



PRESS STATEMENT

THE CENTRE FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA, EXPRESSES DEEP CONCERN OVER THE POLITICAL SITUATION IN THE GAMBIA, AND CALLS FOR STRONGER SOUTH AFRICAN ENGAGEMENT

19 January 2017

With the inauguration of the President-elect of The Gambia scheduled for 19 January 2017, the situation in that country is of grave concern to us, as it is to many fellow Africans.

The Centre for Human Rights makes the following calls:

- President Jammeh must accept the outcome of the results of the presidential election of 1 December 2016, and peacefully transfer power to the President-elect. Any form of power sharing should be avoided, as it is our position that this would be seen as rewarding a clear abuse of power and process.
- ECOWAS should take all measures possible to ensure the safe inauguration of the President-elect. In the event that military intervention is part of the ECOWAS approach, maximum care should be taken to comply with human rights and humanitarian obligations, and to avoid loss of civilian life, in particular.
- The government of South Africa should add its weight and voice to those of the African Union (AU) and the Economic Community of West African States (ECOWAS). South Africa has an added responsibility, as a current member of the AU Peace and Security Council. All efforts should be taken to prevent the situation from escalating into loss of human life. It should be taken into account that this may easily become a situation in which the AU may invoke article 4(h) of its Constitutive Act, which allows it to intervene in a member state which is unable and unwilling to

protect its own citizens, and where serious human rights violations in the form of crimes against humanity or war crimes occur. Raising this possibility, which is something enshrined firmly within the AU legal framework, should be part of engaging Jammeh.

- ECOWAS and the AU should remain in constant consultation and contact with the UN Security Council, to ensure that authorisation is obtained (as required in article 53 of the UN Charter), to dispel any dispute about the legality of any intervention.
- It is more important than ever that African solidarity be shown, and to emphasise that blatant disregard for basic constitutional principles and the rule of law in the name of sovereignty has to make way for the common African values of respecting 'democratic principles, human rights, the rule of law and good governance' (set out in article 4 of the AU Constitutive Act). What is happening in The Gambia is not a West African issue; it is an *African issue*. South Africa should take a stronger position on the situation in The Gambia, and use its diplomatic weight to contribute to the removal of Jammeh from office. We therefore further urge the South African government to go beyond the statement by its Department of International Relations and Cooperation (DIRCO), on 12 January 2017, and take very specific and concerted efforts to persuade all parties to seek a peaceful resolution of the issue. South Africa should take a leadership role in condemning the abuse of process, and in trying to prevent loss of life, which increasingly seems to be inevitable, otherwise.
- The African Commission on Human and Peoples' Rights, which has its headquarters in The Gambia, should condemn the denial of the right to self-determination of the Gambian people, and should urgently undertake consultations with ECOWAS and Jammeh, and designate a mechanism to follow up on the progress.

Background

A presidential election was held in The Gambia on 1 December 2016. On 5 December 2016, the Independent Electoral Commission (IEC) declared the leader of a coalition of opposition parties, Adama Barrow, as the winner. The IEC subsequently pointed out that there were some errors in the collation of results, and re-issued the results, still indicating that Adama Barrow had won the election, albeit with a reduced majority.

Despite initially accepting the result, the incumbent at the time, then President Jammeh, later reversed his position, and on 13 December 2016 instituted an election petition, contesting the validity of the results. However, the Gambian Supreme Court, the only court competent to deal with this

matter, could not hear it due to a lack of a quorum. Five judges are required to constitute a quorum. There is currently only one Supreme Court Justice in the country, the Chief Justice, who is Nigerian. Then President Jammeh sacked two Gambian judges of the Court in 2015 after the full bench of the Court decided in favour of certain military officers who were convicted of treason and sentenced to death, commuting their sentences to life imprisonment. Although judges from Nigeria and Sierra Leone were earmarked for appointment to the Court, they never took office.

Jammeh cannot rely on absence of quorate Supreme Court to cling to power

Jammeh's utter disrespect has now come back to haunt him. Last-minute attempts to get judges to travel to The Gambia and take up their positions, thereby creating a quorum, have been futile. The Gambian Chief Justice wrote to the Chief Justices of Nigeria and Sierra Leone requesting them to permit the Judges to travel to The Gambia to hear the petition, but he was not successful. With the case on the roll in December 2016, and again on 10 January 2017, it was postponed to May 2017, in order to form a quorum.

On 12 January 2017, Jammeh's lawyer wanted to move a motion, seeking for an injunction to stop the inauguration of the President-elect. However, because the motion calls on the Chief Justice to be restrained from swearing in the President-elect, he recused himself. Also this matter can only be heard when there is quorum of five judges.

The inability of the Gambian courts to hear this matter is entirely Jammeh's own doing, and is the result of his utter disregard for the rule of law. He can now hardly invoke the lack of a quorate court – which he brought about when he interfered with judicial independence on pure political grounds – as a reason why he should remain in office pending the resolution of this dispute. As has been the case in other countries, confirmed by recent examples in Ghana and Kenya, in the event of a disputed election, the winner takes office, while the loser may contest the result by way of judicial process. Since Gambian law seems silent on this particular point, the general – and logical – approach should be followed. The Gambian Constitution does not specify a time limit within which this dispute should be settled.

Abuse of constitutional process does not justify Jammeh's attempt to retain power

Having failed to constitute a court of his liking, the President, with his lawyers' assistance, argued that he has found a loophole. This loophole only opens when the Parliament is effectively under the President's control – as is the case presently in The Gambia. The loophole lies in the following constitutional route: The President of The Gambia may 'declare that a state of emergency exists' in the whole or parts of the Gambia (section 34 of the Constitution). When the President has declared a state of emergency, the National Assembly *may* adopt a resolution to prolong its own term for a

period up to three months (section 99(2)). Upon the adoption of this resolution, the term of office of the President is then prolonged for the same period of time.

In line with these provisions, Jammeh declared a state of emergency on 17 January 2017. On 18 January, the National Assembly met, and adopted a resolution to prolong its term for a further three months. The consequence is that, according to the letter of the law, Jammeh's term in office has also been prolonged for three months.

The Gambian Parliament, or National Assembly, created under the Constitution, has lost its function as an accountability mechanism due to the announcement of a state of emergency. The Constitution states under section 96 that the National Assembly will be elected three months after the date of election of office of the President. Since the Presidential election took place on 1 December 2016, this would set the date for 1 March 2017. However, similar to the provisions pertaining to the election of the President, the Constitution allows for an extension of the term of the National Assembly under a state of emergency for a period of three months at a time, up to a year. When the National Assembly passed a resolution to this effect on 18 January 2017, it effectively extended the terms of both the President and the National Assembly for at least another three months.

The three-step approach is a deliberate attempt to undermine the wishes of the majority of the Gambian people. They have been taken on the basis of inadequate evidence, and have not been substantively justified. The National Assembly has clearly acted as a mere rubber stamp in support of the President's only objective, namely, to remain in power. The President's declaration and the National Assembly's resolution were not taken with the safety and security of the Gambian people in mind, but in pursuit of a desperate individual clinging to power and, in the process, showing disregard for the lives of his people by drawing them into a situation of potential insecurity and conflict.

It should be recalled that the very act that brought Jammeh to power similarly was a flagrant denial of the people of The Gambia's right to self-determination. We recall that after Jammeh had seized power in a *coup d'état* in 1994, he suspended the Bill of Rights contained in the 1970 Constitution, by Military Decree no 30/31. His present actions see him reverting to his old ways.

Jammeh's argument that he should be allowed to stay in power for three months, thus allowing the Court to rule on the electoral dispute, submitted by him, is a mere ruse, and amounts to constitutional trickery and manipulation. It cannot undo the fact that the entire train of events was triggered by Jammeh's own illegal and unfounded refusal to accept the election result.

Fortunately, ECOWAS has in the recent past been exposed to, but rejected, similar reasoning: After the 2010 run-off election in Côte d'Ivoire, ECOWAS rejected as an obvious manipulation the attempts by President Gbagbo to have himself installed as President by the Constitutional Court, which was stacked with his backers, against the unequivocal announcement of the country's electoral commission that Ouattara had won the election.

The Gambia, a member of ECOWAS, is in clear violation of its responsibilities under the ECOWAS Protocol on Democracy and Good Governance, to which it is a state party. Article 9 states that a party or candidate who loses an election shall concede defeat to the political party or candidate finally declared the winner, following guidelines and within the deadline stipulated by the law. Jammeh's actions indicate that he has no interest in giving up power, with no deadline stipulated in the law regarding the ongoing dispute with regard to the election result.

The road to peace is for Jammeh to stand down

When Jammeh (then a junior officer) deposed his predecessor, President Jawara, through a military coup, in 1994, President Jawara initially fled, but was later allowed to return and live a dignified and peaceful life with his family. The same future could possibly be waiting for Jammeh if he stands down now. But should he take his country on a road to conflict, should he choose to hold on to power, it should be known to him that The Gambia is a party to the Protocol on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, which empowers ECOWAS to take serious measures under article 45. Knowingly adopting a course that exposes his people to a real risk of serious harm can, under certain circumstances, amount to a crime against humanity, which can lead to indictment by the International Criminal Court (ICC). The Gambia's withdrawal from the ICC Statute last year, followed South Africa, cannot absolve Jammeh from accountability, as the withdrawal only takes effect later and has no retrospective force.

ECOWAS intervention

ECOWAS has on previous occasions intervened with military force in one of its member states, for example in order to save the lives of civilians and restore democracy in Liberia. However, any intervention entails risk. In this case, there is the risk of a military intervention leading to loss of civilians' lives ('collateral damage'); there is the further risk of the intervention triggering attacks between opposing factions in the country, and in the process exacerbating underlying ethnic animosity. Although military intervention should therefore be a matter of last resort, it is one that ECOWAS is – and should be – considering. However, if this is done, the clarity and parameters of such a mandate is very important: it should be as targeted ('surgical') and limited as possible, aimed at achieving a peaceful transfer of power.

Any military intervention should be considered with article 10 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention in mind, which sets out the functions of the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security. Article 10(c) authorises all forms of intervention and particularly with regard to military missions, not only to address human rights violations, but also to prevent them from happening.

The Centre for Human Rights calls on Jammeh, the African Commission on Human and Peoples' Rights (ACHPR), the Economic Community of West African States (ECOWAS), the African Union (AU), and South Africa and other member states of the AU to urgently engage themselves in the protection of human rights, humanitarian rights and democracy in the looming threat of a more serious democratic regression in The Gambia.

Excerpts from the Gambian Constitution:

Section 99(2) provides as follows: 'At any time when The Gambia is at war or a state of emergency is declared, the National assembly may, by resolution supported by the votes of not less than two-thirds of all the members, extend the life of the National Assembly for not more than three months at a time, but the life of the National Assembly shall not be extended under this subsection for more than a total period of one year.'

Section 63(6): 'Where the life of the National Assembly is extended for any period in accordance with section 99 (2), the term of office of the President shall be extended for the same period.'

Excerpt from the UN Charter:

Article 53(1) of UN Charter: 'The Security Council shall, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council ...'

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