

Intervening for Democracy: The Threat or Use of Force and Crisis in The Gambia

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Abstract

The recent constitutional crisis in the West African state of the Republic of The Gambia saw the incumbent president of the state refuse to relinquish power after he was defeated in a democratic election. While political means were ultimately successful, the early response to the crisis involved the threat of force, which was held over the state throughout the situation and was ultimately carried out by the involved nations. Despite the lack of bloodshed and actual conflict, this resort to the threat and use of force was not in keeping with the accepted prohibitions contained in the United Nations Charter system and international law. This article seeks to outline how the international response to the crisis in The Gambia was a breach of international law in an attempt to impose the will of other states upon the internal political workings of another under the moral justification of the defence of democracy. Further, it will show that the prohibition of the threat or use of force established by the UN Charter system does not make room for force to stand as a stick with which to guarantee democratic freedoms.

INTRODUCTION

In international law, the threat or use of force is strictly regulated, and with good reason. With modern international law being founded in the ruins created by the horrors of two worldwide conflicts, the need to eliminate conflict requires little explanation. However, while a general prohibition of the use of force does exist, the law does not impose a blanket ban as such. Recourse to armed force is instead limited to such an extent that it should generally only be used to prevent further conflicts.¹ That said, the United Nations (UN) system, and indeed many other international and regional systems that have been founded to regulate relations between nation

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¹ United Nations, Charter of the United Nations (San Francisco, 26 June 1945), 3 Bevans 1153, 59 Stat. 1031, T.S. No. 993, entered into force 24 October 1945; The allowances in the UN Charter to utilise force in self-defence or to protect peace and security clearly demonstrate the intention to limit force to instances where it is necessary to prevent all-out conflicts, such as those seen in the first half of the twentieth century.

states, contain explicit prohibitions on the threat or use of force in certain situations.² The most relevant of these in this instance is the prohibition against any interference with the political independence of another state. Unlike other aspects of this area of law, the use of force against political independence of states is not one that has brought about considerable controversy. Indeed, any arguments against this prohibition would seem somewhat fruitless given the unambiguous wording of Article 2(4) of the UN Charter:

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.³

The wording of this article is plain and straightforward enough to leave little ambiguity to the principle enshrined within; the threat or use of armed force against the territorial integrity or political independence of another state is prohibited. As is often the case though, the fact that such threats or uses of force are prohibited does not prevent instances which push the boundaries of the prohibition and could possibly even be said to breach the rule.

This paper will demonstrate one such example of pushing of boundaries which occurred in late 2016/early 2017. It will show that the international response to the political crisis in The Gambia is an example of a situation where the prohibition on the threat or use of force against the political independence of a state was not observed. In doing so it will be established that the African states involved in the crisis acted in a way which was not only a complicating factor, but in fact went against the principles of international law on the threat or use of force. This paper does not seek to pass comment as to whether the actions of the African states were morally justified, and further does not aim to condone or condemn the actions of either side of the situation. The purpose of this paper is merely to use this example to demonstrate how the rules of international law can be ignored and twisted by the international community where other goals, such as the defence and promotion of democracy, are deemed to take precedence as the greater good.

In analysing this situation, the first section of this paper will briefly outline the constitutional crisis, which arose in The Gambia in the beginning of December of 2016 and came to an end in late January of 2017. The

² See for example Organization of African Unity, Constitutive Act of the African Union (Lomé, 1 July 2000), OAU Doc. CAB/LEG/23.15, entered into force 21 May 2001, art 4; Charter of the Organization of American States (as amended) (Bogota, 30 April 1948), 2 U.S.T. 2394, T.I.A.S. No. 2361; amended effective 1970, 21 U.S.T. 607, T.I.A.S. No. 6847, entered into force 13 December 1951, art 3(g); League of Arab States, Charter of the League of Arab States (Cairo, 22 March 1945), 70 UNTS 237, entered into force 10 May 1945, art 5.

³ UN Charter art 2 para 4.

second section will present an overview of the rules on the use of force in international law relevant to this discussion. Since the focus here is on the threat and use of force in respect to the specific situation in The Gambia, this paper will not attempt to provide an all-inclusive review of the law. Instead the paper will limit itself to providing a general overview of the topic focussing on the provisions of the UN Charter relevant to the discussion. The third section will draw all of this information together, addressing the situation in The Gambia, applying international law and outlining the extent to which the situation pushed against the limits of what is legal according to established principles of international law on the threat or use of force. Following this will be concluding comments on the subject.

CRISIS IN THE GAMBIA

The now former President of the West African state of the Republic of The Gambia (The Gambia), Yahya Jammeh, gained power in the country after a coup overthrew the country's first president in 1994.⁴ Following this, the leader retained the country's top position through victories in elections in 1996, 2001, 2006 and 2011, until he was eventually, and surprisingly, defeated in democratic elections at the end of 2016.⁵ Despite the fact that the ruler had held onto his position through a number of supposedly democratic elections during his time in office, he was still considered by many to be something of a dictator and a ruthless leader,⁶ as well as being the focus of criticism in relation to human rights abuses in the country.⁷ His eventual defeat to opponent Adama Barrow in the elections of December 2016 came as a shock to many, and was greeted by celebrations in the state.⁸ Despite this, the loss was met in a seemingly positive and statesmanlike manner by the defeated president who initially conceded defeat, and was commended by international organisations for so doing.⁹ Unfortunately,

⁴ Abdoulaye Saine, 'The Gambia's "Elected Autocrat Poverty, Peripherality, and Political Instability," 1994–2006: A Political Economy Assessment' (2008) 34 *Armed Forces & Society* 450, 451.

⁵ BBC News, 'Gambia's Jammeh Loses to Adama Barrow in Shock Election Result' *BBC World News* (London, 2 December 2016) <<http://www.bbc.com/news/world-africa-38183906>> accessed 16 March 2017.

⁶ BBC News, 'Gambia President Yahya Jammeh must Step Down – UN' *BBC World News* (London, 10 December 2016) <<http://www.bbc.com/news/world-africa-38275511>> accessed 16 March 2017.

⁷ BBC News (n 5).

⁸ Al Jazeera and News Agencies, 'Yahya Jammeh Loses to Adama Barrow in Gambia Election', *Al Jazeera* (Qatar, 3 December 2016) <<http://www.aljazeera.com/news/2016/12/gambia-yahya-jammeh-loses-election-adama-barrow-161202130519550.html>> accessed 16 March 2017.

⁹ ECOWAS, 'ECOWAS, African Union and UN Statement on the Gambian December 1 Presidential Election' *ECOWAS* (2 December 2016) <<http://www.ecowas.int/ecowas-african-union-and-un-statement-on-the-gambian-december-1-presidential-election/>> accessed 16 March 2017.

this apparent goodwill on the part of the president did not hold for long, and on 9 December the president backtracked on his concession, rejecting the election results and citing ‘irregularities’ in the election as having cost him the election victory.¹⁰ It was this rejection and refusal to step aside, which marked the beginning of the crisis in The Gambia.

Following his rejection of the election results, the president claimed that the electoral commission had changed some results and made a petition to the Gambian Supreme Court for a re-run of the polls.¹¹ The case was supposed to be heard on 10 January 2017, but with only a Chief Justice in situ, the hearing would not have been able to get underway until May, after additional judges were brought in.¹² President Jammeh therefore sought to have the inauguration of the president-elect blocked until the court ruled on the results. However, Gambia’s Chief Justice refused to rule on the matter.¹³ After the president’s announcement that he would not step down, the head of the Economic Community of West African States (ECOWAS), Marcel de Souza, was quoted as saying that should President Jammeh refuse to leave office and respect the election results, the armed forces were on standby to intervene and remove him to enforce the will of the Gambian people.¹⁴ This was the point at which the threat of force was established as a method for resolving the political dispute in the country. De Souza did go on to point out that ‘we (ECOWAS) do not wish to start a conflict. If [President Jammeh] loves his people, he has to be able to negotiate an exit door calmly. If it doesn’t happen, the most radical means will be used.’¹⁵ This statement established that ECOWAS’s intent was not to use force as a primary option. However, despite the fact that this clarification placed negotiation at the forefront as the preferred avenue of resolution to the situation, De Souza’s statements made it clear that ECOWAS was willing to, and seemingly

¹⁰ Samuel Osbourne, ‘The Gambia’s Parliament Votes to Extend President Yahya Jammeh’s Term of Office for Three Months’ *Independent* (London, 18 January 2017) <<http://www.independent.co.uk/news/world/africa/gambia-president-yahya-jammeh-parliament-vote-extend-term-office-three-months-lose-election-defeat-a7532881.html>> accessed 16 March 2017.

¹¹ BBC News, ‘Gambia Crisis: Senegal Troops “on alert” if Jammeh Stays On’ *BBC World News* (London, 23 December 2016) <<http://www.bbc.com/news/world-africa-38414790>> accessed 16 March 2017.

¹² Ruth Maclean, ‘West African Leaders Make Last-ditch Effort to End Gambian Crisis’ *The Guardian* (London, 13 January 2017) <<https://www.theguardian.com/world/2017/jan/13/west-african-leaders-banjul-end-gambian-crisis-president-yahya-jammeh-elections>> accessed 12 March 2017.

¹³ BBC News, ‘Gambia Political Crisis: What Happens Next?’ *BBC World News* (London, 20 January 2017) <<http://www.bbc.com/news/world-africa-38650266>> accessed 16 March 2017.

¹⁴ Ruth Maclean, ‘Forces on Standby to Oust Gambian President Yahya Jammeh’ *The Guardian* (London, 23 December 2016) <<https://www.theguardian.com/world/2016/dec/23/forces-on-standby-to-oust-gambian-president-yahya-jammeh>> accessed 16 March 2017.

¹⁵ *ibid.*

preparing to, utilise force to remove the then president and uphold the election results.

The crisis continued for around a month when it was eventually resolved without bloodshed, with the voluntary stepping-down of President Jammeh and the newly elected president taking up office.¹⁶ Until that point though, ECOWAS, the African Union (AU) and the UN Security Council issued several statements in relation to the situation. While the initial statement by De Souza referred to the willingness to use force to ensure the president was removed from his office, the later statements changed tact, and spoke of the encouragement of a peaceful transition of power and called for restraint from the involved parties, rather than reiteration of the threat of force.¹⁷ Although the phrase ‘all necessary measures’ was still present in the statements,¹⁸ it seems the line being broadcast had switched to that of a peaceful, diplomatic transition more in keeping with the tradition of modern international law which focused on political means and negotiation to ensure the transfer of power, whilst also maintaining peace in the country and region.

However, while the wording of such statements apparently sought to uphold this ideal, it would seem that the actions of ECOWAS and the African nations involved in resolving this crisis did not entirely broadcast the same message. From the time of the initial statement threatening the use of force as a potential means to resolve the situation, military forces were said to be on standby, with Senegal, a country which surrounds The Gambia, placed at the head of the operation.¹⁹ It was made clear that President Jammeh had a deadline on 19 January 2017 to leave office or face whatever measures ECOWAS deemed necessary,²⁰ which it would seem from the actions of the intervening states, meant the use of military force. As the deadline approached, reports detailed military forces from five African nations²¹

¹⁶ Al Jazeera and News Agencies, ‘Gambia Crisis Ends as Yahya Jammeh Leaves for Exile’ *Al Jazeera* (Qatar, 22 January 2016) <<http://www.aljazeera.com/news/2017/01/jammeh-arrives-banjul-airport-stepping-170121210246506.html>> accessed 16 March 2017.

¹⁷ ECOWAS, ‘Final Communiqué: Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government’ *ECOWAS Authority of Heads of State and Government* (2016) para 39 <http://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf> accessed 16 March 2017; This Communiqué was also endorsed by both the African Union (see AU, ‘Communiqué: 654th Meeting of the Peace and Security Council’ *Peace and Security Council of the African Union* (2017) para 6 <<http://www.peaceau.org/uploads/654-psc-comm-gambia-20-01-2017.pdf>> accessed 16 March 2017) and the UN (see UNSC Res 2337, UN SCOR, UN Doc S/RES/2337 (2017) para 4).

¹⁸ Id ECOWAS para 38.

¹⁹ Maclean (n 14).

²⁰ AU (n 17) para 5.

²¹ Ruth Maclean, ‘Gambia Crisis: Senegal Troops Poised at Border as Jammeh Mandate Ends’ *The Guardian* (London, 19 January 2017) <<https://www.theguardian.com/world/2017/jan/19/senegal-troops-poised-at-the-gambia-border-as-jammeh-mandate-ends>> accessed 16 March 2017.

moving towards the Gambian border in preparation for intervention should the defeated president refuse to step down.²² These actions showed not only the willingness of ECOWAS to utilise force to uphold the election results, but seemingly the full intention to do so to ensure that democracy prevailed in the country.

It should be noted that at this point, Jammeh was still officially the president of The Gambia even with the loss of the election. However, on 19 January, after his term as president officially ended, the UN Security Council adopted Resolution 2337 which provided full support for the newly elected president and for the efforts of ECOWAS to remove President Jammeh 'by political means first'.²³ Shortly after the Resolution passed, the troops that had until then been positioned at the Gambian border, were ordered to enter the country to remove the now ex-president Jammeh, taking the UNSC Resolution as support for military intervention.²⁴ Shortly afterwards, the troops were halted to allow for a final attempt to negotiate with the incumbent leader with orders to march on the capital of the country should negotiations fail.²⁵ The crisis finally ended when President Jammeh, faced with the prospect of being forcibly removed by ECOWAS, agreed to step down and allow for the transfer of power to the new president, Adama Barrow. In exchange for this peaceful handover of power, assurances were given to Jammeh that no legal measures would be taken against him and that his family and supporters would be protected.²⁶ With the new president sworn in as the leader of the country, President Jammeh left The Gambia and entered into exile.²⁷

Admittedly, this is a relatively brief outline of the key elements of the crisis, which for almost two months held the world media's attention. However, this overview demonstrates the important factors that contributed to the crisis and eventually led to its resolution. While the conclusion of this

²² Ismail Akwei, 'ECOWAS Okays Military Intervention in Gambia, Joint Troops Stationed at Border' *Africa News* (Brazzaville, 18 January 2017) <<http://www.africanews.com/2017/01/18/ecowas-okays-military-intervention-in-gambia-joint-troop-stationed-at-border/>> accessed 16 March 2017.

²³ UNSC Res 1337 (n 17) para 6.

²⁴ BBC News, 'Gambia Crisis: Senegal Sends in Troops to Back Elected Leader' *BBC World News* (London, 19 January 2017) <<http://www.bbc.com/news/world-africa-38682184>> accessed 16 March 2017.

²⁵ Colin Freeman, 'Gambia Crisis: West African Nations Halt Gambia Military Operation to Give Yahya Jammeh Final Chance to Step Down' *The Telegraph* (London, 20 January 2017) <<http://www.telegraph.co.uk/news/2017/01/19/gambia-crisis-british-tourists-flee-west-african-forces-poised/>> accessed 16 March 2017.

²⁶ Office of the Spokesperson for the UN Secretary-General, 'Joint Declaration by the Economic Community of West African States, the African Union and the United Nations on the Political Situation in the Islamic Republic of The Gambia' (New York, 21 January 2017) <<https://www.un.org/sg/en/content/note-correspondents/2017-01-21/note-correspondents-joint-declaration-political-situation>> accessed 16 March 2017.

²⁷ Al Jazeera (n 16).

crisis can be seen as the desirable one, and indeed the fact that ultimately democracy prevailed in this situation can only be seen as a positive outcome, the means utilised were not as desirable, and somewhat taints the victory. For what was essentially a domestic political situation, the apparent readiness to threaten, and indeed utilise force against a state to ensure the achievement of this conclusion presents a challenge to the international legal system which seeks to remove force from international relations. It serves as a demonstration that in some situations, states and groups of states are willing to sacrifice some values so as to better realise others. However, given the foundational position that the eradication of conflict occupies in the international legal system founded by the UN Charter, it is not a value that can be so readily set aside.

THREAT AND USE OF FORCE IN INTERNATIONAL LAW

UN Charter

The law regulating the threat or use of force in international law, or *jus ad bellum*, is enshrined in the Charter of the United Nations. Today, it is somewhat uncontroversial to say that Article 2(4) of the Charter prohibiting the threat or use of force in international relations is considered a cornerstone of the UN system. Yet, while on the surface the basic prohibition established by Article 2(4) is straightforward, the contents of the Article can be somewhat complex in that they encompass a number of factors. It is important that these factors be properly considered when looking at situations such as that in The Gambia to ensure that breaches of international law are not overlooked, and thus weaken the overall authority of the Charter system. First, as has been repeatedly referred to in this paper, the prohibition is against not only forceful acts, but also threats thereof. The result being that a threat alone in and of itself can amount to a breach of the prohibition, regardless of whether the threat is in fact carried out. Further, the provision explicitly provides that threats or uses of force aimed at the territorial integrity or, importantly in this discussion, against the political independence of states are prohibited. The inclusion of these factors shows the importance that the UN system places on the need to ensure the inviolability of a state in terms of its territory and its ability to rule itself, independently of outside interference. In other words, it highlights the fundamentality of state sovereignty in international law. That is not to say that the prohibition relates only to uses of force relating to these aspects, with the provision also barring threats or uses of force where they are in any other way inconsistent with the purposes the UN. This final aspect plugs a number of gaps that might otherwise exist in the prohibition. With the suppression and ultimately the elimination of conflict and breaches of peace having pride of place in the Charter's listed purposes, this provision

ultimately establishes an almost complete prohibition on interstate uses of force.²⁸

Regional Organisations

This general prohibition of force in international relations is also a key element that can be found in both the Constitutive Act of the African Union, and in the founding treaty of ECOWAS. Moreover, the principles found in the AU Charter contain provisions, not only on the threat or use of force, but also on other factors relevant in this discussion. The Charter lists *inter alia* sovereign equality, non-interference in internal affairs of states, the respect for sovereignty and territorial integrity and the right to independent existence as core principles of the Union.²⁹ In the same section, the Act makes clear that in settling disputes, member states must rely on peaceful means and are prohibited from resorting to the use or threat of force. These factors make clear that the AU, like the UN, places significant importance on the independence of states and their ability to determine their own fate free from interference and the threat of violence. Likewise, the ECOWAS Treaty contains very similar provisions to those found in the AU Charter. The equality of states, as well as the maintenance of peace, stability and security are listed among the fundamental principles of the organisation.³⁰ Additionally, the treaty lists the need for non-aggression between member states and the peaceful settlement of disputes under the same provision.³¹ Clearly, in the African organisations, as it is in the UN, the independence and inviolability of sovereign states is of paramount importance and the requirement to refrain from the threat or use of force is seen as a key facet of the regional order. As such, there are few accepted exceptions to the prohibition on the use of force. While the list of partially accepted or controversial justifications for military force is an ever increasing long one, discussion of such factors of law is beyond the scope of this article. Instead, the discussion will necessarily be limited to outlining the exceptions explicitly allowed in the UN Charter, which establish the generally accepted situations in which force can be used.

Exceptions to the General Prohibition

The exceptions to the general prohibition of the use of force are contained in Chapter VII of the Charter. The first, and most often referred to when justifying uses of force, is that of self-defence found in Article 51. According to this important provision, the Charter allows states to exercise an inherent

²⁸ UN Charter art 1 para 1.

²⁹ Constitutive Act of the African Union (Togo, 11 July 2000) (entered into force 26 May 2001) art 4.

³⁰ ECOWAS, Revised Treaty of the Economic Community of West African States (ECOWAS) (24 July 1993) arts 4(a) and 4(e).

³¹ *ibid* arts 4(d) and 4(f).

right to self-defence, either individually or collectively, where they are the victim of an armed attack.³² Again, to a certain extent, this Article is self-explanatory; when a state is attacked by another, the attacked state has an inherent right to resort to the use of force to defend itself. While there are a number of complexities related to what amounts to an armed attack, which may present some questions in terms of self-defence, these are not entirely relevant to this discussion. Presuming therefore that the force used is sufficient to be considered an armed attack, as long as the force employed to defend against it is limited to what is proportional and necessary to achieve the goal of self-defence it is generally deemed legitimate.³³ Of course, little is quite so straightforward in terms of international law and there are various aspects of this which have been the subject of heated debate. For example, the phrase 'if an armed attack occurs' has fostered much discussion on matters such as whether a state can legitimately act in self-defence against an attack which has not yet occurred but is considered imminent. However, it is important to note that no claim was made that The Gambia was in any way threatening the intervening states with an armed attack, nor that an armed attack had already occurred. It is also unlikely that any violence that may have resulted from the president's refusal to step down, while undesirable, would have posed a genuine threat to other states in the regional bloc. It is sufficient, therefore, merely to highlight the right of states to use force in self-defence against armed attack contained in the Charter without investing significant time into the idea that there was a threat justifying self-defence. Clearly, there were no factors relevant to self-defence present.

The second Charter exception comes in the form of the use of force, which has been authorised by the Security Council of the UN. The makeup of Chapter VII of the Charter is focused primarily on this element, with the first Article expressing the ability of the Security Council to determine matters which represent 'a threat to the peace, breach of the peace, or act of aggression' and to decide what actions should be taken in response.³⁴ This establishes the Council as the primary authority in determining in the first instance when a situation could potentially be subject to enforcement action. The Chapter then provides the various factors surrounding this power and the options available to the Council, with the right of self-defence being an exception to the general rule established here that only the Security Council decides when to use armed force as allowed in Article 42. This is important as it represents the ideal that, save for instances where a state is defending itself against an armed attack from another state, the Security Council is established as the only authority with the power to order the use

³² UN Charter art 51.

³³ Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 Michigan LR 1620, 1635–1638.

³⁴ UN Charter art 39.

of force under the Charter. It can therefore be seen that Chapter VII clearly establishes that the Security Council has the sole authority to determine first what constitutes a situation that threatens international peace and security, or is to be considered aggression, for which force may be authorised in response. This is significant, because while other states, or groups of states (as is the case in the situation currently being considered), may consider a crisis such as that which occurred in The Gambia to be a threat to peace and security, it is the Security Council that must make this assessment and then determine what means, if any, should be authorised to resolve it. Only once the Security Council has made such a determination and has decided on the steps to be taken to resolve the matter, should action be taken by any state or group of states. This amounts to a fundamental principle of the Charter system and is of the utmost importance in an international community determined to avoid conflicts and ensure the inviolability of state sovereignty.

Role of Regional Organisations

As outlined above, self-defence and Security Council mandated uses of force are the only two explicit exceptions to the general prohibition on the use of force envisaged in the Charter. While there are a number of other more controversial justifications for the use of force, which have been argued to varying degrees of success since the inception of the Charter system, this commentary will, for the most part, limit itself to these exceptions explicitly provided for in the Charter. With that said, it does seem pertinent to comment on the role of regional organisations, like ECOWAS, and their increasingly important contribution to the maintenance of international peace and security.

Chapter VIII of the Charter establishes that regional arrangements or agencies may deal with matters relating to the maintenance of international peace and security as are appropriate for regional action, provided their activities are consistent with the purposes and principles of the UN.³⁵ This means that such regional arrangements have some authority to take steps to address such matters. While it is possible to suggest that such organisations have, or should have, some authority to determine when to employ enforcement measures in the interest of international peace and security, such a role is not supported in the Charter. The provisions in Chapter VIII make it sufficiently clear that the authority of regional organisations is limited and does not include enforcement action, which would cover the threat or use of force. Article 52 explains that the member states of regional organisations must seek pacific settlement of disputes, failure of which would then lead to referral of the situation to the Security Council.³⁶

³⁵ Id art 52 para 1.

³⁶ Id art 52 para 2.

Article 53(1) then goes on to establish that while the Security Council may utilise regional arrangements for enforcement action, no such action can be taken by such organisations without Security Council authorisation.³⁷ Furthermore, Article 54 calls for all action taken by regional arrangements to be brought to the attention of the Council.³⁸ Thus, while Chapter VIII establishes an important role for regional organisations in the maintenance of international peace and security in their locality, this role is purely supportive in nature when it comes to enforcement measures and, like the measures found in Chapter VII, depends entirely on authorisation to act by the Security Council. In other words, the Charter does not allow for regional organisations to take unilateral action.

Consent to Use Force

It is important to explain that while these provisions in the Charter prohibit the use of force between states, the use of force by a state in its own territory is not prohibited by the Charter, and a state can give permission for another state to use force within its territory where it deems such assistance is required. The generally accepted position on this matter is that the rightful government of a state is permitted to request outside assistance, including military assistance, for such purposes as repressing insurrection.³⁹ This was highlighted by the International Court of Justice (ICJ) in its decision in the *Nicaragua* case when the Court confirmed the position that intervention is allowed under international law at the request of the government of the state.⁴⁰ It would therefore be uncontroversial to say that intervention in The Gambia at the request of the rightful government to enforce the result of the 2016 election would be a legitimate use of force based on an explicit invitation from the state. As will be shown in the next section, however, establishing this to be the case is less straightforward as it is not true to say that the threat of force, and therefore potential for intervention, came at the request of the rightful government. Indeed, it will be demonstrated that the threat of force by ECOWAS was not in line with the prohibition of the threat or use of force found in the UN Charter. Not only was the threat made in response to an internal political issue, and thus interfered with the political independence of the state, but it also fails to find any justification in international law. No situation necessitating self-defence existed and the Security Council had not authorised any enforcement measures. Moreover, the intervention cannot be defended as having been carried out with the state's consent since it was not requested by the legitimate government of The Gambia at that time. The next section of this will address the factors of

³⁷ Id art 53 para 1.

³⁸ Id art 54.

³⁹ Malcolm Shaw, *International Law* (6 edn, Cambridge University Press 2008) 1151.

⁴⁰ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits Judgment) [1986] ICJ Rep 1986 (27 June) 14 para 246.

international law outlined here in terms of the Gambian crisis. It will outline and explain how the response to the Gambian crisis was not in keeping with the prohibition on the threat or use of force and that while the crisis was resolved positively, the approach taken was not one that should be considered best suited for resolving such problems.

THREAT AND USE OF FORCE AGAINST THE GAMBIA

As previously explained, the crisis in The Gambia arose from the then president, Yahya Jammeh, refusing to step aside after being defeated in a democratic election and allowing the newly elected Adama Barrow to take up office. What followed was almost two months of discussions, negotiations, opinions, resolutions and comments all aimed toward the only acceptable conclusion that Jammeh would no longer be in office and Barrow would be sitting as president. As the result of the democratic vote in the country, this conclusion is undeniably the only one which could, and indeed should, have been achieved for the country. However, in what was conclusively an internal political matter of the Gambian nation, the response of the international community, and especially the regional organisation to which Gambia is a member, ECOWAS, was not necessarily the correct, most appropriate, nor indeed legally sound method of achieving this goal.

It has already been well established that the wording of the UN Charter is sufficiently clear on what is prohibited in terms of the use of force in situations such as this; save for where there is a legitimate Chapter VII justification, the use or threat of force against the political independence of a state is prohibited.⁴¹ This principle has been reaffirmed a number of times. For example, the UN General Assembly has stated in its resolutions that states have no right to intervene, for any reason, in the affairs of other states, and that it condemns such intervention or threats thereof, and considers such intervention a breach of international law.⁴² It seems, therefore, that there can be little argument against the idea that intervening in general, and particularly intervening with the threat or use of force, is not an acceptable act in the realm of international law. These principles make clear that the political independence of a state is to be respected and that political issues are internal matters of the state and are therefore to be considered of little concern to other nations. In other words, such matters are to be dealt with only by the state itself through its domestic institutions.

In the case of The Gambia, the defeated president's refusal to step down cannot be said to constitute a situation serious enough that it would pierce this veil of non-intervention and non-interference. A leader who refuses to give up his hold on power is certainly a serious and concerning development,

⁴¹ UN Charter art 2 para 4.

⁴² GA Res 2131, UN GAOR, 20th Sess 11, UN Doc A/RES/20/2131 (1965) art 1; GA Res 2625, UN GAOR, 25th Sess 121, UN Doc A/RES/20/2131 (1970) art 1 (adding that intervention is a breach of international law).

but it is one which should be dealt with by the state's domestic institutions. Merely as a practical matter, such institutions must wield their own power to ensure that the political process is respected and that only the legitimate government can rule. While this may certainly be a difficult task, it is one which needs to be undertaken for the internal powers of the state to have any real legitimacy. That is not to say that at some point, for example, where domestic institutions have been unable to facilitate the desired outcome, the rightful government is precluded from reaching out for assistance. Indeed, as mentioned, sovereign states are, as part of that sovereignty, entitled to request assistance from foreign nations should they deem it warranted. The point being made here is that in this situation, Jammeh's refusal did not justify the immediate resort to the threat of force, which came before any chance was given, nor any attempt made by the state's institutions, that would have seen the state address its developing political situation itself. Certainly, it could be argued that Jammeh's position made this unlikely. Equally, perhaps intervention would have been warranted to prevent escalation of the situation and the descent of the country into civil war. However, these possibilities do not automatically strip a state of its sovereignty and the threat of force should not be issued without first allowing diplomacy to have its day.

This commentary has already gone to great lengths to outline and reinforce the importance of the prohibition of the threat or use of force in international law. This prohibition is not only important for the working of the international system but reflects the core purpose of the UN system: to prevent conflict. It seems almost unnecessary to analyse to any significant extent whether the refusal to step aside could amount to a situation, which satisfies the limited exceptions to the prohibition. Certainly, Jammeh's actions after his decision to contest the results were disturbing and threatened stability in the country. Early on in the crisis, reports suggested that military activity in the nation had increased and that the army was setting up positions within cities, seemingly preparing for violence.⁴³ The president also sent troops to occupy the electoral commission headquarters building before the first delegation of Heads of States had arrived in the country to begin the negotiation process for his departure.⁴⁴ He then lodged his petition with the Supreme Court to hear the case on whether the commission had properly collated the results.⁴⁵ Going even further, the

⁴³ Ruth Maclean, 'The Gambia: Life Goes On in Banjul as Yahya Jammeh Clings to Power,' *The Guardian* (London, 11 December 2016) <<https://www.theguardian.com/world/2016/dec/11/the-gambia-election-results-yahya-jammeh-adama-barrow-troops-banjul>> accessed 17 March 2017.

⁴⁴ Ruth Maclean, 'Gambian Military Takes Over Offices of Electoral Commission' *The Guardian* (London, 13 December 2016) <<https://www.theguardian.com/world/2016/dec/13/gambian-military-takes-over-offices-of-electoral-commission-yahya-jammeh>> accessed 17 March 2017.

⁴⁵ *ibid.*

defeated leader later attempted to better secure his position in the country by declaring a ninety-day state of emergency.⁴⁶ This move was seen by his opponents as a clear attempt to shore up his position and hold onto power, while he cited international interference in the elections and in the internal affairs of The Gambia, coupled with the hostile atmosphere surrounding his refusal to step down as justifications for his actions.⁴⁷

While it is plain to see that these are the actions of a man attempting to cling to his seat of power in the face of defeat, it is a flawed claim that these actions present a reasonable justification for intervention in a country's political process. From the moment Jammeh announced that he disputed the election results, the threat of force was made to prevent him from remaining in power. Despite the discussions later changing in tone and mediation being given priority as the key method for resolving the situation, the threat of force hung continuously and ominously over the situation like a guillotine poised to fall. Forces, which were said to have been on standby from the outset of the situation were at no point said to have stood down, even while talks continued. Meanwhile, ECOWAS and the AU made statements indicating that they would use 'all necessary means' to ensure Jammeh was removed from power.⁴⁸ Given that the threat of force was clearly established, maintained and that armed forces were undergoing preparations to mobilise,⁴⁹ it is difficult to contend that the removal of the (at that time) legitimate government of the country through force was not an obvious and clear consequence of a failure to comply with the demands of the involved nations.

Of course, as was outlined in the previous section, the legitimate government of a state has the right to permit the use of force by international forces within its territory. Indeed, since the election results named Barrow as the victor and thus the new president and Head of State, his new government would indeed be able to legitimately request such assistance. However, it should be noted that when the threat of force was made, Jammeh was still very much the legitimate president and his government still in power. The 1997 Constitution of The Gambia states that a victorious presidential candidate shall take office sixty days after they are elected and that before taking office, they are required to take the prescribed oaths.⁵⁰ Until such a time as these requirements are met, the sitting president remains the rightful leader of the state and their government remains in power. As such,

⁴⁶ BBC News (n 13).

⁴⁷ Al Jazeera and News Agencies, 'Gambia's Yahya Jammeh Declares State of Emergency' *Al Jazeera* (Qatar, 18 January 2017) <<http://www.aljazeera.com/news/2017/01/gambia-yahya-jammeh-declares-state-emergency-170117165356768.html>> accessed 17 March 2017.

⁴⁸ AU (n 17) para 3.

⁴⁹ Maggie Fick, 'Military Intervention to End Gambia Impasse Draws Closer' *Financial Times* (London, 15 January 2017) <<https://www.ft.com/content/1d9b5ca6-db21-11e6-9d7c-be108f1c1dce>> accessed 17 March 2017.

⁵⁰ Constitution of the Republic of the Gambia (1996) (as amended in 2001), art 63 paras 1–2.

regardless of the fact that Barrow was to become the rightful president soon after, he was not so until the term of President Jammeh ended on 19 January and the required oaths were taken to confirm Barrow as the legitimate president. The result of these facts is that, since he had not been sworn in as the new president, Barrow cannot be said to have had the authority to authorise the threat or use of force against actors within the Gambian state as the legitimate leader of the state. An additionally complicating factor here is the fact that the Gambian parliament had voted to allow Jammeh to remain in power for a further three months.⁵¹ Per the Gambian Constitution, the country's National Assembly has the power to extend its own life for up to three months during a state of emergency.⁵² In such a situation, the term of the president is also extended for the same amount of time.⁵³ Since Jammeh, based on his exclusive authority as Head of State,⁵⁴ had declared a state of emergency to exist on 17 January,⁵⁵ according to Gambian law the Assembly possessed the power to extend its own life, and thus the term of the president. This tactic again has been pointed out by many as an obvious attempt by Jammeh to illegitimately maintain his grip on power in the country. Undoubtedly, this is likely the case, however, it is not for another state to determine whether such constitutional principles within the country are valid or whether they can be initiated. The fact may well be that the constitutional principles were being abused in a way which was purely designed to allow the defeated leader to maintain his grip on power, but that does not make intervention in the state and the disregarding of Gambian law any more justifiable under international law. If the constitutional law of The Gambia is to be deemed flawed and open to abuse, then it is for the state's legislative organs to address these problems.

Of course, interventions such as these are not unheard of in international law, and indeed there has been significant discussion for some time as to whether a country seeking to restore democracy in a foreign state is justified in utilising force under international law. However, in what has been termed as 'the Reagan Doctrine', the idea that a country is justified in utilising force to remove a non-democratic government, is one which has been largely

⁵¹ Al Jazeera and News Agencies, 'Gambia MPs Extend President Jammeh's Term' *Al Jazeera* (Qatar, 18 January 2017) <<http://www.aljazeera.com/news/2017/01/gambia-mps-extend-president-jammeh-term-170118082031908.html>> accessed 17 March 2017.

⁵² Constitution of the Republic of the Gambia, art 99 para 2.

⁵³ Id art 63(6).

⁵⁴ Id art 34(1).

⁵⁵ Samuel Osborne, 'The Gambia's Parliament Votes to Extend President Yahya Jammeh's Term of Office for Three Months' *Independent* (London, 18 January 2017) <<http://www.independent.co.uk/news/world/africa/gambia-president-yahya-jammeh-parliament-vote-extend-term-office-three-months-lose-election-defeat-a7532881.html>> accessed 17 March 2017.

rejected by international law.⁵⁶ For example, this position was used as part of the justification for the US intervention in Panama in 1989. According to a speech given by former President George HW Bush, the goals of the US were, *inter alia*, 'to defend democracy in Panama'.⁵⁷ While, like many other moral justifications for an act which is not in keeping with the letter of the law, this seems a commendable goal, it does not stand up to scrutiny and, moreover, having morality on one's side does not equate to having legitimacy. This fact was recognised by the US which during the debates in the Security Council, outlined that it did not contend the existence of a right to intervene in favour of democracy, instead relying on self-defence of its nationals in the country.⁵⁸

Intervention in favour of democracy did however appear again as one of many points raised in the discussion surrounding the invasion of Iraq in 2003. Perhaps in this situation the principle received a little support through the response of the UN, which did not find itself in a position to condemn the invasion. After the initial incursion into the state, the UN Security Council provided some legitimacy for the means undertaken, highlighting the importance of the principles that 'the sovereignty of Iraq resides in the State of Iraq'; that it was 'the right of the Iraqi people freely to determine their own political future and control their own natural resources'; and 'reiterating its resolve that the day when Iraqis govern themselves must come quickly'.⁵⁹ Far from condemning the move of the international force in its invasion of the state, to some extent the Security Council provided legitimacy to the idea that restoring the power to govern to the people of the state justified the intervention. While this example suggests that there may be some room for such a principle in international law, it far from establishes an accepted doctrine. Indeed, the invasion of Iraq, and the justifications presented to legitimise it, continue to be an extremely contentious issue in international law. It would be of great concern to the international community to be faced with the possibility of a state being given the authorisation to invade other states based purely on the idea that they are governed by non-democratic leaderships. Such a principle would place a number of states under the crosshairs of other nations with the desire to intervene in their domestic affairs. The Charter prohibition and the very purpose of the UN in general, clearly places the maintenance of peace above the need to ensure democratic rule in member states. As a simple

⁵⁶ Louis Henkin, 'The Invasion of Panama Under International Law: A Gross Violation' (1991) 29 *Columbia J of Transnational Law* 293, 298.

⁵⁷ George HW Bush, 'Fighting in Panama' (White House Address, Washington, 21 December 1989) <<http://www.nytimes.com/1989/12/21/world/fighting-panama-president-transcript-bush-s-address-decision-use-force-panama.html>> accessed 21 March 2017.

⁵⁸ United Nations, 1989, *Yearbook of the United Nations*, Lake Success, NY Department of Public Information, United Nations, 172–176.

⁵⁹ SC Res 1511, UN SCOR, UN Doc S/RES/1511 (2003).

reading of the purposes outlined in the Charter shows, freedom from war and a situation in which peace and security reign without the need to resort to the use of armed force are all expressed purposes; the rule of democracy is not. It has even been said that there is nothing to suggest that the principle of self-determination, if interpreted as including democracy under its ambit, could be considered a norm higher than that of non-intervention.⁶⁰ Thus, in situations such as the crisis in The Gambia, the ideal of intervening to ensure the success of democracy receives little to no defence under international law and cannot be justified in such terms.

This is, of course, not even the first instance of intervention in an African country to uphold the results of a democratic election, merely the most recent. In 2010, the former president of the Ivory Coast, Laurent Gbagbo, refused to step aside in favour of the newly elected President Alassane Dramane Ouattara.⁶¹ The refusal sparked further violence in the country between supporters of the two presidents. In response to the situation, the UN Security Council passed resolutions, which condemned the actions of Gbagbo, called for an end to violence in the country and extended the mandate of the ongoing peacekeeping operation in the country.⁶² Unfortunately, this did not produce the desired result and the country suffered from months of conflict between the two domestic forces, UN forces and supporting French troops, until Gbagbo was eventually arrested and President Ouattara sworn in.⁶³ Perhaps this example could be seen as a precedent for the use of force to intervene in a situation such as that in The Gambia where an incumbent Head of State refuses to abide by the results of an election. If that is the case, the months of conflict that ensued are already not a great help to the idea of intervention in favour of democracy. However, the differences in the two situations cannot be overlooked. While the refusal of the defeated president in the Ivory Coast to allow the democratically elected president to take up office can be said to have prompted a forceful intervention, an operation involving UN and French forces had already existed in the state since 2004 under the authorisation of Security Council Resolution 1528.⁶⁴ As such, when conflict in the country intensified following the election, the decision of the Security Council was an extension of an operation attempting to restore peace in an ongoing conflict. Thus, the intervention cannot be said to have been a direct result of the president's refusal to step down nor does it support intervention for democracy. It should be further noted that while there was already a well-established threat to peace and security in

⁶⁰ Shaw (n 39) 1158.

⁶¹ United Nations Operation in Côte d'Ivoire, 'Post-election Crisis' (*United Nations News Centre*) <<https://peacekeeping.un.org/mission/past/unoci/elections.shtml>> accessed 17 March 2017.

⁶² UNSC Res 1975, UN SCOR, UN Doc S/RES/1975 (2011).

⁶³ United Nations Operation in Côte d'Ivoire (n 61).

⁶⁴ UNSC Res 1528, UN SCOR, UN Doc S/RES/1528 (2004).

the Ivory Coast,⁶⁵ no such threat existed in the situation in The Gambia, and the developing crisis did not represent such an obvious threat. Indeed, there was no suggestion that such a threat existed or had been established by the UN Security Council. Additionally, after the refusal of the president to step down, and throughout the crisis, there were no reports of violence within the country. Indeed, as one report put it, '[o]n the quiet streets of Banjul (the capital city), there has been an increased military presence ... Soldiers piled up sandbags and propped up machine guns on them but merely waved people through checkpoints.'⁶⁶ This hardly painted a picture of a situation amounting to a threat to international peace and security. This is perhaps reflected in the resolution adopted by the Security Council towards the end of the crisis, which spoke only of the need to ensure a peaceful transition of power and the need to utilise 'peaceful means first' to facilitate such transition, whilst failing to establish that the situation amounted to a threat to peace and security.⁶⁷

Despite its wording, and the complete lack of any such authority, the Security Council Resolution on 19 January was taken as authorisation for the waiting ECOWAS forces to carry out the threat of force to ensure that Jammeh did not hold onto power. Shortly after the resolution was passed, the Senegalese military confirmed that their troops had entered The Gambia to support Barrow's election victory.⁶⁸ While this incursion into the country was halted to allow for one final attempt at negotiating a peaceful handover,⁶⁹ the act of utilising armed forces to intervene in a domestic situation had at this point been carried out. Without the authorisation of the UN Security Council and with no demonstrable self-defence justifications, this act is a further breach of the basic prohibition on the use of force in the UN Charter. The ECOWAS forces, which had been standing by to intervene from the very outset of the crisis were now an invading force in The Gambia with the mandate to remove President Jammeh. Perhaps the only argument which may provide a level of defence in favour of the eventual movement into the state was that by this time, Adama Barrow had been sworn in as president in the Gambian embassy in Senegal and had made a request for international

⁶⁵ SC Res 1975 (n 62); The Security Council determined 'that the situation in Côte d'Ivoire continues to pose a threat to international peace and security in the region.' [emphasis added].

⁶⁶ Maclean (n 43).

⁶⁷ SC Res 2337 (n 17).

⁶⁸ Adam Withnall, 'Senegal Troops Enter The Gambia as Election Victor Adama Barrow is Declared President in Exile' *Independent* (London, 19 January 2017) <<http://www.independent.co.uk/news/world/africa/gambia-adama-barrow-sworn-in-inauguration-yahajammeh-president-a7535956.html>> accessed 17 March 2017.

⁶⁹ Freeman (n 25).

assistance in the country.⁷⁰ This of course, does ignore the other aspects of this complex situation such as the extension granted by the Gambian National Assembly. After the troops were halted and a last ditched effort to peacefully resolve the situation was undertaken, the now ex-president ‘with the greater interest of the Gambian people in mind, and in order to preserve the peace, stability and security of The Gambia and maintain its sovereignty, territorial integrity and the dignity of the Gambian people’⁷¹ agreed to stand aside. Nevertheless, while this was perhaps a satisfying end for democracy in a situation—which could have only had one result—the passing of power to the rightfully elected president—it was not without its cost. While it is certainly a desirable result, which did not see the loss of any lives, its price was the further erosion of the Charter regime and its prohibition on the threat or use of force against the independence of states.

CONCLUSION

As clearly stated at the outset, the purpose of this is not to attempt to justify the refusal to respect democratic processes, or indeed to deny a rightfully elected leader the right to take up office. The author supports these institutions, which represent key pillars of freedom and the rule of law. The point has been to show that the UN Charter’s prohibition on the threat or use of force against the political independence of another state should prevent foreign nations from interfering in such situations. When crises such as that in The Gambia arise, the solution can and must come instead from the domestic law and institutions of the state in question. The Charter is clear that it prohibits the threat or use of force in such matters, yet as the crisis in The Gambia shows, states can be too eager to openly threaten the use of forcible means to ensure that democracy prevails. It is perhaps an unfortunate yet necessary fact of international law that having morality on ones’ side does not necessarily result in actions being legally justifiable.

In this case, the threat of force was made at the outset of the crisis and remained for its duration, despite political means being placed at the forefront of attempts to resolve the situation. As a domestic political matter, the threat was not in keeping with the prohibition contained in Article 2(4) of the UN Charter, and such means were not justified by the Chapter VII exceptions to the general prohibition. As the examples of the past have shown, international law does not accept the existence of a doctrine legitimising the threat or use of force to uphold democracy, and as such, these means should not be relied upon in such situations. Perhaps in the context of Africa, a continent that has a long history of dictatorships, colonialism and cruel regimes, the

⁷⁰ Al Jazeera and News Agencies, ‘Adama Barrow Sworn in as Gambia’s President in Senegal’ *Al Jazeera* (Qatar, 20 January 2017) <<http://www.aljazeera.com/news/2017/01/gambia-president-adama-barrow-takes-oath-senegal-170119170745954.html>> accessed 17 March 2017.

⁷¹ Office of the Spokesperson for the UN Secretary-General (n 26) para 3.

show of strength by ECOWAS is an example of the determination of states to uphold the principle of democracy. This is not, however, an argument which justifies the threat and eventual use of force under international law. Of course, states should attempt to ensure the success of the democratic process, but a knee-jerk resort to the threat of force is not the path to success in upholding the ideals of democracy and peaceful civilisation. States should be very careful in their decisions to interfere in the domestic matters of other nations, since what is democracy without sovereignty and the ability of a state to determine its own fate? Perhaps the fact of the matter was best stated by the commander of the Gambian armed forces, who, when speaking about the possibility of military intervention in the country, was quoted as saying: 'We are not going to involve ourselves militarily, this is a political dispute ... I am not going to involve my soldiers in a stupid fight. I love my men.'⁷² His sentiment is pertinent and entirely accurate. This was a political dispute between two leaders, the satisfactory resolution to which does not come out of the end of a rifle. The potential for conflict was, if anything, increased through the threat to use force to support President Barrow. It was the political route which secured the desired outcome, and it should be so. Domestic political matters are just that, and it is not the place of foreign states or their militaries to decide the outcome of such situations.

⁷² BBC News, 'Gambia's President Jammeh Refuses to Leave Office as Deadline Passes' *BBC World News* (London, 19 January 2017) <<http://www.bbc.com/news/world-africa-38672840>> accessed 17 March 2017.