

*Insecurity implications of unconstitutional changes of
government in Africa: from military to constitutional coups*

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Introduction

Accession to political power in non-democratic societies is marred with difficulties. In post-independence Africa, accession to power was often achieved through military coups¹, staged internally or from outside.² The trend changed somewhat in the 1990s onwards, when African states embraced the democratic way of accession to power through elections.³ This shift was due to a number of political and economic factors such as the end of the Cold War⁴ and the pressures for

¹ Issaka K. Souaré, "The African Union as a Norm Entrepreneur on Military Coups d'État in Africa (1952–2012): an Empirical Assessment," *Journal of Modern African Studies* 52, no. 1(2014): p. 80.

² According to the weekly journal *Jeune Afrique*, 87 coups have been perpetrated in Africa since 1950 until the last coup in Egypt in 2013; see *Jeune Afrique*, "Coups d'État en Afrique : la fin d'une époque ?", 17 May 2016: <http://www.jeuneafrique.com/mag/323809/politique/coups-detat-afrique-fin-dune-epoque/>.

³ Between 1990 and 2000, twelve African Heads of States left power after losing elections, see Souaré, *supra* note 1, p. 80.

⁴ George Derpanopoulos, Erica Frantz, Barbara Geddes and Joseph Wright, "Are coups good for democracy?" *Research and Politics* (January-March 2016): pp. 1–7, p. 2.

democratization from international financial⁵ and political⁶ actors. However, the new trend did not end the practice of military coups d'état, as many countries experienced coups until quite recently.⁷ Moreover, a new trend of subtle unconstitutional change of government is taking place on the continent: the practice of amending constitutions or other electoral laws in order for the incumbent to remain in power for additional terms or for life. This new development comes with new challenges for the African Union (AU) and democracy in Africa because it is basically operationalized under a legal disguise, within the ambit of the jurisdictional sovereignty of member states.

Within the continental Organization of African Unity (OAU) (now AU), accession to power through military coups or other unconstitutional changes of regime have been linked to political instability, the deficit in democracy and good governance, along with armed conflicts waged on the continent.⁸ This finding prompted the organization, in 2009, to adopt a zero-tolerance policy, with a number of legal and policy documents outlawing anti-democratic practices of accession to power. The overall goal of the AU is to entrench a democratic governance culture, which will promote and enhance the rule of law, security, and stability on the continent.

This paper aims at briefly examining the regime the OAU/AU put in place to ensure a continent free of coups d'état and other unconstitutional changes of governments (UCG). It will then investigate whether or not there is a correlation between the decrease of UCGs and the OAU/AU anti-UCG stance, without necessarily delving into the analysis of the effectiveness of the responses. Part I explores the concept of unconstitutional changes of government in the African context. Part II

⁵ In the 1980-90s, the World Bank and the International Monetary Fund (IMF) set aid conditionalities which led Africa to align its policies to the development paradigm founded on democracy and good governance in order to receive aid, see Julie Aubut, *The Good Governance Agenda: Who Wins and Who Loses. Some Empirical Evidence for 2001*, LSE Working Paper Series, 2004:11.

⁶ The La Baule Conference in 1990 set the tone for democratization of francophone Africa.

⁷ The last coup attempts were perpetrated in Burkina Faso in 2014 and in Burundi on 13 May 2015.

⁸ *Decision on the Resurgence of the Scourge of Coups d'État in Africa*, Assembly/AU/Dec.220(XII), para.1. For the AU Assembly of Heads of State and Government, an unconstitutional change of government "(...)undermines the progress achieved in the ongoing democratization processes in the Continent and constitutes a threat to peace and security in Africa", see *Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations*, Doc. Assembly/AU/4(XVI), Assembly/AU/Dec.269(XIV) Rev.1, para. 3.

critically assesses OAU/AU responses to UCGs, along with the dilemmas and challenges the continental organization is faced with in its anti-UCG campaign. However, given the limited space for this article, it will not deal with some forms of unconstitutional changes such as the 2011 intervention in Libya (an international coup?) duly authorized by the United Nations Security Council, or the so-called “democratic coups” or “good coups” against undemocratic governments, except as an illustration. Similarly, although Regional Economic Communities (RECs) are part of the AU governance and security architecture, anti-UCGs responses from the RECs are not considered in this paper.

Concept and Classification of Unconstitutional Changes of Governments

The concept of unconstitutional change of government

No clear definition of what constitutes an unconstitutional change of government is provided for in relevant AU legal and policy instruments. On the face of it, the concept would encompass any change in government inconsistent with fundamental laws governing accession to power in a given country. However, the instruments adopted within the OAU/AU attempted a definition, by way of description, of unconstitutional changes of government. The most comprehensive document that highlights the forms of unconstitutional change of governments is the *Malabo Protocol on the Amendments to the Protocol creating the African Court of Justice and Human Rights*, adopted in Malabo in July 2014. According to Article 28E of the annexed Statute of the Court, the commission or the ordering of commission of the following acts, with the aim of illegally accessing or maintaining power, amounts to an unconstitutional change of government:

- a. A putsch or coup d'état against a democratically elected government;
- b. An intervention by mercenaries to replace a democratically elected government;
- c. Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;

- d. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e. Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- f. Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.⁹

In fact, the Malabo Protocol consolidates UCG definitions already provided for in other OAU/AU documents, such as the *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government* which provides for the first four types of unconstitutional change of government retained by the Malabo Protocol and the African Charter on Democracy, Elections and Governance (ACDEG)¹⁰ which adds the fifth aspect (e). The only innovation by the Protocol was the addition of the last category referring to the illegitimate amendments of electoral laws closer to the electoral period.

Classification of unconstitutional changes of government

From the above, two major forms of unconstitutional changes of government are discernable: the classical ones, which are effectuated with the use of force or violence, and the soft ones which do not implicate, at least directly, violence or the use of force.

⁹ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (pp. 25-26): [http://www.au.int/en/sites/default/files/treaties/7804-treaty-0045 -
_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf](http://www.au.int/en/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)

¹⁰ The *Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government* (AHG/Decl.5 (XXXVI) (hereinafter: Lomé Declaration).

Classical unconstitutional changes of government

Traditionally, the unconstitutional change of government is committed by the use of or the threat to use force to overthrow a legitimate and democratic government.¹¹ The most frequent form is the military putsch otherwise known as coup d'état. According to Ikome, "a coup d'état, or simply a coup, is the sudden overthrow of a government against the general will (*volonté générale*) formed by the majority of the citizenry. It is usually carried out by a small, but well-organised group that threatens, or effectively uses, force to replace the top power echelons of the state."¹²

Throughout the history of post-independence Africa, three waves of coups d'état have been perpetrated. The first wave occurred shortly after the granting of independence in the 1960s and involved the installation of a new civilian ruler. The rationale behind the military toppling a democratically elected government and replacing it with a new civilian regime was a *trompe-l'oeil* for the populace: the military justification was only to get rid of a rogue government and not to seize power, to convince the population to support the new government. However, the installed government operated under the instructions and directives from the military to the point that it can be considered a puppet government.¹³

The second wave of coups was different from the first in that the military took power and assumed direct executive control. The constitutional order was discarded; democratic institutions such as the parliament and the government are either suspended or simply dissolved. The chief putschist became the president of the country and, in most cases, the minister of defence. This was the most common type of military coup from the 1970s to 1990s.

¹¹ C.E. Miller and M.E. King, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (Geneva: University for Peace in Africa, Geneva, 2005, 2nd ed.), p. 28.

¹² Francis Nguendi Ikome, *Good Coups and Bad Coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa*, (Johannesburg: Institute for Global Dialogue, February 2007), Occasional paper no 55, p. 7. According to Ezrow and Frantz, coups are classed in five categories: a veto coup; a reform coup; a guardian coup; a palace coup and a putsch; see N. Ezrow and E. Frantz, *Dictators and Dictatorships Understanding Authoritarian Regimes and their Leaders* (London: The Continuum International Publishing Group, 2011), p. 97.

¹³ That was the case of the 1964 coup in Gabon where the then President Leon Mba was deposed by the army and replaced by Jean-Hilaire Aubame, a civilian.

The third wave involves the seizure of power by military dissidents or rebellions or other armed movements sometimes with the help of external forces, either mercenaries or major powers, especially during the Cold War era.¹⁴ In both the second and third generation of coups, many military putschists managed to transition into elected rulers after masqueraded electoral processes. That was the case of Blaise Compaoré in Burkina Faso, Yoweri Museveni in Uganda, Zine El Abidine Ben Ali in Tunisia, Paul Kagame in Rwanda, etc. Some even gave up their military ranks and become civilians while others simply retained their uniforms, even after elections confirmed them as “democratic” rulers.

In a nutshell, the coup d'état has largely represented the most common form of unconstitutional change of government experienced in post-colonial Africa. But the trend changed to some extent from the 1990s onwards, when African states embarked on democratization. For instance, national conferences in francophone Africa were held to craft national consensus on democratic principles for good governance. Elections were subsequently organized to replace military dictatorial regimes. This was the case with Benin in 1990-91, Congo-Brazzaville in 1991-92, Burundi in 1992-93, etc. The shift was later supported by legal, policy, and institutional developments at the continental level. On the institutional level, it materialized in the metamorphosis of the OAU into the AU during 2000-2002. Contrary to what some scholars say, this was not a cosmetic but a profound change in the continental organisation's vision. While the OAU pursued the political liberation of the continent, the AU aimed at strengthening democratic governance within Africa. Its Constitutive Act incorporates liberal democratic ideals. For instance, Article 4 sets forth key principles essential for the democratization of Africa. Paragraph (m) of Article 4 embodies the principle of respect for democratic principles, human rights, the rule of law and good governance; paragraph (h) provides for the right (duty) for the Union to intervene in a member state in exceptional circumstances, such as in case of genocide, crimes against humanity and war crimes; paragraph (p) affirms the condemnation and rejection of unconstitutional changes of governments. The “democratic principles” component of the AU Constitutive Act has

¹⁴ This was the case of Comoros. On 3 August 1975 the French government supported mercenaries Bob Denard and Jacques Foccart to overthrow President Ahmed Abdallah of the Comoros. In Uganda, Museveni's National Resistance Movement conquered power in 1986 whereas the Kagame's Rwanda Patriotic Front/Army did the same in 1994 in Rwanda.

further been complemented by the adoption of the African Charter on Democracy, Elections and Governance in 2007.¹⁵

From the above, two main observations can be made. Firstly, the AU is committed to the promotion of liberal democratic ideals. Both the AU Constitutive Act and the African democracy charter enshrine fundamental principles of a representative democracy that the AU is striving to entrench on the continent. Henceforth, the AU Constitutive Act and the Charter clearly lay down the foundation for the right to democratic governance for Africans.¹⁶ This new right is taken seriously by African people as it was evidenced during the Arab Spring and quite recently in Burundi and Burkina Faso where citizens went into the streets to protest against so-called “third terms”. Secondly, the AU Constitutive Act represents a paradigm shift from the cherished and well-entrenched principle of non-interference in sovereign states to the non-indifference principle¹⁷, which allows the AU to intervene in a member states in case of exceptional circumstances.¹⁸ Although the principle of non-intervention remains a cornerstone in the relations among equal and sovereign states, the AU Constitutive Act also institutes the well-entrenched principle of international law that human rights are no longer regarded as a purely domestic matter. While each member state has a duty to protect its citizens, to respect and ensure respect for human rights, the AU as a continental organization can no longer turn a blind eye to massive human rights violations, including those arising out of unconstitutional change of government.

Soft unconstitutional changes of government

The second major category of unconstitutional changes of government consists of some practices that are apparently legal but which are devised to ensure continuity in the governance architecture through political manipulation of the fundamental legal

¹⁵ The African Charter on Democracy, Elections and Governance comes into force in February 2012.

¹⁶ It is curiously to note that, despite all the good principles enshrined in both the AU Constitutive Act and the African Democracy Charter, there no specific creation of a new legal right to democracy for the African citizens.

¹⁷ Paul D. Williams “From non-intervention to non-indifference: The origins and development of the African Union’s security culture” *African Affairs* 106:2(2007), p. 253; Stef Vandeginste, “The African Union, Constitutionalism and Power Sharing” *Journal of African Law* 57, no. 1 (2013): p. 4.

¹⁸ African Union Constitutive Act, art. 4(h)

provisions pertinent to accession to power. That is the case with the refusal to relinquish power after loss in elections or the amendments of the constitution or other electoral laws in order to guarantee the incumbent president or party a continuation on power for an additional term or for life. This phenomenon is mostly, although not exclusively, found in Africa.¹⁹ These practices undermine the democratic principles of equality before the law, political participation, and free and fair elections. Although the main objective of such change is not really to access power outside the democratic boundaries, it nevertheless constitutes an affront to democratic principles governing access to power by manipulating or circumventing the electoral system.

The refusal to relinquish power is exemplified in the Côte d'Ivoire case where former President Laurent Gbagbo refused to recognize the new administration which had been victorious in the 2010 elections and he decided to proclaim himself the winner with the help of the then constitutional court. He remained in power until he was ousted with the assistance of French and UN military forces. In fact, the loss of elections can come as a surprise to ruling parties that have been able to rig previous elections in their favour. The same holds true for revision or amendments of electoral laws a few months or even a few days prior to elections, which is intended to change the rules of the game, without prior notice or sufficient time for all the candidates to compete on an equal footing. The revision ensures that the incumbent wins the elections and continues to govern the country. In those circumstances, the electoral process is not transparent; citizens are denied a real opportunity to change governments and that is why the revision in those circumstances can lead to charges of an unconstitutional change (via maintenance) of government.²⁰

¹⁹ The same wave swept Latin America when countries like Venezuela, Honduras, etc. attempted to amend their constitutions in order to allow third terms in office for the incumbent presidents, see Peter DeShazo, "Constitutional Referendum in Venezuela", online:

<https://www.csis.org/analysis/constitutional-referendum-venezuela>; Peter J. Meyer, "Honduran Political Crisis, June 2009-January 2010", (Washington: Congressional Research Service, February 2010), p. 2.

²⁰ For instance, in late 2015 the Ugandan Parliament made minor amendments to its election laws which reduced the hours polls would be open and increased the financial hurdles for those running for president or parliament. See Parliament of the Republic of Uganda, "Parliament amends electoral laws," (2015): <http://www.parliament.go.ug/index.php/about-parliament/parliamentary-news/708-parliament-amends-electoral-laws>. Gazetted just over two months before the February 2016 general elections, both moves helped the incumbent party, President Museveni's Nation Resistance Movement. Just three

The other soft means by which an unconstitutional change of government can be effectuated is the amendment of constitutions or other fundamental laws or judicial manipulation of the existing laws in order for the incumbent to remain in power. As coups d'état have become rare, probably due to the AU's consistent and toughening stance against them, some leaders are engineering new methods. Constitutional amendments allowing the incumbent president/party or government to stay in power or facilitate a father-to-son succession have become commonplace and this practice will most likely become common in the future.

However, although constitutional amendments may also amount to an unconstitutional change of government, this path raises a number of challenges from a legal perspective as the line between legal and illegal constitutional amendments is quite thin. There are two reasons for this. On one hand, there is nothing inherently illegal in effecting a constitutional amendment. Being human creations meant to regulate changing human behaviour, constitutions are not perfect and can be amended anytime to take into consideration peoples' needs and aspirations. Therefore, constitutions provide for special amendment procedures. So, as long as the procedural requirements are met, constitutional amendments, for whatever reasons – including remaining in power – are perfectly legal.

On the other hand, neither AU law nor international law forbids a long-term tenure, even life tenure, in office, provided that regular, fair and transparent elections are organized. This is deemed to be a sensitive matter within the ambit of each sovereign state. In fact, if a government does deliver on the basic services to the satisfaction of the entire population, why should it be subjected to term limits? I think that government performance should override the legalistic or dogmatic paradigm that favours limited terms in office.²¹ Even pre-colonial African governance practice does not support the limitation of terms in office. Traditional chiefs' terms were not limited; they remained in office until the time their closest councils or advisors decided otherwise.

months before August 2016 general elections in Zambia, parliament hastily passed a electoral amendment bill that conferred significant advantages for the ruling party. See Sishuwa Sishuwa, "Zambia's 2016 elections: is a disputed outcome now inevitable?" African Arguments.org (1 June 2016):

<http://africanarguments.org/2016/06/01/zambias-2016-elections-is-a-disputed-outcome-now-inevitable/>.

²¹ Note that at least one of the editors disagrees with this sentiment. And during the pre-colonial era, there were a range of formal and informal accountability mechanisms in place across different polities, including the option of exit, that could constrain even hereditary rulers and chiefs.

The liberal democracy embraced by the AU does not forbid limitless terms either. That is why many western parliamentary democracies such as Canada, United Kingdom, etc., do not have constitutional term limits. The government performance criterion comes into play during regular elections. Moreover, even from a human rights perspective, the right to be eligible for elected office is not a time-bound right, conceived for a certain period of time, unless the law provides otherwise. So, as long as somebody respects the rules of the game, there is nothing fundamentally wrong about him or her remaining in power, provided that most of the population is genuinely happy about it.²²

The recent constitutional practice in most African countries has been to limit a president to two terms in office. However, in the absence of regulation or guidance on term limits, many AU member states have carried out constitutional revisions either to eliminate the notion of terms (e.g., Uganda in 2005; Algeria in 2008; Cameroon in 2008; Congo-Brazzaville in 2015) or to extend their duration or extend the number of terms (Namibia in 1999²³, Gabon in 2003, Rwanda in 2016, etc.). Today's concept of "third term" may be misleading as AU law does not limit the number and duration of terms for African leaders. In all of those cases, the constitutional change was envisaged to accommodate the incumbent, whose terms in office were ending, to vie for another or other term(s).²⁴ Elvy however contends that "the imposition of presidential term limits will facilitate political stability by ensuring peaceful successive democratic changes of government and engender public confidence in the integrity of the government by

²² Keeping in mind, however, that a substantial literature about the qualitative differences between parliamentary versus presidential/semi-presidential systems in terms of accountability structures such as term limits reduces the applicability of "no term limit" double standard charged against parliamentary systems, and ignores the whole question of constitutional institutionalization as a prerequisite for a formal rules-bound polity. See, for instance, Boniface Madalitso Dulani, "Personal Rule and Presidential Term Limits in Africa," Ph.D dissertation, Michigan State University, 2011; Filip Reyntjens, "The Struggle over Term Limits in Africa: A New Look at the Evidence," *Journal of Democracy* 27, no. 3 (July 2016): pp. 61-68; Daniel N. Posner and Daniel J. Young, "Term Limits and the Transfer of Power," in Nicholas Cheeseman, ed., *Politics in Africa: The Importance of Institutions* (New York: Cambridge University Press, forthcoming).

²³ Note that Namibia's constitutional amendment only applied to the founding president, Nujoma, and since he stepped down after a third term in 2005, President Pohambo served only two terms and now the ruling party has a third elected president, Hage Giengob.

²⁴ Other presidents, such as Pierre Nkurunziza of Burundi and Frederick Chiluba of Zambia have not been successful in constitutional amendments for the same purpose.

ensuring respect for constitutional guarantees and human rights.”²⁵ She then suggests that the AU should provide guidance to member states on establishing appropriate term limits.²⁶ To counter the lack of international consensus on the necessity of presidential term limits, Elvy posits that “the African situation is quite unique and should not be compared to developed democratic countries.”²⁷ In fact, given the culture of changing the constitution so easily, one can ask: what is the value of the constitution in the African context? It seems that in many countries, given the frequency of constitutional amendments or revisions, there is no major difference between constitutions and other laws. Therefore, there is a need for a real cultural shift to materialize so that constitutions are considered fundamental laws both in theory and practice. Until then, term limits will be necessary to ensure democratic consolidation.

However, the real question is, if constitutional amendments are legal and constitutional, when are they to be considered as unconstitutional changes of government? Unfortunately, the AU legal framework provides a vague answer referring only to any change which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution.²⁸ That standard needs to be further refined. Relevant literature offers some guidance on what should characterize an illegitimate and illegal constitutional amendment. The first criterion has to do with the purpose of the amendment. If the objective of the amendment process is to circumvent the system and subvert democracy as freely expressed by the will of the people in order to remain in power after serving constitutionally allowed terms in office, then the amendment is not constitutionally genuine.²⁹ It is, therefore, against the democratic principles of good governance and the rule of law. The second criterion

²⁵ Stacy-Ann Elvy, “Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance” *Emory International Law Review* 27, no. 1 (2013): p. 88.

²⁶ *Ibid.*, 88.

²⁷ Elvy, *supra* note 20, p. 89.

²⁸ *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* (Malabo Protocol), art. 28E(e).

²⁹ For the Ezulwini Framework, “constitutions shall not be manipulated in order to hold on to power against the will of the people” (para. 3 vi) and “constitution-making or constitutional review processes shall not be driven by personal interests and efforts aimed at undermining popular aspirations” (para. 3vii), see *Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa* (hereinafter: Ezulwini Framework), Ezulwini, Kingdom of Swaziland, 17-19 December 2009.

alludes to the degree of popular involvement in the amendment process. Did the population initiate the process as was alleged by Rwandan authorities? If not, to what extent were they meaningfully consulted on the project throughout its different stages? Ultimately, did they consent to the project through an electoral process such as a constitutional referendum? These questions are critical in order to assess the legitimacy and validity of a constitutional revision process. It is therefore important, for such process to appear genuine, that they include meaningful popular participation. A fake participatory process or manipulation of the populace falls short of this requirement. As such, the lack of genuine popular participation undermines the legitimacy and the legality of the constitutional amendment process, which will therefore culminate in an unconstitutional change of government in violation of the African Democracy Charter which stipulates that “State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.”³⁰

Finally, the last criterion refers to the outcome or the impact of the amendment project. If the project is likely to pose a serious threat to political stability and may lead to political crisis, even conflict, it is not worth it. Therefore, in order to safeguard national unity, safety, social harmony and eventually territorial integrity, constitutional amendments of this nature are not well warranted. Conducting them despite this high risk is tantamount to an unconstitutional change of government, which can lead to popular uprisings.

In conclusion, one can argue that unconstitutional changes of government refer not exclusively to the sudden overthrow of a government, but encompass the subversion of democracy as expressed by the will of the people through the ballot, and manipulating the supreme law, the constitution, in order to extend the incumbency of a serving government.³¹

³⁰ ACDEG, art. 10(1).

³¹ Mxolisi S. Nkosi, *Analysis of OAU/AU Responses to Unconstitutional Changes of Government in Africa*, Master Thesis (Unpublished), University of Pretoria, 2010, p. 9.

AU responses to unconstitutional changes of governments

Through its legal and policy documents outlawing unconstitutional changes of government, the OAU/AU has totally rejected unconstitutional changes of government, and shown its determination to put a definitive end to this scourge.³² Henceforth, it signalled the adoption of a zero tolerance policy for coups d'état and other violations of democratic standards.³³ For a better implementation of the policy, the OAU/AU has established a sanctions' regime to ensure a return to normality and a restoration of the constitutional order, in case of an unconstitutional change of government in a given member state. Depending on the situation on the ground, sanctions range from politico-diplomatic to military intervention. Sanctions are essentially instituted by the Peace and Security Council of the AU, in accordance with the Lomé Declaration and other relevant legal instruments such as the African Democracy Charter.³⁴

Political and diplomatic sanctions

Condemnation of the UCG

In case of an unconstitutional change of government in a given member state, the first reaction from AU organs is to publicly and strongly condemn the non-democratic change. In addition, they urge for the speedy return to constitutional order and convey a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized by the organization.³⁵ The condemnation is usually done by the Chairperson of the Union and the Chairperson of the African Union Commission.³⁶

³² *Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage such Situations*, Doc. Assembly/AU/4(XVI), Assembly/AU/Dec.269(XIV) Rev.1, para. 3.

³³ *Ibid.*, para. 5.

³⁴ *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, art. 7 (1)g). For instance, the AU has managed to impose sanctions against the Central African Republic (CAR) (2003 and 2013), Togo (2005), the Islamic Republic of Mauritania (2005 and 2008), Comoros (2007), Guinea (2008), Madagascar (2009), Ivory Coast (2010), Mali (2012) and Guinea-Bissau (2012), Niger, and Egypt (2014)

³⁵ Lomé Declaration, *supra* note 9.

³⁶ *Ibid.*

Suspension

After the condemnation of an unconstitutional change of government, the member state where it occurred is suspended for a period of six months in accordance with Article 30 of the AU Constitutive Act, which provides that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”³⁷ The six-month period has been criticized as being too long and inadequate.³⁸ It has even been suggested that the period be shortened to three months (ninety (90) days),³⁹ the reason being that “the current six-month window gives the leaders of coup-born regimes ample time to consolidate their position.”⁴⁰ However, the practice shows that some undemocratic regimes last longer than six months before the return to constitutional order.⁴¹ The suspension is not automatic; it comes into play after diplomatic efforts fail to bear fruit.⁴² This additional condition by the African Democracy Charter is problematic, as it does not precisely define diplomatic failure. In practice though, member states are suspended in a matter of days after the UCG was committed, keeping up with the Lomé Declaration provisions, which do not impose such conditionality.

In case of a suspension measure against a member state from participation in the policy organs’ meetings and activities, its membership in the AU remains intact; therefore, it still has to honour its basic obligations towards the organization including financial contributions to its regular budget.⁴³ Moreover, the chairperson of the AU Commission is required to maintain diplomatic contacts with the perpetrators to ascertain their intentions and plans to return to the constitutional order. In this regard, the chairperson can rely on some African personalities and leaders or the sub-regional

³⁶ AU Constitutive Act, Art. 30.

³⁶ *Ibid.*

³⁷ AU Constitutive Act, Art. 30

³⁸ Elvy, *supra* note 20, p. 62

³⁷ Elvy, *supra* note 20, p. 62.

³⁹ Ezulwini Framework, *supra* note 22, para. 7.

⁴⁰ Souaré, *supra* note 1, p. 92.

⁴¹ For instance, Madagascar regime of Rajoelina lasted almost 5 years (03/2009 – 1/2014); Niger’s military regime lasted 16 months (02/2010 -05/2011), etc.

⁴² ACDEG, art. 25(1).

⁴³ *Ibid.*

grouping to which the state belongs to exert moral pressure on the perpetrators.⁴⁴ Therefore, even during the suspension, political and diplomatic efforts continue.⁴⁵ Most of the time, special envoys or representatives, usually former presidents or high-level diplomats, are appointed.⁴⁶ With the assistance of staff from the AU Commission, they will meet with coup plotters and other stakeholders to find a durable solution to the crisis.

Targeted sanctions

During the six-month suspension from the AU, the perpetrators of an unconstitutional change of government are requested to restore the constitutional order.⁴⁷ If the situation does not return to normality within that timeframe, other more forceful sanctions can be envisaged, such as restrictions of government-to-government contacts, trade restrictions or embargoes. Moreover, targeted sanctions against coup plotters or other perpetrators of unconstitutional changes of government are possible.⁴⁸ These smart sanctions can range from the freezing of their financial assets wherever they are, including travel bans (for example, the 2009 case of Madagascar under Rajoelina) and denial of visas. The undemocratic leaders could also be prosecuted⁴⁹ before the future African Court of Justice and Human Rights as the UCG is now criminalized in the new Malabo Protocol.

With reference to politics, “the perpetrators of an unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.”⁵⁰ This forecloses possibilities of self-legitimation of UCG plotters. However, the provision was challenged soon after its promulgation. On June 30th, 2013 the Egyptian military ousted elected president Mohamed Morsi amid popular contestations of his government’s authoritarian style. Although the AU did suspend Egypt in accordance

⁴⁴ Ibid.

⁴⁵ In Mali, after the 2012 coup, political and diplomatic contacts with the junta made possible a framework agreement (6 April 2012) by which the junta handed over power to the Speaker of Parliament.

⁴⁶ For a list of current envoys or representatives, see online: <http://www.au.int/en/cpauc/envoys>

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ ACDEG, art. 25(5).

⁵⁰ Ibid, art. 25(4).

with its rules and policy, it condoned the 2014 presidential elections⁵¹ which saw the participation of General Abdel Fatah el-Sisi, one of the masterminds of the coup, as a presidential candidate, and he won. This kind of situation places the AU in an untenable situation where the organization has to choose pragmatism over legalism to maintain peace, order, and stability in a member state.

The Egyptian case is similar to the situation of the so-called “democratic coups”⁵² or “good coups”⁵³ perpetrated in the interest of democracy as was the case in Niger in 2010, and to some extent in Guinea in 2008.⁵⁴ In fact, there may be a honeymoon between the population and successful “democratic” military or constitutional coups plotters, at least for a short time,⁵⁵ to the point that they can become successful electoral candidates. In such a case, such as in Egypt, it is much less plausible that the AU won’t recognize the new regime. In any case, the AU and the international community remain pragmatic over constitutionalism; for instance, they frequently condone power-sharing agreements after unconstitutional changes of government or similar situations, albeit “power-sharing is advocated as an interim measure to enable a return to constitutional order through elections.”⁵⁶ Unfortunately, the end-result will be the legitimization of unconstitutional seizure of power through ensuing elections or power-sharing, a result all the legal and policy instruments were meant to prevent. This is why, at the very minimum, the AU still suspends member states where supposedly “good coups” have been perpetrated as in Niger and Egypt, reaffirming its stance that the end cannot

⁵¹ AU sent an observer mission under the name AU of African Union Election Observer Mission (AUEOM).

⁵² Jonathan M. Powell, “An assessment of the ‘democratic’ coup theory: Democratic trajectories in Africa, 1952–2012, *African Security Review* 23, no.3 (2014); Albert Trithart, “Democratic Coups? Regional Responses to the Constitutional Crises in Honduras and Niger”, *Journal of Public and International Affairs*, 2013.

⁵³ Ikome describes good coups “as those that are informed by a genuine desire on the part of coup-plotters to resolve unsettling societal realities, particularly in relation to poor leadership and the hardships that it brings to the people – and against the backdrop of constrained political space for peaceful change.” See Ikome, *supra* note 11, p. 14.

⁵⁴ According to Derpanopoulos et al., “though coups against autocrats have sometimes led to democratization, more often they install a new set of autocratic elites and expose citizens to higher levels of repression.”, see George Derpanopoulos, Erica Frantz, Barbara Geddes and Joseph Wright, “Are coups good for democracy? , *Research and Politics*, January-March 2016: 1 –7, p. 2.

⁵⁵ That was the case for the Dadis Camara coup in Guinea in 2008, see I.K. Souaré, “Explaining the December 2008 Military Coup d’État in Guinea,” *Conflict Trends*, 1 (2009): pp. 27–33.

⁵⁶ Vandeginste, *supra* note 16, p. 15.

justify the means.⁵⁷ Finally, in extreme circumstances, the AU can decide on intervention.

Intervention in a Member State

The intervention envisaged in the Lomé Declaration appears to be solely political and diplomatic. This is to be attributed to the fact that mediation and conciliation are the guiding principles of the AU policy and practice on conflict resolution. However, a more forcible intervention can be warranted. The AU Peace and Security Council is of that opinion. At a retreat of the Council on the ways and means of strengthening the capacity of the AU to deal with the scourge of unconstitutional changes of government in Africa, it was decided: "At the expiration of a given period, and if no progress is made towards return to constitutional order, further steps should be taken, including the possibility of deployment of a peace enforcement mission. In this respect, and once operationalized, the African Standby Force will be able to provide some dissuasion and put pressure on coup perpetrators."⁵⁸ Furthermore, in the case of a grave situation arising out of an unconstitutional change of government⁵⁹, the AU – and the international community at large – has a responsibility to protect the population.⁶⁰ According to this doctrine, better known under its acronym "R2P", the international community or regional community can intervene in a state in case of massive and serious violations of human rights amounting to genocide, crimes against humanity, or war crimes.⁶¹ However, the nature of the intervention required is not specified. For instance, it is not clear, from its policies or legal documents, that the AU can intervene

⁵⁷ Kathryn Sturman, *Unconstitutional Changes of Government: The Democrat's Dilemma in Africa*, Global Insights (Johannesburg: Governance of Africa's Resources Programme, 2011), Policy Briefing 30, p. 2; online: <http://www.saiia.org.za/policy-briefings/204-unconstitutional-changes-of-government-the-democrat-s-dilemma-in-africa/file>.

⁵⁸ Ezulwini Framework, supra note 22, para. 7.

⁵⁹ There is a grave situation when the UCG gives rise to the perpetration of serious and massive violations which can for instance qualify as genocide, war crimes or crimes against humanity.

⁶⁰ *The Responsibility to Protect*, Report of International Commission on Intervention and State Sovereignty, 2001. Information about the UN adoption of R2P pillars in 2005 and ongoing plans and debates regarding implementation are available at <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.

⁶¹ Ben Kioko, "The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention" *International Review of the Red Cross* 85, no. 852 (2003): p. 819; Dan Kuwali, "Art. 4fH + R2P: Towards a Doctrine of Persuasive, Prevention to End Mass Atrocity Crimes," *Interdisciplinary Journal of Human Rights*, 3 (2008–2009): p. 55.

militarily to force a return to constitutional order in case of UCG. From a legal perspective, AU law on intervention (art. 4(h)(j), strictly construed, may not support such an intervention. However, I contend that a liberal and purposive interpretation may provide a legal basis for intervention, as the UCG constitutes an exceptional circumstance threatening the constitutional order of a member state. Precedents do exist in this regard where military interventions have been successful carried out: the case of Uganda when the Tanzanian army intervened to restore ousted president Milton Obote in 1979 and in Sierra Leone when ECOWAS restored Ahmed Tejan Kabbah to power in 1998. It is worth noting that these interventions were carried out before the current AU legal regime and they were not strictly continental; they were led by hegemonic regional powers in their respective regions based on a particular calculus and interests.

The legal question put aside, another related issue would be the purpose of the intervention. In the Lomé Declaration, intervention by way of sanctions is aimed at restoring constitutional order. However, the AU position is not clear as no definition of a successful restoration of constitutional order is provided. Does it necessarily imply restoration of the *status quo ante* situation? In other words, does it mean reinstating the ousted government/president or handing over the power to the constitutionally entitled successor? The AU has maintained silence on this issue, especially with the case of Niger where former president Mamadou Tandja did not take the AU's advice and decided instead to carry out constitutional amendments despite the open opposition of the parliament and the judiciary. When he was ousted in a military coup, Niger was suspended from the AU, as a matter of principle, but the organization was not advocating for his reinstatement. In fact, taking that position might become counterproductive, especially in the case of a "democratic coup". Some may construe such a decision as a tentative legitimization of the ousted regime or a demonization of the new government by others. Being a political organization, the AU is not inclined to do so. In fact, the situation on the ground is likely to inform the AU's position more than constitutionalism. We have to admit that the AU finds itself in an untenable situation, where the incumbent (UCG) regime has a grip on power and has shifted the political calculus, while the ousted one may have lost legitimacy in the meantime. That was the case of President Andry Rajoelina of Madagascar who enjoyed military support to the detriment of the ousted Marc Ravalomanana who enjoyed legitimacy as the

elected president. Understandably, to expect a de facto regime, controlling all levers of state power, to relinquish power and step aside appears not only idealistic, but rather naïve.

Similarly, from a logistical and political perspective, the AU lacks the required resources for military missions, as it always needs to appeal to the international community for support, both financially and politically. One paragraph of the Communiqué of the Peace and Security Council of the African Union (AU), at its 565th meeting held on 17 December 2015 authorizing the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU), is particularly telling:

[The Council] Urges the international partners to provide the necessary technical, financial and logistical support to facilitate the early deployment of MAPROBU and the effective implementation of its mandate. In particular, Council urges the UN Security Council, in view of its primary responsibility for the maintenance of international peace and security, to support the deployment of MAPROBU and authorize the urgent establishment, in its favor, of a logistical support package funded by assessed contributions to the UN budget. Council requests the Chairperson of the Commission to take all necessary initiatives to facilitate the urgent mobilization of international assistance and to report to Council within a period of seven (7) days on the evolution of efforts to reach out to international partners, particularly the UN Security Council.⁶²

Given its attachment to the R2P doctrine and its commitment to the rule of law and promotion of human rights internationally, Canada may be of assistance to the AU in its efforts to restore constitutional order in a member state facing a UCG situation, though more in a diplomatic and financial support role than in the provision of coercive means.

Finally, another challenging factor is the unwillingness or the resistance of the new government to consent to military intervention or to cooperate with the AU mission. Resistance would dangerously compromise the intervention's effectiveness and the AU would be reluctant to go ahead despite a clear opposition from the member

⁶² Communiqué of the Peace and Security Council of the African Union (AU), 565th meeting (Adis-Ababa, 17 December 2015) PSC/PR/COMM.(DLXV), para. 13(a)vi.

state. As such, it may then prove difficult for the AU to enforce its sanctions and other measures taken against coup plotters.

Conclusion

In the AU understanding, unconstitutional changes of regime “are one of the essential causes of insecurity, instability and violent conflict in Africa.”⁶³ Empirical data shows that countries which never experience UCGs such as Mauritius or Botswana are the most stable and democratic on the continent. The democratic governance-stability theory explains the continental organization’s impressive institutional and legal framework to prevent or, eventually, to respond to UCGs. In so doing and in line with its objectives and principles, the AU aims at entrenching a democratic system of governance where power devolution is determined by free, fair, and regular elections. Nevertheless, some authors contest the validity of the link between democracy and stability in the African context.⁶⁴ According to Ngoma, “continued coups and coup attempts suggest that the democratic-stability link is weak. Evidence indicates that the adherence to democratic norms alone is no guarantee that states will not slide into the undemocratic tendencies...”⁶⁵ However, more recent research suggests that as formal, democratic aspects of political systems are institutionalized, as those norms become stronger, democracy is gradually strengthened⁶⁶, including in ways that enhance economic reforms due to “credible commitments”.⁶⁷

Following the AU adoption of the policy and legal framework against UCGs, there was a substantial decrease in the number of successful undemocratic changes, although the phenomenon did not end. This was the result of the AU’s consistent and constant responses against coup-born regimes. By rapidly and strongly intervening in sovereignty-related issues of this nature, more than any other continental organization, the AU has asserted its influence and authority, thereby showing its uncompromised

⁶³ ADEG, preamble.

⁶⁴ Naison Ngoma, “Coups and Coups Attempts” *African Security Review* 13, no. 3 (2004): p. 89.

⁶⁵ Ibid.

⁶⁶ Posner and Young, “Term Limits and the Transfer of Power,” *supra* note 21.

⁶⁷ M. Anne Pitcher, *Party Politics and Economic Reform in Africa’s Democracies* (New York : Cambridge University Press, 2012).

readiness to implement its zero tolerance policy and fulfill the promise of democratic rule on the continent. However, norm-setting is not sufficient; action must also be taken to ensure that Africans, including leaders, value and respect their constitutions. Whether the AU consistent approach and stance may pave the way for the democratization of Africa or not is yet to be seen. But, it is a step in the right direction.