Collectively Enforcing the Results of Democratic Elections in Africa

Part II: Third Gear – The UN Security Council

As the 19 January deadline approached, without Jammeh showing any inclination to resign, the crisis deepened. Troops from Senegal, Nigeria and Ghana – subsequently codenamed ECOMIG (ECOWAS Mission in the Gambia) – massed around the borders of The Gambia, obviously ready to remove the county’s long-time leader from office by force if necessary. In keeping with the timetable foreseen in the Gambian constitution, Barrow, the President-elect, was sworn in on 19 January – albeit not in Banjul but in the Gambian embassy in Dakar, where he has taken refuge a few days earlier. Both ECOWAS and the AU welcomed the [swearing-in ceremony](http://example.com) and congratulated Barrow for his assumption of the presidency; with the AU adding to this a call on its member states and the larger international community to recognize Barrow as “the legitimate President” of The Gambia.

Almost immediately after the inauguration, a meeting was convened on the other side of the Atlantic by the UN Security Council, which resulted in Resolution 2337 (2017). In it, the Council unanimously endorsed all measures taken by ECOWAS and the AU, including their decisions “to recognize Mr. Adama Barrow as President of the Gambia”. Additionally, the Council expressed full support to ECOWAS in its endeavor “to ensure, by political means first, the respect of the will of the people of the Gambia”. While containing some R2P-references in its preamble, the resolution was not adopted under Chapter VII of the UN Charter (reportedly at the behest of Russia) and, hence, does not include any specific authorization to use force. Nevertheless, it calls upon the countries and relevant organizations in the region “to cooperate with President Barrow in his efforts to realize the transition to power”.

Indeed, this was just what happened. Apparently with Barrow’s approval, ECOWAS troops crossed the border to The Gambia moments after the adoption of Resolution 2337, for the most part without meeting local resistance. The operation was halted, though, to enable a last-ditch attempt at a diplomatic solution. This was eventually achieved on 20 January in the form of a [political agreement](http://example.com), on the basis of which Jammeh formally accepted to step down and leave the country – which he actually did a day later – in exchange for a number of debatable concessions (including assurances that assets and properties “lawfully” acquired by the former President and his family during Jammeh’s 22 years of reign will essentially stay untouched).

Overall assessment
Looking at the response to the latest post-electoral crisis in Africa by African regional organizations and the UN from the point of view of (general) international law, one could perhaps argue that the case does in fact not involve major legal issues, given that Gambia's (former) leader has finally consented to resign and to transfer power to President-elect Barrow, whose inauguration in Senegal might have been unusual but largely in conformity with the Gambian constitution. Still, by the time Jammeh has put his signature under the 20 January agreement, ECOMIG troops had already entered the country and it is highly unlikely that he would have quit without ECOWAS effectively holding a gun to his head. Indeed, the passage of the deal, in which ECOWAS, the AU and the UN commend “the goodwill and statesmanship” of the former President, “who with the greater interest of the Gambian people in mind ... has decided to facilitate an immediate peaceful and orderly transition”, can only be understood as an exercise in diplomatic sarcasm (especially since Jammeh has allegedly flown off to his cozy exile in Equatorial Guinea with millions of dollars stolen during his final days in office).

This brings us to the central issue(s) raised by the Gambian episode: Was ECOWAS' recourse to force in order to ensure respect for the results of the 1 December presidential elections yet another example of pro-democratic interventionism? Arguably, it was. Was it authorized by the Security Council in accordance with Chapter VIII of the UN Charter? No, it wasn't. Was ECOMIG's deployment thus unlawful? Most likely, it wasn't either. Since Gambia's duly inaugurated new President has officially 'okayed' ECOWAS' military engagement, the case can plausibly be classified as an intervention by invitation; a concept widely recognized as providing an adequate legal basis for the deployment of foreign troops on the territory of a state whose government has freely assented to it. Strictly speaking, the concept does not reflect an exception to the UN and customary law prohibition of the use of force. Rather, given that military action is taken in accordance with the consent of the state in question, there is no legally relevant 'use of force' in the first place. Pursuant to conventional doctrine, however, the government requesting foreign intervention must be in effective control over the territory of the state, or at least over a sufficiently representative part of it. Clearly, this was not the case here, with Barrow representing, at best, the head of a government-in-exile, which has never before exerted effective governmental control over The Gambia.

In normative terms, it is here where the concerted international response to the Gambian crisis becomes most relevant. The collective recognition of the elected President-in-exile Barrow by African regional organizations and the eventual approval of this course of action by the UN Security Council have effectively remedied the legal concerns otherwise associated with requests to foreign military intervention by governments-in-exile. Recognition of a (rival) government lacking effective territorial control would normally be regarded as premature and, hence, as a violation of the principle of non-interference in a state's internal affairs. Considering Article 2 (7) of the UN Charter, this rule also applies to the Security Council, unless it is acting under Chapter VII of the Charter. The fact that the Council has not done so in the present case, while it nevertheless recognized Barrow as Gambia's new President even prior to Jammeh's resignation, indeed tells a lot about the At the very least, Resolution 2337 provides further evidence that the integrity of 'genuine' elections is no longer perceived by the international community as a matter “essentially within the domestic jurisdiction of any state”, particularly when the state in question has accepted regional commitments specifically requiring states to respect the outcome of free and fair elections.

Finally, then, the issue needs to be addressed that ECOWAS (like the AU) has proclaimed its intention to use 'all necessary means' to enforce the 1 December election results already prior to Barrow's recognition as Gambia's new president. As Mohamed Helal points out in a post over at Opinio Juris, this pronouncement, combined with the mobilization of ECOMIG in the weeks before 19 January, constitutes a threat of force, which as such is prohibited under Article 2 (4) of the UN Charter. While one may question whether the Charter prohibition of the threat of force is reflective of a concomitant rule in customary international law (after all, regional organizations are not themselves party to the Charter), it is clear that Article 2 (4) is in any case applicable to the individual members of such organizations.

In its Nuclear Weapons Advisory Opinion the ICJ declared (at para. 47) that “if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal”. While
the application of this formula seems rather straightforward, it needs to be kept in mind that, more
often than not, it will allow for a valid statement on the legality of a threat to use force only
retrospectively. The case under consideration here again exemplifies this. When first articulating its
threat to use force in December 2016, ECOWAS may well have anticipated eventual Security Council
authorization, or (perhaps more likely) a future request to intervene by Gambia’s freely elected new
leader, following his inauguration and recognition as the country’s new Head of State by the
international community.

Admittedly, there is a certain measure of speculation involved here, but the fact that (in its
communiqué of 17 December) ECOWAS has explicitly requested “the endorsement of the AU and the
UN on all decisions taken on the matter of the Gambia” seems to indicate that the organization has
indeed not intended to light-handedly engage in an unauthorized, or unsolicited, ‘we-do-it-because-
we-can’ military operation in the present case. All things considered, therefore, it would appear that
the recent ECOWAS intervention to safeguard the outcome of democratic elections in The Gambia was
generally in line with international law as it presently stands.

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Cite as: Christian Pippan, “Collectively Enforcing the Results of Democratic Elections in Africa – Part II”,