

## “Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention

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### Abstract

Despite intense criticism, Yahya Jammeh who had seized the power by military coup of 1994, managed to keep the lead in the elections held in 2001, 2006 and 2011. Jammeh’s consolidation of power established an authoritarian rule which undergone a massive erosion with the loss of elections held December 1, 2016. Jammeh's reluctance to hand the power to his elected successor and the escalation of the crisis were reacted on by the international community, including the African Union, ECOWAS and the UN Security Council. In order to implement the December 2016 election results which resulted in a constitutional crisis, ECOWAS has successfully used the threat to use force “to restore democracy again”. However, ECOWAS's request to use force and preparation for the use of force challenged certain legal aspects of the use of force. This study claims that ECOWAS's military intervention in the Gambia is problematic and questionable in terms of international law. In this context, the purpose of the study is to discuss the legitimacy of the intervention.

**Keywords:** African Union, ECOWAS, UN Security Council, Threat of the Use of Force, Operation Restore Democracy

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## **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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### **Introduction**

Yahya Jammeh seized the power by 1994 military coup in the Gambia. By consolidating his power he managed to win elections held in 2001, 2006 and 2011. However, he was exposed to intense criticism that the elections were not fair and free, and were not at international standards. The power of Jammeh, who emerged as an autocratic leader, has been recently transformed into a “*climate of fear*” with a significant increase in human rights violations, and the authoritarian rule he has established begun to erode (Perfect, 2017; 324-325). Jammeh, who was defeated in the elections on 1 December 2016, initially rejected the election results on the grounds that “*there were serious and unacceptable abnormalities in the elections*” and demanded that the elections be held again under the supervision of the independent electoral commission. In addition, Jammeh issued a decree to declare a three-month state of emergency from the Gambia Parliament, with an excuse that the Gambia’ sovereignty, security and stability have been undermined and interfered. Jammeh's attitude triggered a political crisis.

Facing the constitutional crisis in the Gambia, Jammeh was condemned by the international community and asked to remain faithful to the election results of 1 December 2016. However, Jammeh's reluctance to ensure the transition of power to the elected successor, worsened the crisis and caused the reactions to become even harder. A statement by the UN Security Council issued on 10 December 2016 called for a peaceful and orderly transition, further

emphasizing that the security of Adama Barrow and the people of Gambia should be fully ensured(SC/12616-AFR/3501/10 December 2016). On the other hand, on 17 December 2016 at the Summit of Heads of States and Governments of the ECOWAS(*Economic Community of West African States*), ECOWAS called to accept the results of the election, to ensure the peaceful transition of the power, and the avoidance of a possible action against the other party and has notified that it will “*take all necessary measures*” to exactly implement the 1 December 2016 election(ECOWAS, 2016a; 7-8). On December 12, 2016 and January 13, 2017, the African Union(AU) Peace and Security Council took a resolution in parallel with ECOWAS, and emphasized that the election results of 1 December 2016 clearly reflect the will of the Gambian people(African Union, 2016a; 2017b). The UN Security Council, with its Resolution 2337(2017), welcomed the decisions taken by ECOWAS and the Peace and Security Council of AU, and made a statement regarding the resolution of the problem through political means (UNSC/RES/2337/19 January 2017). At the same time, the UN Security Council did not consider the Gambian problem as a threat to international peace and security and declared that chapter VII and VIII of the UN Charter should not be considered as a matter of fact to make an authorization for the use of force.

The stable and decisive attitudes of ECOWAS members and mediators without UN authorization played a decisive role in the solution of the problem. It is an undeniable fact that ECOWAS has restored the democracy in the Gambia by resorting to the threat of the

## **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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use of force. However, ECOWAS's request and preparedness for the use and threat of the use of force challenged certain aspects of the law regarding the use of force. In this context, the study appears to be one of the examples that prove that pro-democratic intervention has not become a norm in the context of doctrine and state practices. Based on the thesis that ECOWAS' intervention in Gambia is problematic and questionable in terms of international law, the study is based on two parts: In the first chapter, the historical and chronological literature of the case was discussed as well as the social and political developments in the Gambia. In the second chapter, the legitimacy of the “*operation restore democracy*” in the Gambia in the light of the debates in the literature, state practices and normative order has been examined in terms of international law.

### **1. SOCIETY AND POLITICS IN THE GAMBIA: 1 DECEMBER 2016 ELECTIONS**

#### **1.1. From Gambia to Senegambia Confederation**

Although the origin and meaning of the word “*Gambia*” is unclear, it derives its name from the river Gambia, which passes through its territory and surrounds it (Hughes and Perfect, 2008; 72). Gambia is the smallest country in the continental mainland of Africa, and is completely surrounded by Senegal, except for a small Atlantic coastline. The Gambia consists of various ethnic groups<sup>1</sup>, where 95%

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<sup>1</sup> According to CIA Factbook's 2013 data; 33.8% Mandinka/Jahankas, 22.1% Fulani/Tukulur/Lorobo, 12.2% Wolof, 10.9% Jola/Karoninka, 7% Serahuleh, 3.2% Serer, 2.1% Manjago, 1% Bambara, 0.8% Creole/Aku Marabout, 6.8% others. (CIA The World Factbook, 2018)

of its population consists of Muslims and 5% of Christians and others. The Gambia is one of the four former British colonies such as Sierra Leone, Ghana and Nigeria, which entered the British patronage in 1821 and became a colony in 1886 after the 1878 Berlin Conference(Sanyang and Camara, 2017; 6). After 1843, the Legislative and Executive Councils, which were typical colonial instruments, showed themselves in the Gambia government mechanism(Hughes and Perfect, 2008; 43-44). After having gained its independence in 1965, the Gambia became a Republic in 1970 and became part of the British Commonwealth of Nations(Hughes and Perfect, 2008; 44).

In 1981, the consensus (known as the *Kaur Declaration*), reached between the President of the Republic of Senegal, Abdou Diouf and the President of the Gambia, Dawda Jawara, brought the two states into the process of integration. February 1981 military coup led by Senegal in the Gambia helped the integration and in 1982 “*Senegambia Confederation*” has been established(Hughes, 1992; 200-201). The fact that the Confederation represented a union between independent French and English-speaking African country appeared to be an exclusive feature. Indeed, in the post-colonial period, the political unity of the colonial regions (Union of African States-Ghana, Guinea and Mali) represented the political unity of states with similar characteristics (language, religion and ethnic origin), while the unification of Senegal and Gambia under the same political unity was an exceptional situation to be included in the formation of unity(Hughes and Lewis, 1995; 228-229).

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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It was recorded that the presidency of Senegambia Confederation would be held by Senegal and the vice presidency by the Gambia, on 9 February 1982 (Confederal Document of Senegambia, 1982; Art. 6). The Senegambia Confederation has made concrete the idea of pan-Africanism soon after the post-colonial period. Although the Confederation Agreement is of great importance, the organized “*loi cadre*” form has been used as a framework agreement to be expanded with the protocols arranged in a short and simple manner (Hughes, 1992; 202). The text of the agreement includes basic principles and objectives such as protecting the independence, sovereignty and territorial integrity of both states, developing economic and monetary union, combining military and security forces, coordinating in the field of foreign policy and creating confederal institutions (Confederal Document of Senegambia, Art. 2). However, the fact that the idea of taking part in the Confederation did not find much support among the Gambian people, the ruling elite and the private sector was the *de facto* obstacle to the survival of the Confederation. This *de facto* obstacle mainly was because of the fear that sovereignty would result in the loss of independence and to exist under the hegemony of Senegal (Kupchan, 2010; 359-360). In other words, the asymmetric distribution of power between the two countries was effective in the dissolution of the Confederation of Senegambia in 1989 (Kupchan, 2010; 365).

An unsuccessful attempt at political integration has heralded a change in the political sense in Gambia, leading to the emergence of opposition groups/figures in power. Yahya Jammeh was the head of

these figures. Jammeh was born in Kanilai, Western Gambia, in 1965, and is a member of the Jola ethnic group, which is commonly found in Guinea and Senegal. Immediately after the 1981 coup, Jammeh, who was trained in Senegal under a confederal agreement between Gambia and Senegal, joined a branch of security services, also known as the gendarmerie, a French paramilitary force (Sanyang and Camara, 2017;7). Jammeh who was in President Dawda Jawara's protection unit, has got his military training in the US and Turkey. He had been in the country's administration for many years before conducting a military coup in 1994.

## **1.2. The 1994 Coup and The End of 'One Billion Years' Rule**

In 1965, Dawda Jawara with the independence of the Gambia enabled various political parties and led to the establishment of regular, fair and competitive elections. As an internationally recognized face, Jawara has emerged as one of the most violent advocates of human rights. In this context; he has used the Commonwealth as an effective platform for human rights issues and has been a pioneer in the preparation of *the African Charter for Human and Peoples' Rights* in the Gambia, known as the *Banjul Declaration*, established the *African Center for Democracy and Human Rights Studies* based in The Gambia in 1989, defended pluralism and multi-partyism in the period of authoritarian regimes in continental Africa (Wiseman and Vidler, 1995; 54), abolished obstacles to freedom of press and death penalty (Reid, 2016). Although

### **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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Jawara's international recognition has often created an added value for Continental Africa and the Gambia in particular, the process leading to the coup has emerged as a result of a number of disturbances: the fact that the People's Progressive Party (PPP) led by Jawara has been on power for many years increased nepotism and poverty. The European Union, the World Bank and the IMF's structural adjustment programs have developed the reaction of the opposition (Saine, 2009; 105; Darboe, 2010). The military coup (*coup d'état*) by Yahya Jammeh on July 22, 1994 was noteworthy for several reasons: First, Jawara was Africa's longest serving national leader; second, the end of the coup with a multi-party democracy implemented with Jawara (Wiseman and Vidler, 1995; 53; Saine, 2009; 97). This was instrumental in transforming the Jammeh-led Gambia into an interventionist and authoritarian regime.

Jammeh, who came to power with a bloodless coup, insisted that *the coup was a coup that made a difference, that they were not here to stay permanently, they would return to the barracks after life returns to normal conditions* (French, 1994). Two years after the coup, Jammeh set up a temporary board of directors to convert the country into civilian government in 1996 and left the army during the elections and participated in the elections with the APRC (*Alliance for Patriotic Reorientation and Construction*) Party. The controversial and questionable nature of the election has led to the opposition of national opponents, the United States and the European Union on an international scale.

Jammeh strengthened its power until the 2016 elections, by intimidating opposition elements, prohibiting international observers from watching the elections, preventing the right to protest and to walk, prohibiting access to the internet, censorship to the press, arbitrary human rights violations and arrests, discriminatory and exclusionary treatment against homosexuality, the arbitrary seizure of assets (Streitfeld-Hall, 2017; 4-5; Smith, 2016; Report of Amnesty International, 2016) has caused the international community to take a hard stand against Jammeh rule (Report of Human Rights Watch, 2015). Indeed, the fact that Jammeh did not achieve the relative economic development like in Jawara's time led him to some populist policies: He left the Commonwealth membership and accused England of being a new colonialist; In 2015, he declared the Gambia an Islamic state; In 2016, the Gambia was withdrawn from the Rome Treaty, the legal ground of the International Criminal Court (T24, 2017)

Jammeh lost the elections of 1 December 2016 in an environment of increasing national and international reactions. Adama Barrow was elected as the third president of the Gambia. However, Jammeh did not recognize the election results. Jammeh, who declared that he would rule the country for a "*billion years* ", did not accept the results of the election, which led to the emergence of a constitutional crisis and political conflict.

### **1.3. 2016 Elections: Post-election Constitutional Crisis**

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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Jammeh, who held the power since the 1994 military coup, used security forces to suppress the opposition through torture, intimidation and arbitrary arrests prior to the elections where he was planned to be elected for the fifth time in the Gambia(Hirsch, 2016). The Jammeh's APRC Party, the Barrow's Opposition Coalition, and Mama Kandeh's Gambia Democratic Congress(GDC) participated in the elections held on 1 December 2016. Following the election day, the Independent Electoral Commission declared that Barrow had 45,5% (227,708), Jammeh had 36,7% (208,487) and Mama Kandeh had a 17,8% (89,768) of vote rate(Onuoha and Ngwu, 2017; 3).

Jammeh, four days after losing December 1, 2016 elections, contested the results. Jammeh suggested that the election must be repeated on the grounds that irregularities were made during the election and declared a 90-day state of emergency. International, continental and regional organizations(UN, AU, The Organisation of Islamic Cooperation and ECOWAS), as well as Western powers(US and France) reacted on Jammeh's decision and demanded that the results be accepted by Jammeh and the transition of power be carried out peacefully(Onuoha and Ngwu, 2017; 3-4). In response to Jammeh's position, Senegal urged the Security Council to convene an emergency meeting, while the US State Department spokesman Mark Toner called Jammeh to accept the December 1 election results and allow regular transition of power to the new president Barrow in accordance with the Constitution of the Gambia(Harley, 2016).

The Gambia's problem changed its dimension from internal to international one. The ECOWAS countries decided to take military action against the Gambia and this decision was supported by the UN Security Council and the AU(Cocks and Farge, 2017). Although the political crisis that emerged in the Gambia was disposed of in a peaceful manner, this situation brought up the question of the legality of this intervention.

## **2. “OPERATION RESTORE DEMOCRACY”: THE GAMBIA**

In order to implement the 1 December 2016 election results, ECOWAS has succeeded in “*operation restore democracy*” without the direct use of a physical force, using only the threat of using force. According to Tomas Serna and Virginia Comolli, the purpose of the operation was; to re-establish the constitutional order in Gambia, to enable the newly elected leader Barrow to take office, to re-influence the will of the Gambia in the country's administration, and to establish appropriate conditions for the normalization of the political and humanitarian situation in the Gambia(Serna, 2017; Comolli, 2017). The ECOWAS army, which consisted of a 7,000 military personnel with air and naval support (Senegal, Nigeria, Ghana, Mali and Togo), entered the Gambia on 19 January, but did not encounter any resistance(Serna, 2017; Comolli, 2017). In addition to the resignation of many ministers, the declaration that the Gambia Army will not be a party to the conflict is one of the factors that broke down the power of Jammeh. According to Christof Hartman, four main factors explain

### **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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the behavior of ECOWAS and its success: i) ECOWAS had a clear legal mandate to threaten the use of force in order to protect democracy in one of its member states; ii) there was consensus that ECOWAS forces could have coped with the relatively small Gambian army; iii) the Gambian president could not rely on friends among his regional peers or some powerful ally from outside Africa; iv) regional leaders such as Nigeria and Senegal made a credible commitment to the regional intervention(Hartmann, 2017; 91). It is reasonable for ECOWAS to assume a role and mission to promote democracy in the Gambia. However, ECOWAS's request to use force and threat to use force as well as its preparation for the use of force challenge certain aspects of the law regarding the use of force(Helal, 2017a; 9; Helal, 2017b). This challenge raises the legitimacy of the intervention.

#### **2.1. African Union and ECOWAS: Pro-Democratic Intervention**

AU's basic African regional arrangements, allow intervention in the territories of member states under certain conditions. As a matter of fact, Article 4(h) of the Constitutive Act of the AU(African Union, 2000c) adopted in 2000 and Article 7 § 1(e) and 1 (f) of the 2002 Durban Protocol (African Union, 2002d), it has been provided that “*in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, the AU Peace and Security Council has the right of intervention*”. The Protocol on the Amendment to the Constitutive Act of the AU dated 2003(African Union, 2003e) and the scope of Article 4(h) have been expanded by adding the phrase

“*serious threat to the legitimate order*”. However, this protocol has not yet entered into force as it has not been ratified by two-thirds of AU members (Hehir, 2017). Therefore, the relevant protocols<sup>2</sup> of the AU do not constitute a legal basis for intervention in the Gambia case. In the case of Gambia, there is no evidence that war crimes, genocide and crimes against humanity were committed. For this reason, there was no need to intervene.

The Economic Community of West African States dating back to 1964 was the idea of the President of Liberia, William Tubman and resulted in a multilateral agreement that emerged in 1975 (Bakhoun, 1976; 69). ECOWAS, which was initially designed for economic cooperation and coordinated and designed for the integration between West African countries, has undertaken the mission of ending the conflicts and disputes in the region with the wave of political reform since the 1990s. ECOMOG (*Economic Community of West African States Monitoring Group*), which constitutes the military wing of the organization with ad hoc missions, has played an important role in intervening in civil wars and conflicts in the region. ECOWAS's efforts to find solutions to regional crises through humanitarian operations and mediation initiatives have given positive results with the support of the international community. The 1975 ECOWAS Agreement (ECOWAS, 1993b) revised in 1993, Protocol relating to the Mechanism for Conflict Prevention,

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<sup>2</sup> According to Kwesi Aning and Fiif Edu-Afful, AU's Constitutive Act and its Protocols and ECOWAS's Lome and Dakar Protocols show a close resemblance to the norms regarding responsibility to protect (Aning and Afful, 2016; 120-133).

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

Management, Resolution, Peacekeeping and Security -1999 *Lomé Protocol*- (ECOWAS, 1999c) and The December 2001 ECOWAS Protocol on Democracy and Good Governance -2001 *Dakar Protocol*- (ECOWAS, 2001d) are official mechanisms established for democracy, common security and peace. In addition, ECOWAS tried to monitor and control the elections held in the member countries with the mechanisms it has established (Tejpar and Albuquerque, 2015; 2). This responsibility became evident with the 2001 Dakar Protocol, which allowed ECOWAS's 2005 established commission; *Electoral Assistance Unit* to systematically monitor all national elections in ECOWAS member countries (Hartmann, 2017; 88). With the arrangements made after 1990, ECOWAS gained a political identity and its influence on the member states has become undeniable. In this case, the question such as “Does ECOWAS have legal authority such as involvement/interference in the internal affairs of the member states? Comes up.

The 1975 original or 1993 revised ECOWAS Agreement does not provide any authorization for use of force. On the contrary, Article 4(d) of the ECOWAS Agreement explicitly commits to support the principle of “*non-aggression between Member States*”. While ECOWAS does not disclose all details of the decision-making process in the Gambia crisis, the Gambia is subject to both the 1999 Lomé Protocol and the 2001 Dakar Protocol. Article 1(c) of the 1999 Lomé Protocol imposes responsibility on states to promote and consolidate a democratic government as well as democratic institutions in each member state again, Article 25(d) and (e) of the Lomé Protocol

recognizes the right of regional democratic intervention to ECOWAS *in event of serious and massive violation of human rights and the rule of law and in the event of an overthrow or attempted overthrow of a democratically elected government.* The Mechanism through the medium of Mediation and Security Council, not only provides the possibility of military intervention to member states, but also dictates such actions when it comes to serious governance problems(Nkea, 2017). The 2001 enacted Dakar Protocol entered into force in 2008 with the approval of 9 of the 15 member states, including the Gambia. ECOWAS supports democratic development in the region, but also checks whether member states are fulfilling democratic governance principles. Article 1(b) and 1(c) of the 2001 Dakar Protocol underline constitutional principles that *“Every accession to power must be made through free, fair and transparent elections”* and *“Zero tolerance for power obtained or maintained by unconstitutional means.”* *In the event that democracy is abruptly brought to an end by any means or where there is massive violation of Human Rights in a Member State, ECOWAS may impose sanctions on the State concerned*(Article 45(1). In other words, ECOWAS allows for intervention where human rights, peace and security and the state of law are threatened and there is an attempt to overthrow or overthrow a democratically elected government. In addition, the Mediation and Security Council has the power to sanction other cases in which the intervention is deemed necessary(Kreß and Nußberger, 2017; 246-247).

However, considering the historical references (Liberia, Côte d'Ivoire, Sierra Leone), the initiatives of ECOWAS create an

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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environment that can be considered reasonable in terms of the success of the organization. In fact, the Gambia case stems from the fact that in the absence of any humanitarian crisis and any threat to international peace and security, the state/states may legitimately request to intervene in another state to support a democratic governance system. According to Claus Kreß and Benjamin Nußberger, the issue of approval for intervention in international law is due to a pre-accession agreement, which makes the problem at the level of normative and state practices troublesome (Kreß and Nußberger, 2017; 248).

As Mohamed Halal points out, the right of states to intervene unilaterally to promote democracy has been of interest in the mid-1990s and 2003 Iraq War discussions. The Intervention of UNMIH (*United Nations Mission in Haiti*) (UNSC/RES/960/1994; UNSC/RES/964/1994) authorized by the UN Security Council to intervene in 1994 in Haiti, against the military junta that overthrew the government of Jean Bertrand Aristide, was found to a pro-democratically intervention (Mobekk, 2001; 173-188). In addition, pro-democratic intervention in countries such as Sierra Leone and Côte d'Ivoire (whether or not authorized by the UN) emerge as past references. On the other hand, the silence of the international community against anti-democratic interventions in countries such as Egypt, Pakistan, Congo and Mauritania shows that there is no consensus on pro-democratic intervention. As in Africa and elsewhere, the decisive factor in whether a military intervention will or will not take place is a political factor rather than a legality.

Therefore, there is no evidence of continuous implementation in order to claim that pro-democratic intervention is a rule of customary international law. Above all, in the post-Cold War UN and various regional/sub-regional organizations, democracy and democratic government promotion have increased. However, the idea of transforming states from non-democratic governments into a democratic regime is not an accepted application in case military coup has been used as a response (Helal, 2017a; 13-14; Nkea, 2017; Janik, 2017).

## **2.2. UNSC Resolution 2337(2017): A “non-prohibitive non-authorization”?**

The UN Charter prohibits the use of force by states in international relations in Article 2(4). Exceptions to the prohibition of the use of force are found in international law as *numerus clausus* (Albayrak, 2016; 98). This prohibition is only violated either by self-defense or by the Security Council authorization. This open authorization provides effective mechanism with a collective security system under chapter VII of the UN Charter entitled “*Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*”. In order for this mechanism to take action, the Security Council must determine whether peace is threatened, distorted or an attack has taken place under Article 39. After making this determination, the Security Council may decide on the implementation of economic and diplomatic sanctions that do not require the use of force within Article 41 and, if it considers that such

### **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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sanctions would be inadequate or have proved to be inadequate, it may take such action including the use of force by air, sea, or land as may be necessary under Article 42.

As Jammeh did not give up on power, the international community started to refine its reflexes against the events. On 10 December 2016, a joint press statement made by members of the Security Council called for *a peaceful and orderly transition process and they requested that the security of the President-elect, Adama Barrow, and that of all Gambian citizen be fully ensured*(SC/12616- AFR/3501/10 December 2016). However, the escalation of the crisis has led the Security Council to take the Resolution 2337(2017). The Security Council made a statement to the resolution that the constitutional crisis in the Gambia was to be resolved by political means; Expressed its full support to ECOWAS by committing to respect the will of the Gambian people expressed in the December 1 elections; declared the elections held on 1 December to be untouchable; suggested that as of January 19, 2017, Jammeh's presidency should end and Barrow should be recognized as the legitimate president of the Gambia; declared to welcome ECOWAS's 17 December and AU's 12 December and 13 January decisions.<sup>3</sup>

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<sup>3</sup> On 17 December, ECOWAS adopted the final decision and the measures taken by the State and Government Presidents' Summit stating the policy of the organization related to the situation in the Gambia. The decision called for Jammeh to accept the results of the election and to allow the peaceful transition of power and the possible action against the doing the contrary. ECOWAS(2016a; 7-8): i) to support the election results of the Gambia held on 1 December 2016; ii) to ensure the security of Adama Barrow, the new head of state; iii) to attend the inauguration ceremony on 19 January 2017 in accordance with the Constitution of the Gambia;

Resolution 2337(2017) does not entitle to either ECOWAS, the AU or the Member States to use the threat of force/force against the Gambia. The resolution of the constitutional crisis through respectable political means, which is respectful to the will of the Gambian people, has been particularly reiterated in the relevant decision. In other words; no explicit authorization has been made in the UN Security Council Resolution 2337. ECOWAS was in anticipation of the use of force, but such an authority was not endorsed by the Security Council. Because none of the accepted indicators are used to indicate the permission for the use of force. In addition, the resolution has not used “*all necessary measures*” keyword because the constitutional crisis in the Gambia is not covered by the chapter VII and VIII, and has not been described as a threat to international peace and security(Hallo de Wolf, 2017).

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iv) Approved to take “*all necessary measures* “ for the precise implementation of the election results of 1 December 2016.

Decisions taken at the 644th meeting of the AU Peace and Security Council constitute the December 12 decisions. With decisions of December 12(African Union; 2016a) December clearly elections reflect the will of the people of Gambia, highlighted that attempts to reverse the election results are absolutely unacceptable(article 7) and that the transition to power by Barrow must be made peacefully (article 8). In addition, the decision by AU; In order to facilitate the transition of power, it has committed itself to “take all necessary measures” in accordance with the relevant instruments of the AU in order to facilitate coordination with ECOWAS and the UN(article 11c) and the implementation of 1 December 2016 election results(article 12). On the other hand, in line with the decisions taken by the AU Peace and Security Council at its 644th meeting, the UN Security Council adopted its resolutions at its 647th meeting on 13 January 2017(African Union, 2017b).

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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The UN Security Council decided on the Gambia problem by Resolution 2337. Although it does not consider it to be a threat to international peace and security under the chapter VII, the distorted statements in the decision have attracted different opinions. Kreß and Nußberger did not deny that the UN Security Council's resolution on the Gambia did not authorize a non-democratic intervention. However, they stressed that the resolution was not an absolute prohibition and could be interpreted broadly where necessary (Kreß and Nußberger, 2017; 242-243). In addition, Kreß and Nußberger argue that Resolution 2337 could be regarded as *non-prohibitive non-authorization*, leaving the door open to use of force under the UN Charter and allowing an ex post facto authorization (Sarkin, 2009; 25; Nußberger, 2017a; ; Kreß and Nußberger, 2017; 244-245). However, this gray area is due to the implementation and political attitude of the Security Council: In the Security Council Resolution 688 (UNSC/RES/688/5 April 1991), which was taken under the leadership of the United States, Britain and France in order to protect the Kurdish and Shiite population in Iraq, there was no authorization for the use of force. No statement of taking all necessary measures nor a statement expressing its consideration in the chapter VII. On the other hand, NATO member states, which wanted to justify the 1999 Kosovo War, launched the bombing campaign without UN authorization, despite the opposition of Russia. NATO's intervention under the UN was not condemned, and UN Security Council adopted Resolution 1244 (UNSC/RES/1244/10 June 1999) to affirm the political outcome of the conflict. This constitutes the ex post facto

acceptance of the interventions. Similar claims were accepted as the justification of a series of interventions undertaken by ECOWAS. The spiral of violence in Liberia and Sierra Leone in the 1990s meets the magnitude of crimes against humanity (Wet, 2014; 360-364). As a matter of fact, the UN Security Council later adopted decisions to approve ECOWAS interventions. In the face of the humanitarian crisis, although the UN Security Council did not initially allow the use of force, it had an ex post facto qualification in its subsequent resolutions. Because the ex post facto authorization of the UN Security Council is in the form of humanitarian crisis, human rights violations, genocide, civil war and internal unrest -Iraq, Kosovo, Sierra Leone and Liberia-. However, the existence of such a situation in the Gambia cannot be a subject of discussion (Helal, 2017; 15-18).

Discussions before the adoption of Resolution 2337 and subsequent Security Council statements do not permit the use of force by ECOWAS. *"The resolution of the crisis in The Gambia is a success of the regional preventive diplomacy"*, commenting the UN Secretary General West Africa Special Representative Mohamed Ibn Chambas. In the event that the ECOWAS intervention in the Gambia becomes necessary, it is essential to seek authorization by the UN Security Council (Mohamed Ibn Chambas, 2017). On the other hand, Senegal's intention to intervene in the Gambia has been dismissed by the Resolution 2337 (2017). In the resolution taken there is no expression to the use of force (Nichols, 2017). During the vote of Resolution 2337, Uruguay stated that an explicit and positive authorization in Article 53 of the UN Charter was not made by the Security Council

### **“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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and that nothing could be interpreted as an explicit authority for the use of force in the 2337 Resolution; Bolivia stressed that the situation does not pose a threat to international peace and security, and therefore there is no interpretation that would require the use of force; Egypt and Russia have suggested that peaceful methods should be used to resolve the current situation(UNSC/PV.7866 /7866th meeting/19 January 2017). UN Secretary General António Guterres said in a statement that *“ECOWAS’s historic decision is fully supported, with the unanimous backing of the Security Council, to restore the rule of law in The Gambia so as to honour and respect the will of the Gambian people”*(SG/SM/18412-AFR/3524/19 January 2017).

#### **2.3. Threat of the use of force: ECOWAS Troops**

Article 2 (4) of the UN Charter requires States to avoid not only the use of force, but also the threat of use of force: *“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”*(UN Charter, 2(4)). The most notable question at this point is the question of whether the actions of the Senegal’s forces deployed by ECOWAS violate the prohibition of use of force. Nußberger pointed out the existence of two preconditions based on the case law of the International Court of Justice(ICJ) when explaining the behavior of ECOWAS(Nußberger, 2017a; 2017b): First; the behavior of the state should pose a threat; it is considered to be a threat the of

use military maneuvering at the border or establishing troops at the border, rearming, establishing military bases in the foreign country's territory, questionable declarations, intensification of troops along the border line, general mobilization and propaganda in favor of the aggression and use of force (Babatunde, 2017; 52; Taşdemir, 2006; 108-109). However, the threat does not always have to be open. As a matter of fact, in the Corfu Channel Case, the ICJ found that “*a demonstration of force for the purpose of exercising political pressure*” was sufficient (ICJ, The Corfu Channel, U.K. v. Albania, Judgement, 1949; 35). In the opinion of the ICJ on the use and the threat of nuclear weapons, ICJ stresses that *the threat must be in a credible manner and in compliance with the provisions and principles of the UN Charter* (ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996; parag. 47, 48). Second precondition; the envisaged use of force must be illegal. International law forbids any intervention or attempted interference with a state or its political, economic or cultural elements (Babatunde, 2017; 52-53).

The threat of the use of force is similar to request to the use of force. The threat and request should be directed and directed to a designated state or a group of states (Babatunde, 2017; 53). Any action taken to use force that is not directed against a specific and identifiable state or a group of states does not pose a threat to a reverse reading. The threat of the use of force is illegal in a situation where the use of actual force is also unlawful. In this context, the threat of the use of force is prohibited in a way that the use of force is prohibited.

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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ECOWAS(mainly Ghana, Nigeria, Liberia, Sierra Leone, Mauritania and Senegal) has attempted to solve the constitutional crisis that took place in the Gambia at the beginning by political means, and sometimes conducted individual or sometimes mediated activities by the leadership of UN Secretary General West Africa Representative Mohamed Ibn Chambas. However, the fact that the mediation mission failed, has caused the harsh statements of ECOWAS. ECOWAS has notified the new president Barrow that it will “*take all necessary measures*” to implement the final results of the December 1, 2016 elections if power is not transitioned. The gathering of Senegalese and Nigerian troops at the Gambia border meant a confirmation of physical stability.

The threat of the use of force is no different from the ultimatums that are used to break political concessions from the target state(Helal, 2017a; 17). The statements and actions of ECOWAS and member states, particularly Senegal and Nigeria, before 19 January 2017, indisputably poses a threat to the use of force. ECOWAS has given a numerous number of ultimatums to Jammeh to meet its demands. ECOWAS requesting the implementation of the election results for 1 December, announced that it will use force in case of non-compliance with the election results. The concrete action of ECOWAS actions was supported by the mobilization of Senegal and Nigerian troops to the Gambia border. If ECOWAS and its members did not have a determined and insistent attitude, Jammeh would not have allowed the transition of power and would not have left the Gambia. The threats posed by ECOWAS to the Gambia prior to the

initiation of the intervention on 19 January 2017 violated the prohibition on the use of force in Article 2(4) of the Charter. On 23 December 2016, ECOWAS announced that Jammeh will transfer the Presidency of the Gambia and that if the transfer of authority and power is not ensured, “*troops already on alert*” will intervene to overthrow his power. ECOWAS has threatened to use force from 23 December the Gambia in violation of international law. This threat was caused by the deployment of 7000 troops to the Gambia region after Jammeh refused to leave the power(Nantulya; 2017).

#### **2.4. Intervention by Invitation: Overcoming the Prohibition?**

If a state government requests military assistance, the invited state/states can use force in the territory of the requesting state without violating the prohibition of use of force as referred to in Article 2(4) of the UN Charter. As a matter of fact, the ICJ reaffirmed the general rule that the intervention by invitation in the Armed Activities(Democratic Congo and Uganda case) “*could be given upon request/permission of the government*” and applied it in practice(ICJ, Case Concerning Armed Activities on the Territory of The Congo Judgment of 19 December 2005, parag. 42-54). On the other hand, the ICJ ruled in the case concerning Military and Paramilitary in and against Nicaragua that “*within the consent of the government, which is the legitimate representative of the state, the intervention would be legitimate but there is no such general right of intervention, in support of an opposition within another State, exists in contemporary*

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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*international law*”(ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgment of 27 June 1986, parag. 209, 246). In this context, Georg Nolte defines the intervention as the intervention of foreign troops in an internal armed conflict. However, the intervention of the foreign state may not only be in the form of actual conflict, but also in the dimension of logistics and technical support(Nolte, 2010; parag. 1).

Although the election results of 1 December were in favor of Barrow, Jammeh's tendency not to transfer power and to initiate direct constitutional proceedings led ECOWAS, the AU and the UN Security Council to react. Against Jammeh who had refused to delegate power, Barrow declared that he is the head of state of the Gambia at the embassy in Senegal's capital, Dakar, and requested ECOWAS for help. However, this situation brought the discussions with it. The validity of the invitation doctrine is based primarily on “*the consent and invitation of a legitimate government*” in the decisions of the ICJ on the Armed Activities Case in the Congo region and the case concerning Military and Paramilitary Activities in and against Nicaragua. Indeed, organizations such as ECOWAS, AU and the UN Security Council, as well as numerous countries, including Britain and France, have accepted Barrow as the elected and legitimate leader of the Gambia(Cocks and Farge, 2017). But this is not the only criterion to justify the doctrine of invitation. The determination of the validity/legality of the invitation requires that the receiving government have *effective control* over the country and the population of the state, it is difficult to claim that Barrow had *effective control* of

the Gambia from the inauguration ceremony in Dakar on January 19, 2017. In fact, the potential problem of ECOWAS's intervention in Gambia stems from the fact that it receives an invitation from an exiled government. Barrow did not preside over a government that provided effective control and had to go to Senegal because of the crisis and internal instability in the country.

The situation of Gambia is different from the ECOWAS interventions in Sierra Leone and Liberia, and completely different from the UN Security Council intervention in Haiti. The intervention by invitation doctrine, in the context of the above examples, is considered to be justified and reasonable upon the invitation of states/leaders who have lost significant effective control over their countries due to a civil war or have been overthrown by a military coup (Helal, 2017a; 11-12). In the case of the Gambia, without the pressure of regional and international organizations, Jammeh would not have delegated power and would maintain his presence in the Gambia, where he maintained effective control. However, neither Barrow's authority nor effective control over the Gambia is the question.

As Georg Nolte pointed out (Nolte, 2010; parag. 18) “A government must display a minimum of effectiveness to have international legal authority to invite foreign troops”. However, Barrow, who does not have effective control over the Gambia in accordance with the existing international legal norms and state practices, is considered as a legitimate authority as a result of

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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widespread recognition by ECOWAS, AU, UN Security Council and various states, according to Mohamed Helal’s statement; this is a “*premature recognition*”(Helal, 2017; 12). The exiling of Barrow to Senegal, his inadequacy at that time, and his widespread recognition by the international community limit Barrow's activities to the “*external dimension*”. However, despite Barrow's external activity, Jammeh's activity throughout the country is reasonable.

The Gambia situation has been in parallel with other events that have taken place within the framework of the “*intervention by invitation*”. The most obvious example is Yemen. On March 5, 2015, the international community witnessed the military intervention initiated by Saudi Arabia. The operation named “*Operation Decisive Storm*” was carried out by a coalition including UAE, Bahrain, Oman, Qatar and Kuwait. The coalition declared that the intervention would be limited and would be held to protect the Yemeni people and its legitimate government from the Houthis(Ruys and Ferro, 2016; 62). The UN Security Council has taken the Resolution 2204(2015) due to internal turmoil which emerged in Yemen. There is no case allowing the use of force in this relevant resolution of the UN Security Council. For this reason, the intervention was carried out at the invitation of Abdu Rabu Mansur Hadi, President of Yemen. This constitutes the legitimacy of the intervention(Turkut, 2015; Dyke, 2015; Weizmann, 2015).

The Gambia and Yemen events are similar in some respects: Barrow has international support, such as Hadi. Neither the Resolution

2204(2015) of the UN Security Council, nor in its Resolution 2337(2017), has the authorized the use force. On the other hand, the Gambia and Yemen events differ in many ways: First of all, another criterion for the intervention to be legitimate is that *full-fledged civil war* must be below the magnitude(intensity) of civil war, and the intervention by intervention doctrine cannot be applied when the full civil war intensity is exceeded(Taşdemir ve Özer, 2017; 66). As a matter of fact, there is full-fledged civil war/internal turmoil in Yemen and it is not possible to mention its existence in the Gambia. On the other hand, the legitimacy of the intervention in Yemen is based on the invitation of Hadi, who has effective control. However, the invitation of Senegalese troops to enter the territory of the Gambia before Barrow declared the presidency makes the invitation problematic(Kreß and Nußberger, 2017; 247-248).

The authoritarian regime consolidated by Jammeh has been eroded constitutional crisis. In the Jammeh government, the resignations of the Ministers of Foreign Affairs, Economy, Trade and Environment, with the fact that the Gambia Army was not confronted with ECOWAS troops could be argued to support Barrow's claims that Jammeh failed to meet the requirement for effective control(Bigg, 2017). However, these resignations despite that they strengthen Barrow's actions, they do not change the fact that Jammeh's authoritarianism did not appoint them according to democratic principles and procedures.

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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**Conclusion: Are Norms of International Law Being Eroded?**

It is reasonable for ECOWAS to assume a role and mission to promote democracy in the Gambia. The Gambia crisis is one of the few events that allowed a head of state in exile to authorize the use of force on state territory without government authority or effective control.

The Gambia event is one of the most important examples that proves that pro-democratic intervention in the doctrine and state practices does not become an aspect of customary norm. As a matter of fact, in the resolution of the UN Security Council No. 2337, the crisis of the Gambia was not considered a threat to international peace and security and it was considered necessary to take measures that did not require the use of force. Although the decision of ECOWAS and AU was supported in the relevant resolution, there was no explicit authorization for the use of force. ECOWAS's intervention, on the other hand, is not legitimate as the intervention did not meet the requirements regarding to the material and form of the intervention by invitation doctrine (Albayrak ve Özer, 2018; 318-319). All these show that military interventions to defend human rights or democracy have often been a functional implementation of political calculus.

Although the intervention of ECOWAS into the Gambia has gained legitimacy with the widespread recognition of the international community, it has led to the erosion of many norms of international law. However, it did not radically change the traditional views on the

law regarding the use of force. The international community's abandonment of its indecisive attitude and its singularity in strengthening the existence of the norms of international law, will provide a convenient way in finding a permanent solution to the problems.

**“Operation Restore Democracy” In The Gambia: The Legitimacy of Military Intervention**

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