governance, which demands that losing candidates shall concede defeat in elections. Article 45 of the Protocol, however, which is dealing with sanctions, does not refer to any action that would go beyond certain political measures and suspension of a member state from the organization's decision-making bodies. To identify a legal basis for more severe measures, one must turn to the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Article 3 of the Protocol explicitly lists the option of deployment of a military force to maintain or restore peace within the sub-region among the Mechanism's objectives. The notion of 'regional peace' is thereby framed in very broad terms, allowing (in Article 25 of the Protocol) for the application of the Mechanism not just in the event of inter-state conflict but also in case of domestic conflict, massive violations of human rights and the rule of law, as well as (attempted) coups against democratically elected governments.

Of course, any actual dispatch of troops by ECOWAS, even if consistent with its own legal regime, raises the question of conformity with the prerequisites of the UN Charter, which – based on its Article 103 – enjoys primacy over other treaty obligations entered into by UN member states. As stipulated in Article 52 of the 1999 ECOWAS Protocol, the organization shall, “in accordance with Chapters VII and VIII” of the UN Charter, inform the UN “of any military intervention undertaken in pursuit of the objectives of this Mechanism”. Merely informing the UN in such situations, however, is insufficient in light of Article 53 of the UN Charter, which requires regional organizations to obtain – if only *ex post facto*, though this is already a very broad interpretation of the norm – Security Council authorization for military enforcement measures. The picture may be different, though, if an organization is able to offer a sound alternative justification for the use of force. We shall get back to this in a moment.

Second Gear: The African Union

As could be expected, the crisis in The Gambia also did not go unnoticed by the AU's Peace and Security Council (PSC), the continental organization's standing decision-making body in the area of conflict prevention and resolution. As early as on 12 December, the PSC stressed its determination “to take all necessary measures, in line with the relevant AU Instruments” in order to ensure full compliance with the will expressed by the people of The Gambia on 1 December 2016. In a follow-up Communiqué, adopted on 13 January, the PSC affirmed its full support for ECOWAS' position on the crisis and declared that, “as of 19 January 2017, outgoing President Yahya Jammeh will cease to be recognized by the AU as [the] legitimate President of The Gambia”.

In its statements, the PSC pointed to Article 23 (4) of the African Charter on Democracy, Elections and Governance, which identifies “any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections” as a variant of an illegal unconstitutional change of government. Interestingly, Gambia has signed the Charter in 2008 but has so far refrained from ratifying it (see [here](#)). Also, the Charter, while allowing for sanctions (including “punitive” economic sanctions), does not directly entitle the AU to use force when dealing with an unconstitutional change of government in one of its member states. This seems notable here, given that the PSC, like ECOWAS, has employed the ‘all necessary measures’ formula in its pronouncements on The Gambia.

To be sure, military measures may be contemplated by the Union in accordance with Article 4 (h) of its Constitutive Act. Yet, the norm is explicitly reserved for ‘R2P-situations’ (i.e. war crimes, genocide and crimes against humanity) and hence does not qualify as a proper basis in AU law for the endorsement of military action in the present case. Needless to add, moreover, that in the absence of UN Security Council authorization any implementation of the norm in practice would also again raise serious concerns in light of the UN Charter. A more promising route for the AU might thus be provided by Article 4 (j) Constitutive Act, which affirms the right of member states “to request intervention from the Union in order to restore peace and security”. According to Article 7 (1) of the Protocol Relating to the Establishment of the AU Peace and Security Council, it is up to the PSC to approve the modalities of an intervention pursuant to Article 4 (j) Constitutive Act. It is doubtful, however, if the plain endorsement of an intervention by a sub-regional group (rather than by the AU itself) is actually

covered by this provision. Also, any PSC decision regarding intervention upon request of a member state would first have to be approved by the AU Assembly of Heads of State and Government – a condition visibly not complied with in the Gambian case (at least not *ex ante*).

This post will be continued in a second part.

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Cite as: Christian Pippan, “Collectively Enforcing the Results of Democratic Elections in Africa- Part I”, *Völkerrechtsblog*, 10 February 2017, doi:

ISSN 2510-2567

Tags: African Union, Democracy, ECOWAS



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