

MILITARY INTERVENTION IN THE GAMBIA: LESSONS FROM THE IVORY COAST, LIBERIA AND SIERRA LEONE

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This article analyses the recent Economic Community of West African States (ECOWAS) military intervention in the Gambia, primarily focusing on possible legal bases for the enforcement action. It examines the political situation following the release of the election results and details the international response to the post-election situation in the Gambia. Among the legal bases assessed include United Nations Security Council authorisation of regional enforcement action under Chapter VIII of the U.N. Charter through Resolution 2337 (2017), intervention by invitation and consent through prior treaty. In so doing, the article also illuminates the plausibility that the ECOWAS military intervention may be considered as unilateral enforcement action, a point further stressed through an analysis of prior ECOWAS interventions, most notable, the interventions into Sierra Leone and Liberia. Moreover, the intervention in the Ivory Coast following the 2010–2011 post-election crisis is also examined in showcasing the situational similarities between those in the Ivory Coast and those in the Gambia. In so doing, the article inter alia, explores the international legal framework pertaining to the prohibition of the threat and use of force; analysing its nature as well as exceptions to it. Article 2(4) of the U.N. Charter, read together with Article 53, therefore form the backbone of the contribution.

Keywords: military intervention; United Nations Security Council; regional organisations; regional enforcement action; African Union; ECOWAS.

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Introduction

In recent decades, unilateral regional enforcement action on the African continent has become a topic of debate. Politically, the continent has arguably the most turbulent and volatile landscape of any region in the world. Since the establishment of the African Union (AU) in 2002, the promotion of democracy has been a cornerstone of its approach to policy on the continent.¹ In pursuing and ensuring peaceful transitions of power following democratic elections across states in Africa, several situations have arisen where a sitting head of state refuses to surrender power upon the completion of successful democratic elections.² The

¹ The objectives of the AU under the African Union Constitutive Act are to *inter alia* “promote democratic principles and institutions, popular participation and good governance” (Art. 3(g)), as well as the principles of the AU to have “respect for democratic principles, human rights, the rule of law and good governance” (Art. 4(m)). See also André Mbata Mangu, *The African Union and the Promotion of Democracy and Good Political Governance Under the African Peer-Review Mechanism: 10 Years On*, 6(1) Africa Review 59, 62–63 (2014).

² See, for example, former President Yahya Jammeh who refused to relinquish power to successor Adama Barrow in the 2016 Gambian elections, former President Laurent Gbagbo refusing to relinquish power to his successor Alassane Ouattara in the 2010 Ivorian elections and former President Didier Ratsiraka refused to relinquish power to his successor Marc Ravalomanana following the 2001–2002 Madagascar election. See Jo-Ansie van Wyk, *Political Leaders in Africa: Presidents, Patrons or Profiteers?*, 2(1) Occasional Paper Series 12, 17–18 (2007).

resistance toward allowing a transition in power has on several occasions prompted international as well as regional efforts to rely not only on peaceful settlement of disputes, but also military intervention, both in the threat and use of force. These interventions have mostly aimed at facilitating a transition of power or restoring the power of democratically elected leaders.³ This paper analyses the most recent such military intervention, namely the Economic Community of West African States (ECOWAS) intervention in the Gambia following the 2016 presidential elections. In assessing the existence of a legal basis by comparing several different legal justifications, important similarities and differences in previous unilateral military interventions are discussed. In determining the most viable legal justification for the ECOWAS intervention, this paper consistently and continuously contrasts the various legal bases with those of other ECOWAS interventions. Among these, specific attention will be paid to the ECOWAS interventions in Liberia of 1989, Sierra Leone of 1998 and the Ivory Coast of 2010.

1. Unilateral Enforcement Action in the International Legal Order

The use of force in international law is prohibited by the Charter of the United Nations (hereinafter the U.N. Charter). Article 2(4) of the U.N. Charter states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Although the interpretation of Art. 2(4) is not spared from criticism, this paper's primary point of departure is that the use of force under Art. 2(4) is understood to constitute a general prohibition.⁴ In other words, any use of force in international

³ As was the case following the 2010–2011 Ivorian elections and the 2016–2017 Gambian elections. For a brief position on the Ivory Coast see Martin Rupiya, *A Review of the African Union's Experience in Facilitating Peaceful Power Transfers: Zimbabwe, Ivory Coast, Libya and Sudan: Are There Prospects for Reform?*, 12(2) *African Journal on Conflict Resolution* 161, 171 (2012), and for the Gambia see David Perfect, *The Gambian 2016 Presidential Election and Its Aftermath*, 106(3) *The Commonwealth Journal of International Affairs* 323, 328–329 (2017).

⁴ A great part of this debate surrounds the scope of the prohibition in Art. 2(4). Particularly, arguments have been put forward suggesting that only the use of force violating a state's "political independence" and "territorial integrity" is prohibited. See Tom Ruys' discussion on the contrasting notions put forward in the International Court of Justice *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, and *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 6 November 2003, versus the *The Corfu Channel Case*, 9 April 1949, on the scope of prohibition of the use of force by Art. 2(4), in Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter*

law, if not sanctioned by the United Nations Security Council (hereinafter the U.N. Security Council) would be deemed illegal. The U.N. Charter does however allow three exceptions to the use of force.⁵ These three are: the right of the U.N. Security Council to authorise member states to use force,⁶ the right to use force in self or collective defence,⁷ and where the U.N. Security Council authorises the use of force by regional arrangements or agencies.⁸ While these three exceptions are firmly rooted within the wording and intention of the U.N. Charter, an additional exception is examined, the principle of consent (intervention by invitation within the context of the Gambia).

While the authority of the U.N. Security Council as the primary international organisation to authorise the use of force is maintained, emerging state practice must too be considered. Often and particularly within the African context, situations arise where the U.N. Security Council does not explicitly authorise the use of force in a given situation (as was the case in the Gambia). The historical analysis suggests that regional organisations, such as the AU and ECOWAS, have at times been more willing to resort to the threat or use of force even without U.N. Security Council authorisation.⁹ Based on this approach, this paper then examines alternative legal bases to U.N. Security Council authorisation, for the threat or use of force in the Gambia.

In this regard, the U.N. Security Council powers in authorising regional enforcement action must briefly be examined. Apart from authorising individual states to use force, the Security Council may also utilize regional organisations to enforce military measures on its behalf.¹⁰ Chapter VIII of the U.N. Charter recognises regional arrangements and agencies and their participation in matters of international peace and security.¹¹ Article 52(1) of the U.N. Charter reads:

2(4)?, 108(2) American Journal of International Law 159, 165–167, 208–210 (2014). See also Oliver Dörr, *Prohibition of Use of Force*, Max Planck Encyclopedia of Public International Law (2015) (May 19, 2018), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427>. Although there are arguments put forward that Art. 2(4) only prohibits the use of force directed at the territorial or political independence of a state, this interpretation is beyond the scope of this paper.

⁵ Suyash Paliwal, *The Primacy of Regional Organizations in International Peacekeeping: The African Example*, 51(1) Virginia Journal of International Law 185, 190–191 (2010).

⁶ Arts. 39, 41 and 42 of the U.N. Charter.

⁷ *Id.* Art. 51.

⁸ *Id.* Art. 53(1).

⁹ See below the case of ECOWAS intervention into Sierra Leone and Liberia. Paliwal 2010, at 187. See also the case of NATO intervention in Kosovo, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 European Journal of International Law 1 (1999).

¹⁰ Art. 53(1) of the U.N. Charter. This thesis consistently uses the term “regional organisations” to refer to Art. 53(1) “regional arrangements or agencies.”

¹¹ *Id.* Arts. 52(1)–(3) and 53(1).

Nothing in the present Charter precludes the existence of regional arrangements or agencies dealing 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.

While the U.N. Charter does not specifically define regional organisations, it is clear in its wording of the need for U.N. Security Council authorisation of regional enforcement action. Article 53(1) of the U.N. Charter reads:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council...

In recent decades, regional organisations such as the AU, ECOWAS and even the Southern African Development Community (SADC) have shifted their approaches to emphasise collective regional security within Africa. Although not a direct matter of discussion within this paper, the security framework of these regional and sub-regional organisations have raised concern that they have begun to challenge the primacy of the U.N. Security Council in matters of peace and security.¹²

Under Chapter VII, the U.N. Security Council is the primary organ responsible for the maintenance and restoration of international peace and security, and may utilize regional organisations and authorise their use of force.¹³ As one of the exceptions to the use of force in the U.N. Charter, Art. 53(1) has undergone a significant amount of strain, particularly on the African continent where regional and sub-regional organisations have seemingly on occasion taken primary responsibility over matters of peace and security.¹⁴ On occasion, regional organisations, and particularly African regional organisations have engaged in peacekeeping missions without the consent of the host state, nor the authorisation of the U.N. Security Council.¹⁵ Moreover, these

¹² Erika De Wet, *Regional Organizations and Arrangements: Authorization, Ratification, or Independent Action* in *The Oxford Handbook of the Use of Force in International Law* 314, 353–355, 368–369 (M. Weller (ed.), Oxford: Oxford University Press, 2015); Erika de Wet, *The United Nations Collective Security System in the 21st Century: Increased Decentralization Through Regionalization and Reliance on Self-Defence in Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum 1553, 1557–1563* (H.P. Hestermeyer et al. (eds.), Leiden; Boston: Martinus Nijhoff, 2012).

¹³ Art. 53(1) of the U.N. Charter.

¹⁴ Paliwal 2010, at 189–191; Erika De Wet, *The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27(2) *Leiden Journal of International Law* 353 (2014).

¹⁵ De Wet, *Regional Organizations and Arrangements*, at 358; Paliwal 2010, at 191.

regional organisations have conducted military interventions into member states without U.N. Security Council authorisation.¹⁶ This practice, particularly by the AU and ECOWAS, has raised questions as to what extent U.N. Security Council authorisation of regional enforcement action is still required.¹⁷ Ordinarily, where no authorisation for regional enforcement action exists, such enforcement action, if not within the confines of the exceptions to Art. 2(4), would be considered illegal.¹⁸

2. The Gambian Elections of 2016

On 1 December 2016, the Gambian presidential elections were held across the country. The following day, before the announcement of the election results, President Yahya Jammeh announced his defeat, conceding to president elect and winner of the Gambian elections, Adama Barrow. On 5 December 2016, Independent Electoral Commission Chairman Alieu Momarr declared the official election results by Gambia's Independent Electoral Commission showing that Barrow had obtained 227 708 votes, with Jammeh receiving 208 487 votes.¹⁹ However, on 9 December, President Jammeh announced his rejection of the election results claiming that "serious and unacceptable abnormalities" had occurred and called for a new election to be held. Subsequent to his announcement, Gambian troops were deployed to the state's capital, Banjul, and Serekunda, the largest city in the Gambia.²⁰

On 10 December 2016, U.N. Secretary-General Ban Ki-moon and the U.N. Security Council called on Jammeh to "fully respect the outcome of the election and to resolve all disputes that may arise from the electoral process through established legal procedures" further calling for "a peaceful, timely and orderly transfer of power, in full respect of the will of the Gambian people as expressed in the election."²¹ The U.N. Security Council called on the support of the United Nations Office for West Africa (UNOWAS) as well as ECOWAS, to "preserve stability in the West African country and work towards the installation of a democratically elected Government in the

¹⁶ Specifically, the ECOWAS interventions in Liberia and Sierra Leone will be addressed in this section.

¹⁷ De Wet 2014.

¹⁸ Arts. 2(4) and 51 of the U.N. Charter. See De Wet 2014; Paliwal 2010, at 188.

¹⁹ Muhammed Jah, *The Total of Final Election Results by Alieu Momarr Njai – Chairman IEC*, Independent Electoral Commission, 5 December 2016 (May 19, 2018), available at <http://iec.gm/the-total-of-final-election-results/>.

²⁰ Ruth Maclean, *The Gambia: Life Goes On in Banjul as Yahya Jammeh Clings to Power*, The Guardian, 11 December 2016 (May 19, 2018), available at <https://www.theguardian.com/world/2016/dec/11/the-gambia-election-results-yahya-jammeh-adama-barrow-troops-banjul>.

²¹ United Nations Secretary-General, Statement Attributable to the Spokesman for the Secretary-General on the Gambia, 10 December 2016 (May 19, 2018), available at <https://www.un.org/sg/en/content/sg/statement/2016-12-10/statement-attributable-spokesman-secretary-general-gambia>.

country.”²² On 19 January, the AU ultimately announced that it would no longer recognise Jammeh as the President of the Gambia.

On 19 January, fearing for his safety in the Gambia, Barrow was sworn in as President of the Gambia in the Gambian embassy in Dakar, Senegal. On that same day, the U.N. Security Council passed Resolution 2337 (2017) on the situation in the Gambia.²³ Despite a lack of explicit authorisation by the Security Council and subsequent to Resolution 2337 (2017), Senegalese forces, assisted by forces from Ghana and Nigeria, entered the Gambia, placing it under a naval blockade.²⁴ On 21 January, Jammeh conceded defeated in a statement on state television, saying

I have decided today in good conscience to relinquish the mantle of leadership of this great nation with infinite gratitude to all Gambians.²⁵

3. Assessing the Legal Bases for ECOWAS Intervention: Implicit Authorisation, Treaty-Based Consent or Intervention by Invitation

3.1. United Nations Security Council Resolution 2337 (2017)

On 19 January 2017, only several hours after Barrow was officially sworn in as President of the Gambia, the U.N. Security Council passed Resolution 2337 (2017) on the situation in the Gambia. The resolution called on Jammeh to step down as President and welcomed the African Union’s Peace and Security Council declaration that it would no longer recognise Jammeh as the Gambia’s president.²⁶ It called on countries and regional organisations to cooperate with “President Barrow” and assist in realising the transition of power.²⁷ While Resolution 2337 (2017) gave no express authorisation for military intervention into the Gambia, it did express its support to ECOWAS in resolving the crisis.²⁸ Several ambassador’s to the U.N. affirmed their stance that Resolution 2337 (2017) did not authorise any military intervention

²² Gambia: UN Calls on Outgoing President to Respect Election Results and to Carry Out a Peaceful Transition, UN News, 10 December 2016 (May 19, 2018), available at <https://news.un.org/en/story/2016/12/547542-gambia-un-calls-outgoing-president-respect-election-results-and-carry-out>.

²³ U.N. Security Council, Security Council resolution 2337 (2017) (on the outcome of the presidential elections held in Gambia on 1 December 2016), 19 January 2017, S/RES/2337.

²⁴ Gambia Crisis: Senegal Sends in Troops to Back Elected Leader, BBC News, 19 January 2017 (May 19, 2018), available at <https://www.bbc.com/news/world-africa-38682184>.

²⁵ Gambia’s Yahya Jammeh Confirms He Will Step Down: Leader of 22 Years Announces on State Television That He Has Decided to Relinquish Power, Al Jazeera, 21 January 2017 (May 19, 2018), available at <https://www.aljazeera.com/news/2017/01/gambia-yahya-jammeh-agrees-step-170120184330091.html>.

²⁶ Paras. 2, 4, 7 of U.N. Security Council Resolution 2337 (2017).

²⁷ *Id.* paras. 7, 9.

²⁸ U.N. Security Council Resolution 2337 (2017).

against Gambia. Uruguay's U.N. Ambassador Elbio Rosselli stated: "Nothing in this resolution should be interpreted as authorization for the express use of force," while these sentiments were shared by Bolivia's U.N. Ambassador Sacha Llorenty Soliz.²⁹

It is prudent to note that the language of Resolution 2337 (2017) did not expressly authorize the use of force in the usual manner the Security Council authorises the use of force. Instead, it states that the Security Council:

Expresses its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of the Gambia as expressed in the results of 1st December elections.³⁰

The use of the words "by political means first" suggests that the use of force could be applied at a later stage, upon the lapse of "political means." However, as Erika De Wet indicates, it is also important to note that Resolution 2337 (2017) was not adopted under Chapter VII of the U.N. Charter. Combined with the timing of Resolution 2337 (2017) passing only a few hours after the inauguration of President Barrow and his explicit request for enforcement action, with the fact that ECOWAS troops positioned on the Gambian border only entered the Gambia after Barrow's official request, indicates the legal basis for the enforcement of democracy pointed further away from authorization from Resolution 2337 (2017) and more toward intervention by invitation.

Although an explicit authorization to use force seems an unlikely conclusion, an argument for implicit U.N. Security Council authorization of the use of force by ECOWAS remains plausible. Two indicators point toward this argument. Firstly, Resolution 2337 (2017) acknowledged and welcomes the decisions reached on the Gambia by both the ECOWAS 50th Ordinary Session held on 17 December 2016, and the decision of the AU's Peace and Security Council held on 12 December 2016. This raises important questions regarding the intention of Resolution 2337 (2017). The decision of ECOWAS and AU at their respective summits both came to similar conclusions – that "all necessary measures" could be used to give effect to the results of the 1 December Gambian elections. The determinations and decisions made at the ECOWAS and AU summits, if read within the general understanding of a threat of use of force, would certainly constitute as such. This fact is further informed by the subsequent actions of ECOWAS when it amassed a 7000-strong force along the Gambian border. In this light, it seems reasonable to conclude that the statements made at the organization's summits constitute a threat of use of force. Presently, however, the primary concern is the acknowledgement of these statements by Resolution 2337 (2017). The argument for implicit authorization would therefore

²⁹ Michelle Nichols, *U.N. Backs West African Efforts to Install New Gambia President*, Reuters, 19 January 2017 (May 19, 2018), available at <https://www.reuters.com/article/us-gambia-un-vote-idUSKBN1532T8>.

³⁰ Para. 6 of U.N. Security Council Resolution 2337 (2017).

stem from first and foremost, the resolution's acknowledgement of the threat of use of force, and its choice of words that it supported ECOWAS to give effect to the will of the Gambian people "by political means first." Resolution 2337 (2017) would certainly have been aware of the decisions the AU and ECOWAS had come to, given it acknowledged their statements, and the U.N. Security Council could certainly have foreseen the materializing of these statements. This fact perhaps informed the very nature of the resolution, a "non-authorizing" yet "non-prohibitive" stance. In any case, where such a resolution failed to at the least implicitly authorize the use of force, several other legal bases could give possibly legality to the ECOWAS use of force.

In light of Resolution 2337 (2017), it is prudent to revisit the situation in the 2010 Ivorian Elections, as well as the ECOWAS interventions into Liberia and Sierra Leone.

The situation in the Gambia was not the first where an incumbent head of state refused to relinquish power to their successor. In the 2010–2011 Ivorian elections, President Laurent Gbagbo refused to concede to successor Alassane Outtara. The refusal of Gbagbo to relinquish power eventually led to U.N. and ECOWAS peacekeeping forces (under the banner of the United Nations Operation in Côte d'Ivoire (UNOCI)) to use force to install Outtara. Even before the Ivory Coast situation, on two other occasions, ECOWAS had used force (without U.N. Security Council authorisation); both in the Liberian civil war of 1989–1996 and the Sierra Leone coup of 1998. These situations are subsequently addressed below.

3.1.1. The 2010–2011 Ivorian Elections

The situation in the Gambia was not the first in which U.N. Security Council Resolution prompted regional enforcement action by ECOWAS, nor was it the first such situation where an international response was involved in unseating a president unwilling to relinquish power. Instead of unilateral military intervention however, efforts by both ECOWAS and U.N. peacekeeping missions culminated in an eventual transition of power through multinational forces working against President Gbagbo of the Ivory Coast.

The Ivorian elections of 2010 were held in two rounds on 31 October and 28 November 2010 respectively. On 4 November 2010, Ivory Coast IEC Chairman Youssouf Bakayoko announced the provisional results of the first round of elections. President Laurent Gbagbo from the ruling Ivorian Popular Front (IPF) had received 38.3% of the vote with former Prime Minister and main opposition leader Alassane Dramane Ouattara from the Rally of the Republicans (RDR) receiving 32.08%. The third position was occupied by Henri Konan Bedie from the Democratic Party of Ivory Coast (DPIC) who had received 25.24% of the vote. According to the UN, the voter turnout for the first round was 85.11%, approximately 4.8 million voters of the country's 5.7 million population.³¹

³¹ Côte d'Ivoire Presidential Elections 31 October – 28 November 2010, Fact Sheet: 25 November 2010 (May 19, 2018), available at http://www.un.org/ar/peacekeeping/missions/unoci/documents/cote_divoire_elections_round2_%20factsheet24112010.pdf.

No candidate could secure a majority vote and according to the Ivorian Constitution, a second round of elections had to be held for a run-off between the top two candidates from the first round.³² On 6 November 2010, President of the Constitutional Council Paul Yao N'Dré, confirmed the provisional results of the first round of elections, declaring Gbagbo to be in the lead.³³

On 2 December 2010, President of the CEI Youssouf Bakayoko announced provisional results of the second round of elections showing that Ouattara had secured 54.1% of the vote with Gbagbo securing 45.9% of the vote.

The announcement came after days of postponement and beyond the deadline which was set for the announcement to take place. Consequently, Ouattara was declared the winner of the election. On 3 December 2010, the President of the Constitutional Council N'Dré announced that the CEI no longer had the authority to announce election results as it had missed the deadline. N'Dré argued that only the Constitutional Council had the authority to announce decisions on contested results.³⁴ Article 94 of the Ivory Coast Constitution states that the Constitutional Court "controls the regularity of the operations of the referendum and proclaims the results." It further states that "the Constitutional Council shall proclaim the final results of the presidential elections." The announcement of 2 December 2010 by the CEI was overturned and N'Dré declared Gbagbo winner of the elections. Speaking on national television, N'Dré stated that results in seven regions in the north of the country (where Ouattara drew most of his support from) had been annulled. He was quoted saying:

The irregularities are of such a nature that they invalidated the vote.³⁵

Consequently, Gbagbo had won the election, being credited 51.45% of the vote, with Ouattara receiving 48.55%.

3.1.2. U.N. Security Council Response: Peacekeeping in the Ivory Coast

The character of the military intervention in the Ivory Coast differs from that of a U.N. Security Council authorised regional enforcement action. Instead, the military operation was in principle, undertaken under the banner of UNOCI's peacekeeping forces. The primary legal basis for military intervention in enforcing the outcome of

³² Art. 94 of the Constitution of Côte d'Ivoire, adopted 23 July 2000.

³³ Decision du Conseil constitutionnel n° 2010/ EP032 du 6 Novembre 2010.

³⁴ Ivory Coast Poll Overturned: Gbagbo Declared Winner, BBC News, 3 December 2010 (May 19, 2018), available at <https://www.bbc.com/news/world-africa-11913832>.

³⁵ Marco Chown Oved, *War Fears as Ivorian Poll Results Overturned*, Independent, 4 December 2010 (May 19, 2018), available at <https://www.independent.co.uk/news/world/africa/war-fears-as-ivorian-poll-result-overturned-2150975.html>.

the 2010–2011 democratic elections in the Ivory Coast stemmed from U.N. Security Council Resolution 1975 (2011), which reaffirmed UNOCI's mandate established under U.N. Security Council Resolution 1528 (2004). The United Nations Mission in Côte d'Ivoire (MINUCI), predecessor of UNOCI, was established by Resolution 1479 (2003). MINUCI was mandated to facilitate the implementation of the Linas-Marcoussis Agreement, a reconciliation agreement facilitated by France with the aim of creating a government of national reconciliation in the Ivory Coast.³⁶ In its establishment of MINUCI's mandate, the Resolution included a "military component on the basis of option (b) identified in the Secretary-General's report" as a means of "complementing the operations of the French and ECOWAS forces" in the Ivory Coast following the first Ivorian Civil War.³⁷ It further requested ECOWAS and French forces in the execution of their mandate in accordance with Resolution 1464 (2003) to work in close consultation with the Special Representative and Monitoring Committee in the implementation of their respective mandates.³⁸ Resolution 1479 (2003) was however preceded by Resolution 1464 (2003), in which the U.N. Security Council first made its determination that the situation in the Ivory Coast was a threat to international peace and security.³⁹ Although MINUCI's establishment inevitably included a military component and further determined that the challenges to the stability in the Ivory Coast constituted a threat to international peace and security in the region, Resolution 1479 (2003) did not authorise the use of force by any of the parties involved in the Ivorian Civil War.

On 27 February 2004, acting under Chapter VII of the U.N. Charter, U.N. Security Council Resolution 1528 (2004) authorised the formation of UNOCI.⁴⁰ The establishment of UNOCI for an initial period of 12 months, transferred peacekeeping authority from the MINUCI and ECOWAS forces to UNOCI.⁴¹ Echoing the sentiment of those in Resolution 1464 (2003) and Resolution 1479 (2003), that the situation in the Ivory Coast constituted a threat to international peace and security, Resolution 1528's predecessor, Resolution 1527 (2004), authorised the extension of the MINUCI mandate until 27 February 2004.

Resolution 1528 (2004) set out UNOCI's mandate, including the monitoring of ceasefire and movements of armed groups, disarmament, demobilisation,

³⁶ Letter dated 27 January 2003 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, 27 January 2003: The Linas-Marcoussis Agreement was a ceasefire agreement between rebel forces and followed the First Ivorian Civil War, a year-long conflict stemming from a volatile political climate and ethnic tensions.

³⁷ Para. 2 of U.N. Security Council Resolution 1479 (2003).

³⁸ *Id.* para. 11.

³⁹ Preamble of U.N. Security Council Resolution 1464 (2003).

⁴⁰ U.N. Security Council Resolution 1528 (2004).

⁴¹ *Id.* para. 2.

reintegration, repatriation, resettlement, protection of United Nations personnel, institutions and civilians, support for humanitarian assistance, the implementation of the peace process, assistance in the field of human rights, public information and law and order. Among these, UNOCI was given authorisation “to use all necessary means to carry out its mandate, within its capabilities and its areas of deployment.”⁴² Further to renewing authorisation given to French and ECOWAS forces through resolution 1527, it authorised French forces for a period of 12 months to “use all necessary means in order to support UNOCI in accordance with the agreement to be reached between UNOCI and the French authorities.”⁴³

In particular, the resolution also authorised French forces to contribute to the general security of the area of activity of the international forces, intervene at the request of UNOCI in support of its elements whose security may be threatened, intervene against belligerent actions, if the security conditions so require, outside the areas directly controlled by UNOCI, and, to help protect civilians in the deployment areas of their units.⁴⁴ Resolution 1528 (2004) was clear in its authorisation given to both UNOCI, ECOWAS and French forces, that “all necessary means” included the use of force.

U.N. Security Council Resolution 1975, unanimously adopted on 30 March 2011 following post-election violence, condemned all violations of international law, reaffirming each states’ primary responsibility to protect civilians.⁴⁵ The U.N. Security Council recalled its determination that the situation in the Ivory Coast constituted a threat to international peace and security.⁴⁶ The Resolution also recalled its authorisation given to UNOCI to “use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population...”⁴⁷ The resolution further adopted targeted sanctions against Gbagbo and his associates.⁴⁸ On 3 April 2011, after several attacks by Gbagbo loyalists against U.N. peacekeepers, U.N. and French peacekeeping forces secured the international airport in Abidjan. In line with Resolution 1975 (2011), France authorised its forces to act against Gbagbo forces. On 11 April 2011, Gbagbo surrendered to Ouattara’s forces and was subsequently detained under U.N. protection. Resolution 1975 (2011) is regarded as the primary legal basis for the use of force in the Ivory Coast by UNOCI and ECOWAS forces in order to install President-elect Ouattara.

⁴² Para. 5 of U.N. Security Council Resolution 1528 (2004).

⁴³ *Id.* para. 11.

⁴⁴ *Id.* para. 5.

⁴⁵ Preamble of U.N. Security Council Resolution 1975 (2004).

⁴⁶ *Id.* Preamble.

⁴⁷ Para. 3 of U.N. Security Council Resolution 1975 (2011).

⁴⁸ *Id.* para. 12.

3.2. ECOWAS Intervention Prior to the Ivory Coast: The Case of Liberia and Sierra Leone

On 28 December 2010, at an Extraordinary Session of the Authority of Heads of State and Government, ECOWAS delivered a statement in which it gave Gbagbo an ultimatum – to step down as president or face the use of force against him in order to install president elect Ouattara.

In the event that Mr. Gbagbo fails to heed this immutable demand of ECOWAS, the Community would be left with no alternative but to take other measures, including the use of legitimate force, to achieve the goals of the Ivorian people. 11. Against the background of the parlous security situation, the Heads of State and Government hereby instruct the President of the ECOWAS Commission to convene without delay a meeting of the Committee of Chiefs of Defence Staff in order to plan future actions, including the provision of security along the Côte d'Ivoire-Liberia border, in the event that their message is not heeded.

While the statement was a firm response by ECOWAS against Gbagbo's refusal to step down, no subsequent military intervention occurred. Instead, the statement would at most have amounted to a threat of use of force (much like the case in the Gambia) which under Art. 2(4) of the U.N. Charter, remains unlawful. While in the case of the Ivory Coast, ECOWAS did not follow through with its decisions, the swift intervention by ECOWAS forces in the Gambia suggests a shift in its approach to these situations.⁴⁹

The situation in the Ivory Coast was not the first such instance that ECOWAS had threatened or even intervened militarily in West Africa. ECOWAS first intervened in the 1989–1996 Liberian Civil War. In August 1990, several West African nations under the banner of ECOWAS sent a peacekeeping mission to Monrovia. This multi-later force, known as the Economic Community of West African States Monitoring Group (ECOMOG), spent three years in Liberia during which it temporarily yet successfully ceased bloodshed and ethnic cleansing.⁵⁰ Notably, the ECOMOG mandate was to impose a ceasefire, assist in forming an interim government and enable elections to be held in the country within 12 months.⁵¹

While no U.N. Security Council Resolution allowed the use of force by ECOWAS in Liberia, ECOWAS relied on the Protocol Relating to Mutual Assistance on Defence in justifying its intervention. Article 18 of the Protocol permitted intervention into

⁴⁹ See broadly Paliwal 2010, at 206–214.

⁵⁰ Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights, Human Rights Watch (June 1993) (May 19, 2018), available at <https://www.hrw.org/legacy/reports/1993/liberia/>.

⁵¹ *Id.* ECOMOG's justification for the intervention on the basis that the civil war was no longer confined to an internal conflict since thousands of ECOWAS nationals were trapped in Liberia and many more thousands of refugees had fled to neighbouring countries.

another state's internal affairs which are "substantially supported externally."⁵² In its Preamble, the Protocol states that members "firmly resolve to safeguard and consolidate the independence and sovereignty of member states against foreign intervention." It goes on to say that any "armed threat or aggression" directed against member states shall constitute a threat or aggression against the entire community.⁵³ Where an "internal armed conflict within any member state engineered and supported from the outside" and which is "likely to endanger the peace and security," ECOWAS is empowered to institute armed or collective intervention.⁵⁴ Article 13(1) and (2) specifically allows for the creation of an ECOWAS military force, and this section has been cited as a further legal basis for the Liberia intervention.⁵⁵ However, the legal basis for the interventions by ECOMOG have been questioned, with arguments suggesting that the interventions were a violation of the Protocol on Mutual Assistance and Defence and the Organisation for African Union (OAU) Charter,⁵⁶ that the intervention was illegal under Arts. 2(4) and 53(1) of the U.N. Charter.⁵⁷ ECOMOG's intervention into Liberia was followed by further intervention into Sierra Leone in 1998. On 25 May 1997, President Ahmad Tejan Kabbah of Sierra Leone was overthrown by a military coup. In February 1998, ECOMOG forces aided by the Sierra Leone Civil Defence Force, were able to "reverse" the coup.⁵⁸

While no U.N. Security Council Resolution allowed for the use of force by ECOWAS against both Liberia in 1990 and in Sierra Leone in 1997, both interventions were praised by the Security Council, giving them a "retroactively authorised status" through U.N. Security Council Resolutions 788 (1992)⁵⁹ and 1132 (1997).⁶⁰ While

⁵² Peter A. Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 35(2) *Denver Journal of International Law and Policy* 333, 344 (2007).

⁵³ Art. 2 of the ECOWAS Protocol Relating to Mutual Assistance on Defence (May 19, 2018), available at http://www.operationspaix.net/DATA/DOCUMENT/3827~v~Protocole_d_Assistance_Mutuelle_en_matiere_de_Defense.pdf.

⁵⁴ *Id.* Art. 4(b).

⁵⁵ ECOWAS and the Subregional Peacekeeping in Liberia, *The Journal of Humanitarian Assistance*, 25 September 1995 (May 19, 2018), available at <https://sites.tufts.edu/jha/archives/66>.

⁵⁶ David Kode, *The Complexities of Democracy-Building in Conflict-Affected States: The Role of ECOWAS and the African Union in Côte d'Ivoire*, *International IDEA* (2016) (May 19, 2018), available at <https://www.idea.int/sites/default/files/publications/democracy-building-in-conflict-affected-states-the-role-of-ecowas-and-au-in-cote%20ivoire.pdf>.

⁵⁷ Jenkins 2007, at 344–345.

⁵⁸ Peter A. Dumbuya, *ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity or Multipolarity?*, 25(2) *Journal of Third World Studies* 83 (2008).

⁵⁹ U.N. Security Council Resolution 778 (1992) commended ECOWAS's efforts to restore peace, security and stability in Liberia and specifically called upon ECOWAS to continue its efforts in implementation of the Yamoussoukro IV Accord.

⁶⁰ U.N. Security Council Resolution 1132 (1997) specifically authorized under Chapter VIII of the U.N. Charter, to among others, ensure the implementation of provisions of the resolution.

the issue of *ex post facto* security council authorisation may not be an acceptable conclusion, and consequently remains outside the scope of this paper, Resolutions 788 (1992) and 1132 (1997) may at best remain *ex post facto* legitimisation of these interventions.⁶¹

The case of the Ivory Coast shows a remarkable similarity in the situation where a head of state refuses to surrender power and further illustrates that the situation in the Gambia was not a new occurrence. Yet, in the Ivory Coast, clear U.N. Security Council authorisation was given, explicitly to ECOWAS, UNOCI, and French forces in the region. No doubt existed as to whether these forces could use force in executing their mandate. Similarly, the situations in Sierra Leone and Liberia, occurring without U.N. Security Council authorisation, have been seemingly granted this authorisation *ex post facto*. Although these situations show that ECOWAS has been more willing to resort to the use of force in the Security Council's absence, it cannot be said to have set any precedent holding value for the Gambia. No further resolutions on the situation were passed and consequently, an argument for *ex post facto* authorisation of the ECOWAS intervention in the Gambia seems hold no credibility. Yet, these interventions have illustrated regional organisation practice in preceding years, and perhaps as a result, show their lack of reluctance to engage in such interventions.

3.3. ECOWAS Intervention: The 1999 ECOWAS Protocol Relating to the Mechanisms for Conflict Prevention, Management, Resolution, Peace-Keeping and Security

Following the ECOWAS interventions into Liberia and Sierra Leone, the ECOWAS Protocol Relating to the Mechanisms for Conflict Prevention, Management, Resolution, Peace-keeping and Security (hereinafter the 1999 ECOWAS Protocol) was adopted in an attempt to put future interventions on better ground.⁶² Dubbed the "most ambitious instrument on the regulation of collective security ever attempted to date" the organisation, once meant to be purely economic, needed a stronger legal foundation for its military missions.⁶³ The Preamble of the 1999 ECOWAS Protocol among others, mentions the organisation's concerns regarding the proliferation of conflicts which "constitute a threat to peace and security in the African continent." Among its objectives include the prevention, management and resolution of internal and inter-state conflicts, maintain and consolidate peace, security and stability within the Community, and "constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises."⁶⁴

⁶¹ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* 291–293 (Oxford: Hart Publishing, 2004).

⁶² Isabel Meyer, *ECOWAS: The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security* 3 (Munich: GRIN Verlag, 2010).

⁶³ *Id.*

⁶⁴ Art. 3 of the 1999 ECOWAS Protocol.

Article 10 of the 1999 ECOWAS Protocol empowers the Mediation and Security Council to take decisions on issues of peace and security. Specifically, Art. 10 allows the Mediation and Security Council to “authorise all forms of intervention and decide particularly on the deployment of political and military missions.”⁶⁵ In relation to its application, Chapter V of the 1999 ECOWAS Protocol further states that where a case of internal conflict arises, the mechanism shall be applied where such conflict (a) threatens to trigger a humanitarian disaster, (b) that poses a serious threat to peace and security in the sub-region.⁶⁶ Chapter V further states that the mechanism may be applied “in the event of an overthrow or attempted overthrow of a democratically elected government” or any other situation which the Mediation and Security Council may decide on.⁶⁷

Finally, Art. 52 on Cooperation states that ECOWAS shall fully cooperate with the Organisation for African Unity, United Nations, and other relevant international organisations.⁶⁸ It adds that in accordance with Chapters VII and VIII of the U.N. Charter, ECOWAS shall inform the United Nations should it undertake any military intervention in pursuit of the objectives of the 1999 ECOWAS Protocol.⁶⁹ While Art. 52 provides some context regarding ECOWAS’s cooperation with the United Nations, specifically adhering to Art. 54 of the U.N. Charter,⁷⁰ Art. 53 of the Charter specifically prohibits enforcement action by regional agencies without prior U.N. Security Council authorisation.⁷¹

A military intervention based on a legal basis found in the 1999 ECOWAS Protocol may however, not be sufficient within the context of the U.N. Charter. Article 2(4) of the U.N. Charter put aside, enforcement action by regional agencies under Art. 53 clearly requires U.N. Security Council authorisation. Further, Art. 103 of the Charter specifically affirms the Charter’s supremacy over other treaties or agreements.⁷² Where any conflict between the obligations of a member state under the U.N. Charter and obligations under any other international agreement arise, the member states obligations under the U.N. Charter prevails.⁷³

⁶⁵ Art. 10(c) of the 1999 ECOWAS Protocol.

⁶⁶ *Id.* Art. 25.

⁶⁷ *Id.*

⁶⁸ *Id.* Art. 52.

⁶⁹ *Id.*

⁷⁰ Article 54 of the U.N. Charter states: “The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.”

⁷¹ *Id.* Art. 53.

⁷² *Id.* Art. 103.

⁷³ *Id.*

Further, Art. 2(7) of the U.N. Charter prohibits a member state from intervening into another member state where domestic affairs of that state concern. Although it would be abiding by the 1999 ECOWAS Protocol, and even bound to uphold its objectives, it is doubtful that ECOWAS's intervention into the Ivory Coast would be legal under the U.N. Charter.

On 12 December, the AU's Peace and Security Council stressed its determination to take all necessary measures in accordance with all AU instruments, in ensuring compliance with results of the 1 December elections.⁷⁴ Although the AU pointed to Art. 23(4) of the African Charter on Democracy, Elections and Governance, which identified the refusal of an incumbent president to transfer power to their successor, as a form of unconstitutional change in government, it does not permit the use of force against such government.⁷⁵

On 17 December 2016, ECOWAS echoed similar sentiments on the situation in the Gambia, stating that the will of the Gambian people had to be respected, and that

the authority [ECOWAS] shall undertake all necessary actions to enforce the results of the election.⁷⁶

Article 9 of the ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security states that

The party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law.⁷⁷

Further, ECOWAS's Protocol on Non-Aggression specifically prohibits member states from threats or use of force against other member states in relation to territorial integrity or political independence.⁷⁸

At its 50th Ordinary Session held on 17 December 2017, ECOWAS's Authority of Heads of State and Government considered what it described as the "worrying

⁷⁴ Communiqué of the Peace and Security Council on the post-election situation in the Islamic Republic of the Gambia, 12 December 2016, PSC/PR/COMM. (DCXLIV), at para. 12 (May 19, 2018), available at <http://www.peaceau.org/en/article/peace-and-security-council-644th-meeting>.

⁷⁵ Article 23(4) of the African Charter on Democracy, Elections and Governance states: "Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections..."

⁷⁶ Ulf Laessing & Paul Carsten, *West Africa Bloc to Take "Necessary Actions" to Uphold Gambia Vote Result*, Reuters, 17 December 2016 (May 19, 2018), available at <https://www.reuters.com/article/us-gambia-politics-idUSKBN1460H6>.

⁷⁷ Signed by Yahya Jammeh himself on 21 December 2001.

⁷⁸ Art. 1 of the ECOWAS Protocol on Non-Aggression.

political situation in the Gambia.”⁷⁹ The Authority of Heads of State and Government agreed to uphold the election results of 1 December 2016, guaranteed the protection of Adama Barrow and requested the endorsement of the AU and the U.N. on all decisions taken on the matter of the Gambia.⁸⁰ The Authority also agreed that it “shall take all necessary measures to strictly enforce the results of the 1 December 2016 election.”⁸¹ The term “all necessary measures” was undoubtedly not used coincidentally and has come to be understood under international law as a normative code permitting enforcement action including the use of force.⁸²

While the Authority may have relied on Art. 9 on the Protocol on Democracy and Good Governance, Art. 45 of the Protocol imposes only sanctions and the suspension of the member state from ECOWAS activities. Article 45 allows, upon the recommendation of the Mediation and Security Council, a decision to be taken as stipulated in Art. 45 of the 1999 ECOWAS Protocol. Article 45 however, makes no mention of intervention or use of force.⁸³

However, Art. 3 of the 1999 ECOWAS Protocol permits the deployment of military forces to maintain or restore peace within the sub-region “whenever the need arises.”⁸⁴ Read together with Art. 25 of the 1999 ECOWAS Protocol (the application of the Mechanism), the use of force may be authorised in domestic conflicts, massive violations of human rights, the overthrow of a democratic government or “any other situation as may be decided by the Mediation and Security Council.”⁸⁵

3.4. Intervention by Invitation

Although the above arguments, each consisting of several factors in favour of the existence of a legal bases for the ECOWAS intervention, each too has its own

⁷⁹ Para. 33 of the ECOWAS Authority of Heads of State and Government Final Communiqué, 17 December 2016 (May 19, 2018), available at http://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf.

⁸⁰ *Id.* para. 38.

⁸¹ *Id.* para. 38(h).

⁸² Christian Pippan, *Collectively Enforcing the Results of Democratic Elections in Africa ECOWAS, the AU, and UN Security Council Resolution 2337 (2017) – Part I*, *Völkerrechtsblog*, 10 February 2017 (May 19, 2018), available at <https://voelkerrechtsblog.org/collectively-enforcing-the-results-of-democratic-elections-in-africa/>.

⁸³ Article 45 of the 1999 ECOWAS Protocol states: “In situations where the authority of government is absent or has been seriously eroded, ECOWAS shall support processes towards the restoration of political authority. Such support may include the preparation, organisation, monitoring and management of the electoral process, with the cooperation of relevant regional and international organisations. The restoration of political authority shall be undertaken at the same time as the development of respect for human rights, enhancement of the rule of law and the judiciary.”

⁸⁴ Art. 3(h) of the 1999 ECOWAS Protocol.

⁸⁵ *Id.* Art. 25(b).

detrimental characteristics. Before any conclusion may be drawn, there is one other legal bases which must be explored, and perhaps the strongest of legal bases yet to be used as a justification for the intervention in the Gambia. During his official swearing in as President of the Gambia, Barrow made a special request to ECOWAS, the AU and the U.N. to remove Gbagbo and assist in the transfer of power. The primary argument advanced in order to justify ECOWAS's military intervention into the Gambia was intervention by invitation at the request of Barrow as the predominantly internationally recognised President of the Gambia.⁸⁶ Basing its legality on intervention by invitation, ECOWAS forces began amassing on the Gambian border. On 19 January, after Jammeh's continued refusal to step down, and the passing of Resolution 2337 (2017) by the U.N. Security Council, Senegalese forces entered the Gambia. While minor clashes against Gambian forces were reported, Senegal halted its offensive to provide for a final mediation effort.⁸⁷

Intervention by invitation is defined as a military intervention by foreign troops in an internal conflict at the invitation of the government concerned.⁸⁸ State practice in the field of intervention by invitation suggests that such intervention may be requested in cases of purely internal conflict.⁸⁹ While certain governments (such as apartheid governments, governments in exile, or invitations issued under duress) are for the most part, not capable of inviting foreign troops,⁹⁰ as Georg Nolte notes, states have sometimes attempted to enhance the legitimacy of intervention by invitation by anticipating this possibility in a treaty or by undertaking multilateral operations.⁹¹ Although such participatory or collective non U.N. mandated interventions have been universally recognised,

It is possible, however, that multilateral interventions by regional security systems might in the future be considered to be a better legitimized form of intervention at the invitation of a government.⁹²

⁸⁶ Mohamed Helal, *The ECOWAS Intervention in the Gambia – 2017*, Public Law and Legal Theory Working Paper Series No. 414, 2 October 2017, at 10 (May 19, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046628.

⁸⁷ Colin Freeman, *Gambia Crisis: West African Nations Halt Gambia Military Operation to Give Yahya Jammeh Final Chance to Step Down*, *The Telegraph*, 20 January 2017 (May 19, 2018), available at <https://www.telegraph.co.uk/news/2017/01/19/gambia-crisis-british-tourists-flee-west-african-forces-poised/>.

⁸⁸ Georg Nolte, *Intervention by Invitation*, *Max Planck Encyclopedia of Public International Law* (May 19, 2018), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* para. 24.

⁹² *Id.*

The crux of this principle as a legal basis may be considered under two points: the question of which authority is entitled to extend an invitation for military intervention and whether certain instruments such as the AU's Constitutive Act, the 1999 ECOWAS Protocol and the ECOWAS Protocol Relating to Mutual Assistance on Defence may better serve to inform the legal basis for intervention by invitation.

3.4.1. *The Legal Authority to Request Intervention*

International law generally accepts that the only authority which can legally request military intervention is the internationally recognised *de jure* government.⁹³ Such *de jure* internationally recognised authority can legally enter into treaties, dispose of the state's resources and have its ambassadors accredited by international organisations.⁹⁴ It is also generally accepted that intervention by invitation during a civil war is impermissible.⁹⁵

The primary legal basis used to justify ECOWAS's intervention into the Gambia was that of the consent of President Barrow.⁹⁶ Consequently, it is important for purposes of this dissertation to establish whether the ECOWAS intervention in the Gambia could be founded on the legal basis of intervention by invitation. In making such a determination, addressing the question of the legality of the intervention by invitation depends on whether President Barrow would legally have possessed the authority to issue such an invitation.

Traditionally, the test for such an invitation was based on whether the government issuing the invitation had exercised effective control over the territory and population of the state.⁹⁷ While the practice of recognition has fallen away in recent times, occurring more through a state's actual dealings with another state, specific international recognition of President Barrow as the head of state of the Gambia may be a determining role in establishing the legality of the intervention in the Gambia.

Yet another point of contention regards whether ECOWAS and the AU's recognition of President Adama Barrow, while Barrow himself not exercising control of the Gambia, was premature recognition.⁹⁸ Arguments put forward for this suggest that the wording adopted by the Communique of the 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government only enforce the outcome

⁹³ Erika De Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26(4) *European Journal of International Law* 979, 982 (2015).

⁹⁴ *Id.*

⁹⁵ *Id.* at 992.

⁹⁶ Helal 2017, at 10 – An argument specifically raised by the Senegalese representative before U.N. Security Council Resolution 2337 (2017) was adopted.

⁹⁷ *Id.* at 11.

⁹⁸ See specifically *Id.* at 13.

of the elections and do not necessarily give recognition to President Barrow as the head of state.⁹⁹

However, when further international recognition is concerned, it was clear that President Barrow had, already before ECOWAS forces had crossed into the Gambia, recognised by several international organisations and states. Resolution 2337 (2017) specifically noted the election of Barrow as President of the Gambia, referring to “former President of the Islamic Republic of the Gambia, Mr. Yahya Jammeh” himself having publicly recognised and accepted Barrow as the new President on 2 December. The resolution further endorsed the decision of ECOWAS and the AU to recognise Barrow as President.¹⁰⁰ Moreover, on 14 January 2017, five days before the ECOWAS intervention, the AU announced its intention to stop recognising Jammeh as the President of the Gambia.¹⁰¹

While neither state practice nor academic scholars have provided a conclusive settlement to the debate between effective control and democratic legitimacy,¹⁰² a new perspective towards democratic governance and a respect for human rights has given democratic legitimacy a more prominent role as a determining factor for recognition.¹⁰³ As De Wet suggests, once a government has been internationally recognised as the “legitimate representative of a state,” they enjoy a large discretion when inviting direct military support from foreign states.¹⁰⁴

3.5. Intervention by Invitation Through Prior Treaty

In determining a potential legal basis for the intervention in the Gambia, Art. 4(j) of the AU’s Constitutive Act empowers members states to request military intervention from the AU in order to maintain peace and security. Read together with the ECOWAS Protocol Relating to Mutual Assistance on Defence, an intervention by invitation is further informed:

When an external armed threat or aggression is directed against a Member State of the Community, the Head of State of that country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS,

⁹⁹ The wording of the Communique states: “The Authority shall take all necessary measures to strictly enforce the results of the 1st December 2016 elections,” *supra* note 77.

¹⁰⁰ Para. 1 of U.N. Security Council Resolution 2337 (2017).

¹⁰¹ AU to Stop Recognising Gambia’s Jammeh as President: African Union Says It Will Not Recognise Yahya Jammeh’s Presidency Unless He Steps Aside When His Mandate Expires, Al Jazeera, 14 January 2017 (May 19, 2018), available at <https://www.aljazeera.com/news/2017/01/au-cease-recognising-jammeh-gambia-president-170113160749764.html>.

¹⁰² Helal 2017, at 12.

¹⁰³ De Wet, *The Modern Practice of Intervention*, at 984.

¹⁰⁴ *Id.* at 998.

with copies to other Members. This request shall mean that the Authority is duly notified and that the AAFC are placed under a state of emergency. The Authority shall decide in accordance with the emergency procedure as stipulated in Article 6 above.¹⁰⁵

In terms of Art. 6 of the ECOWAS Protocol Relating to Mutual Defence, the Authority shall decide on the expediency of military action, entrusting the Force Commander of the Allied Armed Forces of the Community (AAFC) in its execution,¹⁰⁶ and such decisions are immediately enforceable.¹⁰⁷

However, both the 1999 ECOWAS Protocol and the ECOWAS Protocol Relating to Mutual Defence have limitations. The 1999 ECOWAS Protocol provides clear circumstances when the mechanism may be applied – in the case of internal conflict, where there is humanitarian disaster threatened or where such conflict poses a serious threat to peace and security in the sub-region.¹⁰⁸ The ECOWAS Protocol Relating to Mutual Assistance on Defence is also unambiguous as to need for a “written request” and moreover, the crisis remained a purely internal one – accordingly, the use of force under the Protocol would be impermissible.¹⁰⁹

Conclusion

The prohibition on the use of force in international law has been well established, and so too have exceptions to it. Specifically, the right of a regional organization to use force in ensuring regional peace and security has been encompassed by Art. 53(1). Consequently, such use of force is subject to the powers of the U.N. Security Council to authorize such force. Although, it must also be acknowledged that several situations have in the past presented favorable arguments for unilateral enforcement action by ECOWAS and have been complemented by the retroactive authorization of such action. While even these situations continue to present debate among the international community as to whether they set any precedent, or at the least contribute to suggest Security Council practice has before condoned unilateral action, such an avenue may be the weaker of options in justifying the ECOWAS action in the Gambia. Indeed, where arguments point towards Resolution 2337 (2017) as implicitly authorizing ECOWAS enforcement action, instead of acting as *ex post facto* authorization, a stronger and more supported legal backing exists. Yet, the

¹⁰⁵ Art. 16 of the ECOWAS Protocol Relating to Mutual Assistance on Defence.

¹⁰⁶ *Id.* Art. 6(3).

¹⁰⁷ *Id.* Art. 6(4).

¹⁰⁸ Art. 25(a–b) of the 1999 ECOWAS Protocol.

¹⁰⁹ Art. 18(b) of the ECOWAS Protocol Relating to Mutual Assistance on Defence.

deficiencies in Resolution 2337 (2017) in either implicitly authorizing the enforcement action or retroactively authorizing it remain. Evidently, the most notable legal bases for the ECOWAS intervention seem to be rooted in the principles of intervention by invitation, and consent to such intervention through prior treaty.

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