

THE AFRICAN UNION'S RESPONSE IN ADDRESSING UNCONSTITUTIONAL
CHANGES OF GOVERNMENT IN AFRICA BETWEEN 2000 AND 2012

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CERTIFICATION.

I, **Githiri Nicole Wambui**, do hereby declare that apart from references to other people's works which have been duly acknowledged, the entirety of this research is a result of my intellectual, academic and concerted efforts. To the best of my knowledge and belief, a work of similar character has never been submitted, in whole or in part, to any University or other institution for the award of a Bachelor's degree or any other academic endeavour.

APPROVAL.

This work has been diligently supervised and approved as having met the requirements for the award of a Bachelor of Laws degree of Kampala International University.


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DEDICATION

I dedicate this work, first and foremost, to the Almighty God for the honour and privilege of wisdom, strength and favor to successfully finish this work.

Secondly, to my precious parents Rtd, Col, Julius Ayub Githiri and Ms, Irene Wambui Kibutiri for their resilience, love and unwavering support all my life.

Thirdly, to my beloved siblings David Njenga 'Kinyast' and Jimmy Njoro 'Spades' for their priceless support and love and inspiration throughout my education and life.

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LIST OF ACRONYMS

ACDEG	African Charter on Democracy Elections and Governance
ACHPR	African Charter on Human and Peoples Rights (African Charter)
AfCHPR	African Court of Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
ASF	African Standby Force
CA	Constitutive Act of the African Union
CCJ	Central American Court of Justice
CEWS	Continental Early Warning System
ECOWAS	Economic Community of West African States
EC	European Commission
EU	European Union
ICJ	International Court of Justice
IHL	International Humanitarian Law
LD	Lomé Declaration
MDC	Movement for Democratic Change

NEPAD	New Economic Partnership for Africa's Development
OAU	Organisation of African Unity
OIF	Organisation of Francophone States
PAP	Pan African Parliament
PIL	Public International Law
POW	Panel of the Wise
PSC	Peace and Security Council
RECs	Regional Economic Communities
SADC	Southern African Development Community
SICA	Central American Integration System
UCG	Unconstitutional Change of Government
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
ZANU-PF	Zimbabwe African National Union Patriotic Front
ZEC	Zimbabwe Electoral Council.

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CHAPTER ONE

INTRODUCTION

1.1 Background

Public International Law may be defined as the body of rules which are legally binding on States in their intercourse with each other...that govern the relations of States. But, States are not the only subjects of international law. International organizations and to some extent also individuals may be subjects....¹ One of and perhaps the most important functions of the United Nations is to maintain international peace and security² among the Nations of the world. As such, this duty may involve collective measures to prevent and remove threats to peace, suppression of acts of aggression or other attempted breaches of peace and the settlement of international disputes by peaceful means and through promotion of the respect for the rules of International Humanitarian Law during hostilities. In support of these essentials, State Parties to the U.N are admonished to 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 purpose of the U.N³. It is thus safe to conclude that the use of force is impermissible. However, it is accepted that there are a number of situations in which the use of force subject to IHL rules may be allowed. These include **individual and collective self defense**⁴, **measures adopted by the U.N Security Council**⁵ as well as acceptance of the use of necessary force by States for **humanitarian reasons**, that is, for the protection of their nationals and properties under attack in a particular State or territory. Therefore, PIL does not recognize the use of force for the unconstitutional change of government despite the theory that where a force takes over a government and replaces the laws of that regime with its own laws receives acknowledgement by the people of that State and even international recognition then it can be said that there has been

¹ Jennings R and Watts A, *Oppenheim's International Law Vol. 1: Peace*. 9th Edition, page 4.

² United Nations Charter, 1945 A. 1.

³ A. 2(4) *ibid*

⁴ A. 51 *ibid*

⁵ Chapter VII *ibid*

a successful change of government⁶. As such it is a settled fact that regimes that unconstitutionally grab power do not receive recognition and especially from the U.N. Despite this, there are still coups d'état all over the world and especially in Africa and all the while the search continues for a lasting solution to the victims of these unconstitutional changes of government.

At the end of the colonial era, the transfer of power to African leaders gave birth to authoritarian regimes.⁷ African Nationalist leaders liberated the continent from the chains of colonialism and bound it in the stone walls of authoritarianism and dictatorship. This is because Africa inherited institutions that were meant to be oppressive to the colonised peoples. These institutions had no room for political pluralism, public participation, free speech, a free press, and free movement among other fundamental rights and freedoms that allow for democratic governance to flourish. Without undergoing major transformations, African governments remained a product of their colonial heritage naturally becoming totalitarian, oppressive and undemocratic.⁸

One scholar, **Kufuor**, argues that the overarching, constant and noticeable feature when one assesses African politics is the 'rarity of constitutional change in government.'⁹ It is mostly in Africa that political leaders 'unilaterally alter constitutions, bully weak legislatures and judiciaries and openly manipulate and rig elections.'¹⁰ It is also in Africa that military governments found their most marked expression recording an unprecedented eighty-five violent coups and rebellions from the time of the Egyptian revolution in 1952 until 1998.¹¹

⁶ Hans Kelsen Theory on Changes of Regimes.

⁷ JA Wiseman 'Democracy and the new political pluralism in Africa: causes, consequences and significance' Third World Quarterly, 3 (1993) 439.

⁸ Ibid 7

⁹ KO Kufuor 'The AU and recognition of governments in Africa: Analysing its practice and proposals for the future' American Universal International Law Review (2001-2002)369.

¹⁰ NJ Udombana 'Can the leopard change its spots? The African Union Treaty and Human Rights' Am. U. Int'l L. Rev. (2001-2002) 1222.

¹¹ M van der Linde 'Emerging Electoral Trends in the Light of Recent African Elections' International African Human Rights Law Journal (2000) 127 &128.

Seventy-eight of these took place between 1961 and 1997.¹² Consequently, since the days of the Organisation of African Unity (OAU) to the inception of the African Union (AU), millions of civilians have died from deadly conflicts in which individuals or groups fought and continue to fight for power using unconstitutional and undemocratic means.

The AU (formerly the OAU), concerned by these developments developed a framework to address the problem of unconstitutional changes of governments (UCG's). The operational normative framework on UCG's is encapsulated in the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government' (the Lomé Declaration)¹³ and the Constitutive Act of the African Union (the Constitutive Act).¹⁴ The third instrument dealing with UCG's; the African Charter on Democracy, Elections and Governance (ACDEG) has recently come into force.¹⁵ The Ezulwini Framework document on improving the AU response to UCG's, developed recently by the Peace and Security Council (PSC) is hoped to be instrumental in the improvement of the quality of the response.¹⁶

There are various forms of UCG's as defined in the Operational Framework. These include military coups d'état against democratically elected governments; intervention by mercenaries to replace democratically elected governments; replacement of democratically elected governments by armed dissident groups and rebel movements; and the refusal by incumbents to relinquish power after free, fair and regular elections. The ACDEG adds onto the

¹² A Adeyanju 'Africa records 78 coups in 30 years', The Guardian, Lagos, 9 February 1997 See also S Saungweme, 'A critical look at the Charter on Democracy, Elections and Governance in Africa', Open Society Institute, African Governance Monitoring and Advocacy Project, May 2007.

¹³ Adopted in the Lomé, Togo at the 36th Ordinary Session of the Assembly of Heads of States and Governments of the OAU in the period from 10 to 12 July 2000.

¹⁴ Adopted in Lomé, Togo on 11th July 2000 and entered into force on 26 May, 2001 and has been ratified by all 53 Member States of the AU.

¹⁵ Adopted in Addis Ababa, Ethiopia by the 8th Ordinary Summit of the AU in January 2007. It came into force on the 15th February 2012 after Cameroon became the 15th Member State to complete the ratification process.

¹⁶ Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the capacity of the African Union to manage such situations Assembly/AU/Dec.269(xiv) Doc.Assembly/AU/4(xvi), Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010

definition of UCG's 'any amendment or revision of the constitution or legal instruments contrary to principles of democratic change of government.'¹⁷

UCG's are often characterised by forceful and violent seizure or assumption of power by individual civil and or military figures' that circumvent or completely do away with pre-defined democratic procedures to obtain or retain power.¹⁸ The guarantee of human rights as enshrined in various human rights instruments including the African Charter on Human and Peoples' Rights (the African Charter) and some national constitutions are negated as rights and are suspended or ignored upon the commission of UCG's, coups in particular.¹⁹ UCG's therefore undermine efforts to improve the realisation of civil and political as well as social and economic rights.²⁰

The Framework prescribes methods of responding to UCG's among them public condemnation of the UCG, non-recognition of the government that gains power through unconstitutional means, imposition of sanctions on the perpetrators of the UCG or the new unconstitutional government and suspension of the unconstitutional government from participating in the activities of the AU. In order to complement the efforts begun by the OAU as its predecessor; the AU developed a culture of complete intolerance for coups d'état. This practice has yielded significant results. In the decade that has passed since the adoption of the Lomé Declaration (from 2000-2013), the AU has had to contend with only ten coups. This is a considerable decrease if one compares to previous periods when an average of 20 to 25 coups would take place in a decade on the continent.²¹

¹⁷ ACDEG Article 23(5)

¹⁸ This was evidenced by the nature of elections in Zimbabwe 11 March 2002, 31 March 2005 and 27 June 2008 elections and the occurrence of coups in Togo 6 February 2005, Madagascar 16 March 2009, Niger 18 February 2010, and the conduct of the government of Cote d'Ivoire as they continuously postponed elections as at 22 March 2010.

¹⁹ W Sonyika 'We the people-our dignity and the constitution' in *Constitutionalism and society in Africa* (2004)160

²⁰ Articles 4, 5, 6, 9, 10, 11 and 13 of the African Charter respectively.

²¹ Institute for Security Studies 'A critical assessment of security challenges in West Africa' Available at <<http://www.iss.co.za/uploads/18Oct2010WestAfrica.pdf>> (Last accessed 21 September 2013).

Despite this decrease in the incidences of coups, Africa still faces other forms of UCG's whose occurrence is a big challenge to the achievement of democratic governance. One of these is the amendment of constitutions by incumbent leaders particularly provisions on presidential terms of office; which changes are aimed at or have the effect of extending incumbents' stay in power. These amendments are indicative of the reluctance by African leaders to relinquish power. Although some of these changes may be carried out in a procedurally and legally sound manner, their effect or aim is to entrench power in the hands of a few specific individuals hence defeating the ability of constitutions to limit powers; a fundamental value of democracy. In most cases the amendments are accompanied by the violent quashing of political opponents in authoritarian ways resulting in the erosion of a level political platform for the fair contestation of power.

The political reality of coups d'état, mercenary activities and rebellions is that they seek to unseat incumbent leaders. Constitutional amendments and refusal to vacate office after losing elections on the other hand seek to entrench the stay in power of incumbents. Quashing the former forms of UCG's protects incumbents yet castigates the latter exposing them to and putting them at risk of losing power. Hence the commitment of the AU lies in applying the same levels of intolerance towards all forms of UCG's. This study questions the willingness and preparedness of the AU to deal with, one as effectively as the other, all forms of UCG's if the ultimate aim is to see a more democratic Africa. The framework of the AU must not only seek to preserve democracy where it exists but also to establish it where it does not exist. Hence the AU must go beyond how governments come into power but also how they conduct themselves when in power to remain in power.

The normative and practical competencies of the AU will feed into the conclusions of this study. Norms are value-based and actual commitment is evident in sustained practice through implementation of the norms. Hence the interplay of the norms, the independence of the institutions prescribed to deal with UCG's and the powers of persuasion of the methods prescribed in the framework give a good measure of the commitment of the AU to realise the primary purpose for which the framework was enacted; ending UCG's.²²

²² KW Abbot 'Toward a Richer Institutionalism for International Law and Policy' (year) 1 Journal of International Law & International Relations (1-2) 33.

Some scholars have argued that the democratisation process in Africa does not reflect true commitment on the part of African states to see democracy thrive but is meant to serve certain specific agendas. **Quashigah** and **Okafor** suggest that African states only agreed to democratise under pressure from external forces hence they hold ceremonial elections which are always meant to be neither free nor fair.²³ This is why when incumbents lose elections they refuse to accept the result. The rejection of coups has almost acquired the status of customary international law in Africa.²⁴ The same needs to happen for all other forms of UCG's. On paper, the commitment of the AU is solid. However in practice the nature of institutions is so emasculated that they are almost useless,²⁵ and this affects the response of the AU towards UCG's;

“One should however not place too much emphasis on the organisational set up, as what matters is the political will to do what is needed. If the will is there, states will find a way around organisational obstacles, but if it is lacking even the best organisational set up under the most binding commitments will be of little help.”²⁶

The above statement captures the issue that this study addresses. The continued perpetration of UCG's on the African continent depends on the quality of the AU response. If there is no political will the framework becomes redundant. This study cannot prove the disingenuousness of the member states. However through case studies in which the AU responded to situations of UCG's, it will demonstrate trends from which deductions of the specific orientation adopted by the AU can be made.

²³ EF Quashigah & OC Okafor 'Legitimate governance in Africa: the responsibility of the international community' (1999) 464.

²⁴ Ibid Udombana (in 10 above) 1264.

²⁵ Ibid Udombana (in 10 above) 1263.

²⁶ Available at <<http://www.crisisstates.com/download/wp/wpSeries2/WP57.2.Moller.AU.pdf>> (Last accessed 23 September 2013).

1.2 Problem statement

In addition to the fact that the normative framework on UCG's is scattered apart like the pearls of a snapped necklace,²⁷ this study is skeptical about the possibility that the response of the AU and AfCHPR to UCG's will achieve tangible results in pushing the democratisation agenda on the continent without real effective commitment. The AU and AfCHPR's commitment must be directed towards ensuring effective government. Despite the consistency in the application of normative provisions with regard to coups, the AU has not interrogated the underlying causes of coups and other forms of UCG's. It is in addressing these problems that the response can be most effective and relevant. Given that the AU does not possess the authority of a supranational body, it is not clear how some of these issues will be addressed. This study endeavors to address these concerns.

1.3 Research methodology

This study shall be descriptive, narrative and analytical. It describes the norms and institutions prescribed to deal with UCG's as embodied in the instruments of the AU. It narrates and analyses the application of the framework by the AU in specific case studies. Lastly the study suggests means of strengthening the AU response.

Extensive desk research has been carried out in existing literature including published and unpublished books, journal articles, research papers, reports, the internet and other sources. The primary sources consulted in determining the legal framework of the AU with regard to UCG's were the ACDEG, the Constitutive Act and the Lomé Declaration although reference to some other AU instruments was made.

This discussion is premised within the realm of international law. It is therefore imperative to understand the principles and rules of international law regarding its sources to address methodological inquiries on the author's choice of principal sources. Article 38 of the International Court of Justice (ICJ) Statute sets out four classic sources of international law;

²⁷ Ibid Udombana (in 10 above) 1270.

these are **international conventions, international customary law, general principles of law recognised by civilised nations and judicial decisions** as well as **the teachings of the most highly qualified publicists**. The identification of sources of law is important because it determines the meaning and implications of each source.²⁸

The three principal sources have been chosen carefully; The Constitutive Act is the founding treaty of the AU hence it lays out the principles, objectives and values of the AU regarding democracy, good governance and human rights. The Lomé Declaration although it is soft law and as such is not binding, has been and still remains the instrument of the AU that clearly defines UCG's and prescribes the means of responding to them. It is the most frequently referred to instrument when AU organs with a mandate to address UCG's take decisions.

Regarding the ACDEG, the basic law of treaties as provided for in the Vienna Convention on the Law of Treaties (VCLT), clearly provides that States can only be bound by agreements to which they are party to. Such agreements can be expressed through signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, accession, or by any other means. Adopting a definition similar to that in the VCLT, Starke defines a treaty as any agreement between two or more States, attested to by those States notwithstanding its form or the circumstances of its conclusion.²⁹ Signature and ratification are the concluding abstract means of creating a treaty and it is through signature and or ratification that binding and non-binding treaties are set apart. In other words whether or not a treaty is binding is determined by its status in the hierarchy of sources. That status in turn determines whether a State is obliged to comply with its provisions or the quest to obey emanates from a moralistic argument separating the good from the bad.³⁰

The ACDEG has recently come into force and as such is the focal binding instrument prescribing norms and methods of responding to UCG's. The 53 member States of the AU unanimously adopted and signed the ACDEG.³¹ It is a principle of international law that once a State signs a treaty, even if it does not ratify it, it must refrain from engaging in acts that would 'defeat the

²⁸ D Kennedy 'The Sources of International Law' (1987) 2 Am. U. J. Int'l L. & Pol'y 3.

²⁹ J Starke *An introduction to International Law* (1977) 457.

³⁰ VCLT Article 11.

³¹ African Union Panel of the Wise, "Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict," *The African Union Series*, New York: International Peace Institute, (July 2010)

object and purpose of the treaty.³² AU member States must therefore conduct themselves in ways that do not undermine the provisions of ACDEG. Instead a process of developing strategies for its effective implementation must begin. This is the premise upon which the author brings the ACDEG into this study.

1.4 Conceptual framework

The following concepts shape this study. It is prudent at this stage to define them to give the reader an understanding of their meaning within the specific context of this study.

1.4.1 Democracy

The concept of democracy has piqued the interest of many a scholar. Definitions have emerged with some describing democracy as an ideology that obliges those in power to act in the interests of those they have power over.³³ The OAU/AU defines a people's right to democracy as their right;

to determine, in all sovereignty, their system of democracy on the basis of their socio-cultural values, taking into account the realities of each of [them] and the necessity to ensure development and satisfy the basic need of the people³⁴

Another defines democracy as a political system in which parties with different interests, values and opinions exist, lose or win elections periodically and the competition to power is regulated by clearly demarcated rules.³⁵ Lindberg defines democracy as

...an attribute of a political system [whose] core value...is...self-government...and [whose] three necessary attributes are equality of

³² VCLT Article 18.

³³ OA Obilade 'The idea of the common good in legal theory' in IJA Motola (Ed) *Issues in Nigerian Law* (1990).

³⁴ OAU Declaration on the Political and Socio-Economic situation in Africa and the Fundamental Changes taking place in the world, Adopted in Addis Ababa, Ethiopia on 11 July 1990

³⁵ A Przeworski *Democracy and the market: Political and economic reforms in Eastern Europe and Latin America* (1991) 10.

*political participation, free political competition and procedural legitimacy.*³⁶

Although there is many a definition for democracy or what it ought to be, a common feature to which most scholars subscribe is that a government must be put in place through clearly expressed public will in elections. Political participation is a precondition of democracy hence a government forced on a people through rebel activities, mercenary wiles, coups, refusal of incumbents to vacate office after losing elections, 'constitutional amendments' or rigged elections is illegitimate and out rightly undemocratic.

Democracy is intertwined with good governance, peace, security, development and the realisation of human rights. These elements are interdependent and the realisation of one encourages the fulfillment of the other. Democracy requires participatory and inclusive development. Good governance results in the improvement of the quality of life, hence realisation of human rights for populations. All human rights are best achieved when effective democratic processes exist.³⁷ These principles are best sustained under conditions of peace. Institutionalised and effective mechanisms for prevention, management and transformation of conflict which can result from changes of governments therefore need to be effectively managed. For instance the increased activities of rebel groups trying to take over power in the Republic of Mali, the Democratic Republic of Congo, Uganda and Sudan resulted in increased perpetration of sexual violence against women,³⁸ recruitment of child soldiers³⁹ and starvation of millions⁴⁰ respectively.

³⁶ S I Lindberg *Democracy and Elections in Africa* (2006) 21

³⁷ B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in *Human Rights in Africa* Ed A Bösl & J Diescho (2009)136.

³⁸ Institute for war and peace reporting 'Sexual Violence in the Democratic Republic of Congo' Available at <http://www.ceipaz.org/images/contenido/SexualviolenceintheDemocraticRepublicofCongo.pdf> (Last accessed 28 September 2013).

³⁹ World Vision 'Northern Uganda Crisis Caution: children at war' Available at <<http://www.worldvision.org/content.nsf/learn/globalissues-uganda>> (Last accessed 28 September 2013)

⁴⁰ J Prendegarst 'Obama must halt starvation in Darfur' Available at <http://www.realclearpolitics.com/articles/2009/03/obama_must_halt_starvation_in.html>(Last accessed 28 September 2013)

1.4.2 Democratisation

Democratisation is a process that involves the development of checks and balances in the exercise of power by leaders and respect for human dignity for the general population.⁴¹

1.4.3 Democratic governance

A democratic system is one in which “different groups are legally entitled to compete for power and in which institutional power holders are elected by the people and are responsible to the people.”⁴² It is inclusive, participatory, representative, accountable, transparent and responsive to citizens’ aspirations and expectations. As the former United Nations (UN) Secretary General, Kofi Annan stated democratic governance helps to ‘guarantee political rights, protect economic freedoms and foster an environment where peace and development can flourish.’⁴³

1.5 Limitations of the study

Determining the legality or illegality, procedural or unprocedural nature of constitutional amendments has been within the exclusive domain of a nation’s sovereign discretion. Its scholarly discussion has been minimal yet this study dwells on this matter at length. The analysis shall therefore be based on general principles without much literature to rely on.

1.6 Delineation of the study

This study shall focus on case studies between 2000 and 2012, being the lifespan of the framework on UCG’s beginning with the adoption of the Lomé Declaration. It is not by any means an exhaustive analysis of all the circumstances that constituted UCG’s and to which the

⁴¹ Ibid Sonyika (in 19 above) 142

⁴² T Vanhannen *Prospects of democracy: A study of 172 countries* (1997) 31.

⁴³ UN General Assembly ‘The causes of conflict and the promotion of durable peace and sustainable development in Africa’ Presented to the Security Council by the UN Secretary General UN. Doc A/52/871-S/1998/319.

AU ought to have responded. Rather, it will focus on a few cases which best illustrate the orientation of the AU response.

1.7 Significance of the Study

This study interrogates the nature and impact of the AU response to UCG's from not only a legal but also social dimension. As such, this work is dedicated towards critically analyzing unconstitutional changes of government, that is, coups d'état why they occur and what could be their possible aims and even justifications if any. There must be an understanding of the socio-political factors driving the continued occurrence of coups, rebellions, mercenary activities, controversial elections and constitutional amendments. The AU response must focus in an intuitive manner on the dangers of failing to address these fundamentals to be more effective.

1.8 Literature review

The discourse on UCG's has addressed a number of elements relating to UCG's. **Udombana** in 'Human Rights and Contemporary Issues in Africa' describes the prohibition of UCG's in the Constitutive Act as a 'distinct African recognition of a right to constitutional democratic governance in international law.'⁴⁴ Udombana argues that 'democratic governance has emerged as a human right under general and particularly international law' and that '....dictatorship in every ... manifestation, has become a taboo in Africa.'⁴⁵

Odinkalu in 'Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government' traces the history of the development of the AU framework on UCG's with regard to the Kenyan elections of 2007.⁴⁶ Odinkalu argues that in the event that the AU's determination is that an incumbent regime has refused to accept the outcome of a freely organised election,

⁴⁴ N Udombana 'Human Rights and Contemporary Issues in Africa', (2003) 35-106 quoting Crawford J, 'Democracy and International Law', (1993) 64 British Yearbook of International Law 113.

⁴⁵ Ibid Udombana (in 19 above) 92.

⁴⁶ CA Odinkalu 'Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government' Open Society Justice Initiative in Africa (January 2008).

then there is a strong basis for the member states to abide by the Constitutive Act and suspend the participation of Kenya in the activities of the AU.

Ajong in 'African Charter on Democracy, Elections and Good Governance: Changing Times or another Mirage? The Seriousness of a Challenge' argues that the ACDEG does not put in place ample safeguards to curb excesses of leaders in power and their political parties. Ajong cites the scenarios in which election dates are within the exclusive knowledge of the Head of State, and such knowledge is used as a political tool to ambush the opposition.⁴⁷ Ajong continues to argue that the ACDEG fails to put enough safeguards to censure state parties that violate its provisions. He argues that as it stands the ACDEG gives a state party two options; either to respect the provisions of the ACDEG and remain part of the AU or violate it with impunity and become segregated.

In a similar mode, **Ebobrah** in 'The African Charter on Democracy, Elections and Governance: a new dawn for the enthronement of legitimate governance in Africa?' states that the proposed means to ensure implementation of the ACDEG leave much to be desired.⁴⁸ Ebobrah argues that although the AU Peace and Security Council (PSC) is given the prerogative to deal with situations disrupting democratic governance in member states through diplomatic initiatives, yet the nature and type of such initiatives is not specified. He also argues that there is no indication as to which body is expected to initiate these diplomatic efforts.

McMahon in 'The African Charter on Democracy, Elections and Governance: A positive step on a long path' argues that the denunciation of constitutional amendments in ACDEG can be interpreted as a step against 'democratic backsliding' whereby actions with the effect of taking away democratic freedoms and cumulatively maintaining governments in power illegitimately are taken.⁴⁹ McMahon poses the question whether the AU's response to UCG's is a legitimate approach or simply window-dressing developed by governments that have little vested interest in promoting meaningful and credible democratisation processes.

⁴⁷ ML Ajong 'African Charter on Democracy, Elections and Good Governance: Changing Times or another Mirage? The Seriousness of a Challenge.'

⁴⁸ ST Ebobrah 'The African Charter on Democracy, Elections and Governance: a new dawn for the enthronement of legitimate governance in Africa?' Open Society Institute, AfriMAP (May 2007).

⁴⁹ ER McMahon 'The African charter on democracy, elections and governance: a positive step on a long path' Open Society Institute, Africa Governance Monitoring and Advocacy Project AfriMAP (May 2007) 3.

1.9 Research questions & overview of chapters

There is one main research question and four sub-questions which this study seeks to answer. These questions shape the chapters of the study, with the exception of the first chapter.

Main research question

What deductions can be drawn from the AU response to UCG's regarding its commitment to address the problem of UCG's?

Chapter 2

Sub-question 1: What is the normative framework of the AU with regard to UCG's?

This chapter shall set out the operational legal foundations and principles that should inform the decisions of the AU in responding to UCG's. It shall clarify the rationale behind the development of the framework and how UCG's undermine democratisation processes. The chapter discusses the legal norms, mechanisms and institutions prescribed to deal with UCG's.

Chapter 3

Sub-question 2: What has been the AU response to UCG's and is that response in synchrony with the norms?

This chapter shall present case studies in which the AU responded in specific ways to coups and to situations in which incumbents refused to vacate office after losing elections. The chosen case studies are Mali, Mauritania, Madagascar, Guinea Conakry, Kenya and Zimbabwe although reference is made to other cases throughout the discussion.

Chapter 4

Sub-question 3: On what basis is the response questionable and what added value does the ACDEG bring to the response?

This chapter shall present some of the arguments that have been made by scholars and commentators regarding the response of the AU to UCG's. An analysis of whether the framework serves a democratisation or purely political agenda for the benefit of incumbents is

made. The argument in this chapter builds on the Niger case, paying special attention to constitutional amendments and how they can reverse democratic gains by inciting coups, rebel movements, and mercenary activities.

Chapter 5 will present the author's conclusions. It gives recommendations on how the AU can maximise the framework to strengthen the response to UCG's.

CHAPTER TWO

Operational Legal Foundations and Principles and a Framework to Deal with UCG's

2.1 Introduction

The framework consists of three elements. First is the definition of unconstitutional changes, second are the means prescribed to respond to them and third are the institutional actors mandated to implement the measures against them. Primarily, the Lomé Declaration makes up the 'soft law.' The Constitutive Act as well as the Protocol Establishing the Peace and Security Council (PSC Protocol) make the 'hard law' laying out the norms and prescribing institutions to address the problem of UCG's. The AU also recently consolidated its position on UCG's in the Ezulwini Framework.

2.2 Development of the framework

At the time of the formation of the OAU certain fundamental principles were considered inviolable and not up for compromise. Among these was the principle of non-interference in the internal affairs of a member state coupled with the respect for the sovereignty of states.⁵⁰

These standpoints can be explained by the context in which the OAU was founded. Africa had emerged from the yoke of colonialism through hard-fought liberation wars hence preserving and reinforcing the newly acquired sovereignty was of paramount importance.⁵¹

Scrutiny of the manner in which governments governed was least on the list of priorities of the OAU. In the era of the AU with increased appreciation of the relation between democratic governance and political, social and economic stability of African nations, the AU eased its tight rein on non-interference to make room for regional intergovernmental

⁵⁰ OAU Charter Article 3 (2).

⁵¹ M Samb 'Fundamental Issues and practical challenges of human rights in the context of the African Union.'(2009) 15 Ann. Surv. Int'l & Comp. 161.

scrutiny of the governance of individual states. This signified the birth of the framework on UCG's.

Momentum in the development of a regional position for the AU intervention in the face of UCG's was gained in 1997 at the Harare Summit. In that summit, African leaders took a solid position and unanimously condemned the coup that had occurred in Sierra Leone.⁵² In the Algiers Declaration⁵³ and the Declaration on the Principles Governing Democratic Elections in Africa,⁵⁴ the unacceptability of coups was concretised. They were viewed as 'anachronistic acts'. The framework resolved that that democratic, representative and legitimate governance must come through elections not force.

2.3 The framework

2.3.1 The Lomé Declaration

The Lomé Declaration though a non-binding document, lays foundations for the establishment of democratic governance on the continent.⁵⁵ It was necessitated by the OAU member states' concern towards the resurgence of coups in Africa. In the Lomé Declaration, African leaders acknowledge the role of the principles of good governance, transparency and human rights in building representative and stable governments as well as promoting democracy and democratic institutions in Africa.

The Declaration encourages ascension to power through constitutional means and censures UCG's. It articulates principles that drive democracy in Africa which if strictly adhered to would considerably reduce the occurrence of UCG's on the continent. They include, *inter alia*, the adoption and respect of democratic constitutions embodying the separation of powers and independence of the judiciary; the promotion of political pluralism through guarantees on

⁵² Decision AHG/ Dec. 137 (LXXV).

⁵³ Algiers Declaration on Unconstitutional Changes of Government OAU Doc. AGH/Dec (XXXV) 1999.

⁵⁴ OAU/AU Declaration on the Principles Governing Democratic Elections in Africa, OAU Doc. AHG/Decl.1(XXXVIII) Adopted by the Assembly of Heads of States at the 38th Ordinary Session of the AU in Durban, South Africa, July 8 2002, para 1 & 4.

⁵⁵ KF Kufuor (2002—2003) 'The AU and the recognition of governments in Africa: analysing its practice and proposals for the future' 17 Am. U. Int'l. L. Review 393.

freedom of expression and of the press allowing for the opposition to gain political space; democratic change through the organisation of free and fair elections; and constitutional recognition, guarantee and protection of fundamental human rights.

The Lomé Declaration describes coups as ‘sad and unacceptable developments’ which must be ‘unequivocally condemned and rejected.’ Listing situational circumstances, the Lomé Declaration posits that military coups against a democratically elected government, the activities of rebel groups, mercenary activities and situations in which incumbents refuse to vacate office after losing elections constitute UCG’s. The response of the AU set out in the Lomé Declaration has four steps.

First, is the immediate and public condemnation of the UCG by the Chairperson of the African Union Commission (AUC) (formerly Secretary General) calling for a speedy return to constitutional order. This is coupled with the issuance of a warning to perpetrators, expressing AU intolerance towards their actions and refusing to recognise their government.

Second, is the convening of a meeting by the PSC (formerly the Central Organ) to discuss as a matter of urgency the UCG.

Third, is the suspension of the unconstitutional government from participating in the activities of the AU for a period of six months until constitutional rule is restored. The Chairperson during that period will gather all relevant information as to the intentions of the perpetrators of the UCG to restore constitutional order. Member States, the Chairperson of the AUC in collaboration with Regional Economic Communities (RECs) and the good offices of other African personalities will continuously engage the perpetrators and exert diplomatic pressure to expedite efforts towards the restoration of democratic rule.

When all other efforts to restore constitutional rule within the six-month suspension period have failed, the AU will impose targeted sanctions. These sanctions include visa denials, limitations on government to government communications and trade sanctions. The sanctions are enforced by the PSC, in collaboration with member states, regional groupings and the wider international communities.

2.3.2 The Constitutive Act

The Constitutive Act holds the principle of diminished sovereignty for all its member states by acknowledging in Article 4*h* and *j*, the right of the AU to intervene in a member state, pursuant to a decision of the Assembly in respect of serious circumstances such as war crimes, genocide and crimes against humanity and ‘the right of a member state to request intervention from the union in order to ensure peace and security’. The resurgence of coups in Africa prompted the AU in the Declaration on the Framework to redefine the whole concept of unconstitutional changes of government,⁵⁶ and thus includes:

1. A military coup d'état against a democratically elected government
2. Intervention by mercenaries to replace a democratically elected government
3. Replacement of a democratically elected government by armed dissident groups and rebel movements
4. The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections, and
5. Any amendment or revision of the constitution or legal instruments is an infringement on the principles of democratic change of government.

⁵⁶ See, ‘African Union, African Charter on Democracy, Elections and Governance’. Adopted at the 8th Ordinary Session of the Assembly, Addis Abba, Ethiopia, 30 January 2007. Available at <<http://www.unhcr.org/refworld/docid/493fe2332.html>> (Last accessed 3rd March 2014).

The Constitutive Act lays the founding principles of the AU drawing lessons from the OAU. It also responds to the lived realities of Africa acknowledging the dependence of the realisation of human rights on democracy and good governance.⁵⁷ It sets among its objectives the promotion of democratic principles and institutions, popular participation and good governance.⁵⁸ The Constitutive Act draws commitments from states to respect democratic principles, human rights, the rule of law and good governance as well as condemn and reject UCG's.⁵⁹ One of the means of manifesting that commitment is the prerogative of denying any government which comes to power through unconstitutional means the right to participate in the AU's activities.⁶⁰

The Constitutive Act places emphasis on improving democracy and good governance on the continent.⁶¹ It introduces a new era in which the sovereignty of states is overridden by the quest for democratic culture and practices, at least theoretically. Contrary to the OAU focus on non-interference as a paramount principle of engagement among African states, the AU introduces non-indifference. The interventionist approach is pledged to areas of human rights violations, genocide, war crimes and crimes against humanity.⁶² It is also extended to situations posing a 'serious threat to legitimate order.'⁶³

Since the inception of the Constitutive Act, the ethos of democratic and good governance has to a large extent been reinforced in Africa. Zimbabwe, Guinea Conakry, Sierra Leone, Liberia, Sudan, Togo, Somalia and Central African Republic (CAR) are obvious examples. For example, in 2008 Robert Mugabe was forced through the influence of AU and Southern Africa Development Community (SADC) into a unity government with Morgan Tsvangirai, the

⁵⁷ Ibid Gawanas (in 37 above) 139.

⁵⁸ Article 3(g) Constitutive Act adopted in 2000 at the Lome Summit (Togo), entered into force in 2001.

⁵⁹ Article 4 (m) & (p) Constitutive Act adopted in 2000 at the Lome Summit (Togo), entered into force in 2001.

⁶⁰ Article 30 Constitutive Act adopted in 2000 at the Lome Summit (Togo), entered into force in 2001.

⁶¹ E Baimu 'Introduction to Africa's Continental Organisations' in CH Heyns *Human Rights Law in Africa* (2004)99.

⁶² Article 4(h).

⁶³ The Protocol on Amendments to the Constitutive Act of the African Union (2003) Article 4(p).

opposition leader who was the former Prime Minister (Prime Minister position was abolished by The 2013 Zimbabwe Constitution).

The Global Political Agreement (GPA) signifies a beginning of the end of the political hegemony on the state by Zimbabwe African National Union–Patriotic Front (ZANU-PF) and offers an opportunity for the people of Zimbabwe to write their own constitution. The GPA is a development that allows for the dismantling of the Zanufication of Zimbabwe without risking a civil war. This agreement – unity government – has restored peace between the parties and created a measure of stability in Zimbabwe, even though the GPA saw Mugabe retaining the post of president after he had effectively lost the presidential election to Tsvangarai of the Movement for Democratic Change (MDC). New elections have been scheduled for 2013.⁶⁴ In the absence of an appropriate article which states that party with the highest votes will take over power, there is no intention to articulate one either.

In a further case, the joint panel of the UN and African peacekeeping force, the United Nations African Union Mission in Darfur (UNAMID) played an instrumental role in ending the six-year war in Darfur. A nine-member Thabo Mbeki chaired panel worked hard to assist Sudan in organising the first democratic presidential and democratic election in 24 years, to be followed nine months later by a referendum on Southern Sudan's secession.

The Constitutive Act is, however, also rhetorical as demonstrated by the continent's cycle between weak constitutional democracies. The AU and ECOWAS have failed on some occasions to penalise member states that infringed on the Constitution to extend their grip on power. This has been the case in Cameroon. This modest oil producing Central African country's constitution required President Paul Biya to step down in 2011. He has been at the helm for more than 25 years. However, he shocked Cameroonians when on 31 December 2007 in his end-of-year message; he unilaterally proposed a 're-examination of the constitution'.

⁶⁴ General Elections were held in Zimbabwe on 31 July 2013; Incumbent President Robert Mugabe was re-elected.

Similarly, if Article 25(4) of the Constitutive Act is applied to the case of Madagascar, then Andry Nirini Rajoelina who ousted the democratically elected leader, Marc Ravalomanana in a March coup, should be tried before a competent AU court as stipulated in Article 25(5). In this case, the Maputo Political Accord on Madagascar of 9 August 2009 made a mockery of the Constitutive Act. The fact that Rajoelina went against the Maputo Agreement and no sanctions were imposed on him is something to ponder.⁶⁵ In the absence of an appropriate forum and with no evidence of an intention to create one, it is not clear why such a provision was articulated in the Charter.

Paradoxically in the case of the Union of the Comoros, peacekeeping efforts marshaled by the AU succeeded in excluding President Mohamed Bacar from participating in elections in Anjouan, on 15 and 29 June 2008. A new president of the Autonomous Island of Anjouan was designated thanks to military and material resources sent to Comoros by the governments of Tanzania and the Sudan, as well as Libya and Senegal. The AU disregarded the proposal of the then president Thabo Mbeki to hold new elections in May 2008, as a way to resolve the crisis and allow Bacar to contest the elections. Mbeki had tried to stop the invasion on 14 March 2008 but the AU disregarded the proposal and the invasion went ahead. The AU took a bold step in October 2007 by imposing travel sanctions on Anjouan's Bacar and other government officials as well as freezing their foreign assets and proposed fresh elections.⁶⁶

In a further example, the violence in Guinea that saw soldiers kill no fewer than 157 pro-democracy demonstrators and rape dozens of women in September 2009 can be blamed on the AU. The Nation of ten million people had been in limbo since the assassination attempt on the military junta leader, Captain Moïse Dadis Camara, although high-level international delegations held talks in neighboring Burkina Faso aimed at negotiating an end to the country's military rule. Camara and his followers labeling themselves the National Council for Democracy and

⁶⁵ See 'SADC leaders reject Madagascar government': 9 September 2009, 8:54 am. RNW Radio Netherlands Worldwide.

⁶⁶ BBC News 'Timeline: Comoros', 26 March 2008. Available at <http://news.bbc.co.uk/2/hi/africa/1070770.stm> (Last accessed 13 September 2013).

Development (CNDD) launched a coup and seized power⁶⁷ after the death of long-time president and dictator, Lansana Conté, who had long been supported by western powers. Civil society welcomed Camara and the CNDD.⁶⁸ Recent developments after the assassination attempt on Camara on 3 December 2009 and speaking from voluntary exile in Burkina Faso, he urged Guineans to put aside ethnic differences and support the transfer to democracy. However, in line with the Constitutive Act, members of his military government have been barred from contesting in the planned presidential elections.

The Constitutive Act provides for the establishment of the Pan-African Parliament (PAP)⁶⁹ as an advisory body in promoting the principles of human rights and democracy in Africa.⁷⁰ The PAP has the power to; “examine, discuss or express an opinion on any matter... pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy as well as the promotion of good governance and the rule of law.”⁷¹ This includes UCG’s.

The Constitutive Act therefore supplements the response of the AU to UCG’s in the Lomé Declaration in three dimensions. The first dimension is the exclusion of a member state from the AU for perpetrating a UCG. Second is the ability to intervene in the case of a threat to legitimate order. Third is the creation of binding obligations on the Assembly of Heads of State and Government, the PAP and the PSC to implement measures against perpetrators of UCG’s.

⁶⁷ See ‘Africa: Junta warns renegade soldiers to hold fire.’ *City Press*, 13 December 2009, p. 9.

⁶⁸ See African Press Organisation (Organisation de la Press Africaine) ‘Guinea: respect rights of opposition. Criticism of coup government leads to crackdown on dissenters, demonstrators’. Available at <http://appablog.wordpress.com/2009/08/31/guinea-respect-rights-of-oppositioncriticism-of-coup-government-leads-to-crackdown-ondissenters-demonstrators/>. (Last accessed 31 September 2013).

⁶⁹ Protocol to the Treaty establishing the African Economic Community relating to the Pan African Parliament (PAP Protocol) Adopted in Sirte Libya on 2 March 2001 and entered into force on 14 December 2003.

⁷⁰ Article 17 (2) Constitutive Act adopted in 2000 at the Lomé Summit (Togo), entered into force in 2001..

⁷¹ Article 11 (1) Constitutive Act adopted in 2000 at the Lomé Summit (Togo), entered into force in 2001..

2.3.3 The Protocol on the PSC

The PSC was established with the mandate to prevent, manage and resolve conflicts.⁷² The PSC's objectives include anticipating and preventing conflict, peacemaking and peace-building through diplomatic and coercive means.⁷³ It also seeks to 'promote and encourage democratic practices, good governance and the rule of law...'⁷⁴ The diplomatic efforts of the PSC include developing early warning systems, enquiry, mediation and use of good offices, while the coercive means include the threat or use of force and sanctions. The PSC has the discretion to apply these means to situations of both potential and actual conflict.⁷⁵ To fulfill its functions, the PSC can institute sanctions in consultation with the Chairperson of the AUC.⁷⁶

The PSC has established three sub-organs, the Panel of the Wise (POW), the Continental Early Warning System (CEWS) and the African Standby Force (ASF). The POW comprises renowned African personalities of good character and repute tasked with the role of engaging in preventive diplomacy and mediation. The CEWS gathers information which enables the PSC to act timeously to situations that threaten peace and security. The ASF is the brawns in peacekeeping missions consisting of troops from different member states.

2.3.4 The Ezulwini framework

The principles in the Constitutive Act and Lomé Declaration are given further expression in the Ezulwini Framework.⁷⁷ The Ezulwini document extrapolates elements of the ACDEG. The

⁷² Protocol relating to the establishment of the Peace and Security Council of the African Union (PSC Protocol) Adopted by the AU Assembly, in Durban, South Africa on 10 July 2002, entered into force on 26 December 2003

⁷³ Articles 2, 3(b) & 6 Protocol relating to the Peace and Security Council entered into force on 26 December 2003.

⁷⁴ Article 3(f) Protocol relating to the Peace and Security Council entered into force on 26 December 2003.

⁷⁵ Article 9(1) Protocol relating to the Peace and Security Council entered into force on 26 December 2003.

⁷⁶ Article 7 (g) & (l) Protocol relating to the Peace and Security Council entered into force on 26 December 2003.

⁷⁷ Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the capacity of the African Union to manage such situations Assembly/AU/Dec.269 (xiv) Doc.Assembly/AU/4 (xvi), Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010.

Preamble acknowledges UCG's as a setback on the democratisation processes but also as a threat to peace and security on the continent.⁷⁸ It introduces a new orientation in the approach of the AU towards UCG's to include not only zero tolerance for coups but also for violations of democratic standards, realising that failure to do so could lead to the persistence and recurrence of unconstitutional changes. Para 6(i) (b) of the document in addition to the suspension of member states proposes a number of other methods to the AU response. These include the exclusion of perpetrators of the UCG from participating in elections to legitimise their control and the imposition of sanctions on a member state that aids, abets or complicit with perpetrators of a UCG in another state.⁷⁹ The framework is very progressive as it fosters coordination between the various bodies mandated to deal with UCG's. It encourages collaborative efforts between the Chairperson of the AUC, the PSC and the Panel of the Wise in taking measures to prevent UCG's.⁸⁰

The framework is also progressive to the extent that it addresses the weaknesses of the previous response, emphasising the need for international cooperation, without which, AU efforts such as sanctions would be undermined.⁸¹ The Chairperson of the AUC is mandated to oversee the implementation of the framework.

2.4 The methods

The framework on UCG's employs the following methods as its response; naming and shaming, non-recognition of the unconstitutional governments, imposition of sanctions on both perpetrators and all those who act in complicity with them, diplomatic engagement, suspension from AU activities, and prevention of perpetrators to auto-legitimise themselves. The non-recognition of governments has been one of the most powerful tools in the AU response hence it is discussed at length.

⁷⁸ Similar to Para 8, ACDEG Preamble.

⁷⁹ Similar to Articles 25 (4) & (6) of ACDEG.

⁸⁰ Para 6 (ii) (b) & (d).

⁸¹ Para 6 (iii) b.

2.4.1 Non-recognition of governments

Contemporary developments in international law have seen the recognition of governments becoming distinct from the recognition of states. The recognition of a government is primarily a political decision dependent on the discretion of sovereign powers in different states unless otherwise limited by treaty or international law. Although a state cannot recognise a regime as a government without accepting the statehood of the entity within which the regime exercises governmental control, a state can refuse to recognise a particular regime in an entity that it recognises as a state. Hence the recognition of governments is distinct from the recognition of states.

Recognition of governments is one of the principal elements of a sovereign state's foreign affairs power together with such other functions such as treaty making, declarations of war or peace, the establishment of diplomatic relations and recognition of states.⁸² Hence by agreeing to exercise this power through the AU as a single unit, AU member states' gave up their sovereign rights as a sign of their commitment to end coups.

2.4.2 The implications of non-recognition

Recognition of governments directly corresponds to a quest for legitimacy by those in power. It is indisputable that no government, however its means of coming into power, enjoys being segregated or ostracised. This is characteristic of the paradoxical nature of international law, whereby 'powerful states and governments obey powerless rules' desiring legitimacy.⁸³

Scholarly assertions are that the recognition of governments is applicable to situations in which a government comes to power through constitutional as well as through unconstitutional means.⁸⁴ Usually in a case of constitutional transfer of power such

⁸² J B Ojwang & L G Franceschi 'Constitutional regulation of the Foreign Affairs Power in Kenya: A comparative assessment' (2002) 46 *Journal of African Law* 43.

⁸³ TM Franck *The power of legitimacy among nations* (1990) 3.

⁸⁴ S Talmon 'Recognition of governments: An analysis of the new British policy and practice' *The British Year Book of International Law* (1992) 237.

recognition is not formally but tacitly expressed through the continuation of diplomatic relations and ties. However where a coup, revolution or such other rebellion takes place the question is then whether the entity exercising governmental control over a state should be deemed competent to do so and that is when the express recognition or non-recognition of governments comes into play.

The AU has refused to recognise governments that come into power by way of coups or rebellion. This practice has however been controversial. For instance there were controversies surrounding the rightful Ghanaian delegation to be recognised at the 6th Ordinary Session of the OAU Council of Ministers following the military overthrow of President Kwame Nkrumah in 1966.⁸⁵ In 1980 after the unseating of President William Tolbert by the military regime of Samuel Doe in Liberia, the OAU refused to recognise the new military regime.⁸⁶ When the rebel government of Hissen Habre took over power in Chad and sent its delegation to the OAU meeting of Foreign Ministers in 1982, the OAU led by Libya refused to recognise this delegation arguing that accepting the delegation would be wrongly construed by rebel movements elsewhere on the continent to mean that the AU was not opposed to the overthrow of seating governments by rebels.⁸⁷

Most recently, the coup governments of Andry Rajoelina in Madagascar (2008) and that of Salou Djibo in Niger (2009) were not recognised. The marked decrease in the number of coups occurring in a decade can be attributed to this culture of non-recognition of governments that come into power through unconstitutional means.

⁸⁵ Ibid Kufuor (in 55 above) 372.

⁸⁶ Ibid Kufuor (in 55 above) 379.

⁸⁷ Ibid Kufuor (in 55 above) 383

2.5. Conclusion

The framework is a comprehensive intervention which needs backing by practice.⁸⁸ The proposed use of sanctions on perpetrators of UCG's be they rebels, the army, mercenaries or incumbents is also indicative of an AU preparedness to foster democracy in Africa, even though interfering in the internal affairs of member states. The Ezulwini framework takes a bold step to create an immediate solution pending the ratification of ACDEG by extrapolating parts of it that strengthen measures of responding to UCG's.

⁸⁸ Gawanas (in 37 above) 139.

CHAPTER THREE

THE RESPONSE

3.1 Introduction

The report of the Panel of the Wise reflects on a number of issues that are relevant to developing an understanding of the orientation from which the AU response emanates. It dwells upon the paradigm shift from non-interference to non-indifference.⁸⁹ This paradigm is explained in the historical context in which the OAU and the AU were founded, with the former rising out of a need to end the scourge of colonialism and apartheid and the latter focused on entrenching democracy and ending UCG's. Through use of the methods discussed earlier the response has neither been systematic nor consistent. From one case to another, there have been variations in the interventions though abhorrence to coups has been a consistent tenet.

3.2 Case Studies

The following examples endeavor to show the AU response to two forms of UCG's; coups and situations in which incumbents refuse to vacate office after losing elections. They illustrate the disparity in the measure the AU applies to coups as compared, to refusals to hand over power. These cases are representative of the many other situations in which the leadership makes it impossible for constitutional change of government to occur such as Libya, Egypt, Uganda and Ethiopia.

⁸⁹ A Ayebare 'The Shifting of Political Positions in Africa' <http://www.ipinst.org/news/comment-a-analysis/182-the-shifting-of-political-positions-in-africa.html> Last Accessed 6th October 2013

3.2.1. Mauritania

On 6th August 2008, the Mauritanian President Sidi Mohamed Ould Cheikh Abdallahi was ousted in a military coup, by a military group led by General Mohamed Ould Abdel Aziz⁹⁰. The 'popular coup' was justified on the basis that the former President had supported bad governance by reappointing corrupt Ministers and encouraging terrorism by releasing suspected terrorists.⁹¹ The final straw was the President's dismissal of the Generals who then deposed him the same day. The AU immediately condemned the coup and demanded a restoration to constitutional order. The PSC demanded the release of the ousted Mauritanian leader as well as a restoration of the ousted institutions and personalities calling on the provisions of the ACDEG. The PSC also refused to recognise the coup government, declaring all its constitutional, institutional, legislative and diplomatic initiatives illegal, illegitimate and therefore null and void. Through the Chairperson of the AU, Mr Jean Ping, who met with General Aziz in Nouakchott, Mauritania on August 25th 2006, the AU engaged the coup leaders to restore a constitutional government.⁹² A month later the PSC released a statement demanding the former President; Abdallahi's "unconditional restoration" by 6th October threatening "sanctions and isolation" for the perpetrators of the coup if they did not do so. The PSC reiterated the legitimacy of the ousted legislature and presidency of Mauritania as chosen in the Parliamentary and Presidential elections of November 2006 and March 2007.⁹³

In response to this statement the members of Parliament supportive of the coup announced on 26th September their rejection of the AU PSC's demand on the basis that "it simply ignore[d] the reality in the country where two-thirds of the parliament, almost all of the elected

⁹⁰ "Coup leaders form new state council in Mauritania". France 24. 2008-08-06. Available at <http://www.france24.com/en/20080806-president-prime-minister-arrested-apparent-mauritania-coup-soldiers&navi=MONDE> (Last accessed 6th October 2013).

⁹¹ 'Mauritanian Junta: A year of Empty European Condemnation' Can Europe sanction Mauritania with its new oil finds?

⁹² "Al-Qaeda denounces Mauritania's 'infidel' military junta: report", AFP, Available at <http://afp.google.com/article/ALEqM5h3Y4v950M3sDatRItzZNX8R03gIQ> (Last Accessed October 16th, 2013)

⁹³ PSC/PR/Comm (CLIV).

mayors and the majority of people support[ed] the changes of 6th August "94 The leader of the coup, Abdel Aziz, also rejected the AU PSC's demand.⁹⁵

The Chairperson of the AUC engaged the coup leaders reiterating the position for the ousted President to be released. He observed that the AU could not afford to compromise its stance on coups because doing so would 'lay down a dangerous precedent with grave consequences for the stability of the continent and the credibility of ongoing democratic processes in Africa.'⁹⁶ He reiterated the need for 'firmness' in the implementation of commitments that feed into the development of a culture of democracy, peace and stability.

The PSC then gave the coup-plotters 5th February 2009 as the deadline by which they ought to have restored constitutional rule or else face sanctions.⁹⁷ The sanctions applied to members of the High Council of State, the government and any other persons whose conduct supported the coup government.⁹⁸ They included travel bans and freezing of bank assets of the junta members. General Aziz dismissed the sanctions as meaningless because none of his fellow coup-plotters had a bank account outside of Mauritania. Despite the sanctions, the desired effect of a reversal of the military coup and restoration of democratic governance did not occur immediately owing to the absence of cohesive means of implementing the sanctions.⁹⁹ The interventions of the AU also faced socio-structural challenges considering that the military government had obtained effective control over the territory and had the support of the people.

⁹⁴ "Pro-coup lawmakers in Mauritania reject AU ultimatum", AFP, Available at <<http://afp.google.com/article/ALeqM5hNzLtiIwucIhBmUX1ZtUFLyvHZxw>> Last accessed 16th October 2013

⁹⁵ "Mauritanian coup leader rejects AU ultimatum", AFP, Available at <<http://afp.google.com/article/ALeqM5iAPV5wvH4evDM3CelqAiiDNbs9zQ>> Last accessed 16th October 2013

⁹⁶ Report of the Chairperson to the African Union Commission PSC/MIN/3 (CLXIII) Para 41.

⁹⁷ PSC/MIN/Comm.3 (CLXIII) Para 9, this decision was affirmed in February 2009 in PSC/PR/ (CLXVIII) Para 2

⁹⁸ PSC/PR/COMM (CLXXXII) Para 4.

⁹⁹ K Aning 'The African Union's Peace and Security Architecture: Defining an emerging response mechanism' (2008) Lecture series on African Security, Kofi Annan International Peacekeeping Training Centre, Accra, Ghana. Available at <http://www.nai.uu.se/research/nai-foi%20lectures/calendar2009/aning.pdf> Last Accessed 17th October 2013.

3.2.2 Madagascar

In March 2009, President Marc Ravalomanana announced transfer of power to the military. The military then transferred power to an unelected candidate, Andry Rajoelina, the mayor of the Malagasy capital, Antananarivo. The AU PSC suspended Madagascar from participating in AU activities on the next day. The decision stated that Madagascar “marked another serious setback in the ongoing democratisation processes on the continent and reinforce[d] the concern over the resurgence of the scourge of coups in Africa.”¹⁰⁰

The AU actively engaged the parties to establish a transitional government pending elections and urged the assessment of Madagascar’s electoral needs to ensure a smooth return to democratic governance.¹⁰¹ The PSC reaffirmed its total rejection of UCG’s urging the political parties in Madagascar to resolve the stalemate and political tensions in the country.¹⁰² As part of its diplomatic initiatives, the AU organised a summit in collaboration with the International Joint Mediation team consisting of the AU, the Southern African Development Community (SADC), and the Organisation of Francophone states (OIF) and the UN. The Maputo Summit charted the way to return Madagascar to democratic governance and end the violent surges that were creating instability in the country, calling for the holding of free, fair, transparent and credible elections within fifteen months

The idea of a transitional government did not yield much results as the de facto authorities, under Rajoelina did not abide by the resultant agreements of the summit. This then led to the decision by the AU PSC to impose sanctions on the Rajoelina government.¹⁰³ The sanctions were to be travel bans against all members of the institutions set up by the de facto authorities borne out of the UCG and all other individual members of the Rajoelina camp whose actions impeded the AU and SADC efforts to restore constitutional order. They also included the freezing of

¹⁰⁰ PSC/PR/BR (CLXXIX) Para 3.

¹⁰¹ PSC/PR/Comm. (CCVIII).

¹⁰² PSC/PR/BR (CLXXIX) Para 4.

¹⁰³ Communiqué on the Decision of the Peace and Security Council of the African Union (AU) on the situation in the Republic of Madagascar, adopted at its 216th meeting of the Peace and Security Council held on 19 February 2010 Addis Ababa, Ethiopia PSC/PR/COMM.1(CCXVI).

funds, other financial assets and economic resources of all individuals and entities contributing, in one way or another, to the maintenance of the unconstitutional status quo. The third aspect of the sanctions was to be the diplomatic isolation of the de facto authorities. The AU encouraged concerted action by member states to challenge the participation of the representatives of these de facto authorities in the activities of non-African international organisations, including the UN, its agencies and other concerned bodies. The question that arises is whether in responding promptly and boldly to the events in Madagascar, the PSC was conveying the message that it was not hesitant to act against threats to democratisation processes in Africa or this was a mere political statement to would-be coup-plotters seeking to unseat incumbents that such actions would not be tolerated.

3.2.3 Guinea Conakry

Following the coup d'état in Guinea Conakry (Guinea) on 24th December 2008, the PSC condemned the coup as a flagrant violation of the Constitution of Guinea and demanded a return to constitutional rule that same day. Two days later, on 26th December 2008, the Chairperson of the AUC undertook a visit to Guinea to discuss the matter with the coup-plotters. Three days after the coup the PSC suspended Guinea from participating in the activities of the AU until constitutional order was restored in line with the provisions in the Constitutive Act and the Lomé Declaration.

The AU in collaboration with ECOWAS formed an International Contact Group on Guinea which held meetings to discuss the matter and push towards a restoration of constitutional order. The PSC commended the political dialogue that was taking place between the various political actors in Guinea hoping this dialogue would lead to a transition to constitutional order.¹⁰⁴ The PSC displayed commendable innovativeness by suggesting that all the coup-plotters should not stand for election in the elections restoring democratic governance. Captain Dadis Moussa Camara, leader of the coup rejected this idea. The PSC then imposed sanctions against

¹⁰⁴ PSC/PR/BR (CLXXXIII).

Captain Camara and all other individuals in support of his position.¹⁰⁵ Eventually constitutional rule was restored with the holding of elections although the process could have been expedited.

3.2.4 Kenya

In December 2007, the presidential post in Kenya was contested between the Party of National Union (PNU) and the Orange Democratic Movement (ODM) led by Mwai Kibaki and Raila Odinga respectively. In the aftermath of that election Odinga claimed victory and that the elections had been rigged. Violence broke out in Kenya fueled by the careless statement of the then head of the Electoral Commission, the Late Samuel Kivuitu that, "I do not know who has won [the elections]". Whereas the elections were held on 27th December and the dispute pertaining to the results began a week later, the AU only became visible four weeks later after many lives were lost, property and infrastructure destroyed, refugees and IDP's emerged out of the conflict and the Kenyan stability was compromised.¹⁰⁶

Even then the response was an expression of concern over the violence in Kenya and its consequent results.¹⁰⁷ The closest inclination there was to acknowledging the unconstitutional change emanating from the election was the call by the PSC to "initiate a collective reflection on the challenges linked to the tension and disputes that often characterise electoral processes in Africa."¹⁰⁸ The PSC then urged a resolution through the power-sharing agreement.¹⁰⁹ Though, the PSC acknowledged the Presidential status of the disputed winner, Mwai Kibaki.¹¹⁰

¹⁰⁵ PSC/PR/Comm. (CCIV) which decision was confirmed in PSC//AHG/COMM.2(CCVII) Para 4.

¹⁰⁶ PSC/PR/Comm (CXV) Para 9 came after close to a 1000 and over 250 000 people were displaced as a result of the violence.

¹⁰⁷ PSC/PR/BR (CIX) .

¹⁰⁸ PSC/PR/BR (CIX) Para 7.

¹⁰⁹ The Agreement on the Principles of Partnership of the Coalition Government which then solidified into the National Accord and Reconciliation Act of 2008.

¹¹⁰ PSC/PR/BR (CXIII).

The Assembly expressed concern with the perpetration of violence against the civilian population of Kenya.¹¹¹ It called for those responsible for the violence to be held accountable. However it did not expressly identify the situation in Kenya for what it was; the refusal by an incumbent to gracefully relinquish power. In that same session, however the Assembly unequivocally expressed its condemnation of the activities of rebel groups against the Chadian government, identifying these attacks as an attempt for an unconstitutional change.¹¹²

The evidence of the AU's knowledge that the elections were stolen lies in their willingness to promote power-sharing. Where rebels try to steal power the AU opposes them until constitutional rule is restored yet when an opposition wins an election and an incumbent refuses to vacate office the AU supports negotiation for power-sharing. This is a clear contradiction in policy. One could argue that a culture of politicking permeates the response when incumbents are involved and are threatened.

3.2.5 Zimbabwe

On 29th March 2008 Zimbabweans went to the polls to elect their President and representatives in parliament, Senate and local government. The choice was mainly between the Zimbabwe African National Union Patriotic Front (ZANU-PF) led by Robert Mugabe and the Movement for Democratic Change (MDC) under Morgan Tsvangirai. The results from the parliamentary, senatorial and local government counts set predictions of a Tsvangirai victory in the Presidential count. In light of these predictions the Zimbabwe Electoral Council (ZEC), the electoral body, under the control of the incumbent withheld presidential election results for several weeks in contravention of the Electoral Act. When the results were eventually announced Tsvangirai had won without the necessary majority that the Constitution required. A runoff election was scheduled for 27th June. The period to the run-off saw the perpetration of gross human rights violations against actual and perceived MDC supporters. The runoff itself was so fraught with irregularities that even the AU could not declare it legitimate. Mugabe's re-election was clearly a

¹¹¹ Decision on the situation in Kenya following the presidential election of 27 December 2007 Assembly/AU/Dec.187 (X) 2008.

¹¹² Decision on the situation in Chad Assembly/AU/Dec.188 (X) 2008.

fraud though the AU did not pronounce it to be so. Instead, the AU supported SADC efforts for the parties involved to negotiate a power-sharing settlement.¹¹³

In the aftermath of the runoff, the then UN Secretary General, Kofi Anan offered to mediate the political tensions between the conflicting parties. Mugabe refused the offer arguing that the AU was taking care of the situation. This gesture could be read as an assertion of the role of the AU within the global sphere as a driver of the African democratisation agenda. It could also be indicative of the weaknesses of the system where incumbents, comfortable in the knowledge of the culture of stayism, usurpation of power and profiteering through personalisation of state as private property¹¹⁴ that characterise African politics,¹¹⁵ and thus prefer dealing with the regional mechanisms which they know to be of no consequence.

SADC strictly applied its Principles and Guidelines for the Holding of Democratic Elections and beamed the spotlight on the gross irregularities of the June 2008 elections. They also exposed the unsuccessful rigging attempt by Mugabe of the March election. One of the monitors Dianne Kohler-Banard reported the tampering of ballot boxes in a number of constituencies to ensure a Mugabe victory and noted;

In Mberengwa West they brought the first four boxes down for counting. Each box has two of the blue ties with numbers on it that are used to seal it along with padlocks. They had a whole set of duplicates of the blue ties, with the same numbers, on the other side of the hall. The keys to the padlocks are inside envelopes sealed with wax. All the seals were broken. I can only surmise that the keys were removed and the padlocks unlocked. Then they

¹¹³ The negotiations were facilitated by the then Chairperson of SADC and President of the Republic of South Africa, Thabo Mbeki.

¹¹⁴ Teodoro Obiang Nguema Basongo of Equatorial Guinea, King Mswati III of Swaziland, Yoweri Museveni of Uganda and Hosni Mubarak of Egypt are the number 13,15, 19 and 24 on the ratings of the world's richest heads of state respectively yet on average 35 % of their populations live below the poverty datum line.

¹¹⁵ The recent incidents in Niger where the incumbent President Mamadou Tandja changed the Constitution so he could have another term in office. Available at. <http://www.guardian.co.uk/world/2010/feb/19/niger-military-junta-coup> (Last Accessed 17th October 2013)

*discovered that the protocol register, which lists how many voting books were used and the numbers, was missing.*¹¹⁶

SADC observers acknowledged that Mugabe was not legitimately elected in the June 2008. The fact that the RECs have taken much stronger positions with regard to UCG's than the AU raises major concerns about the AU approach. The AU could have boldly declared the 27 June election a UCG but it did not. SADC brokered a power-sharing agreement, the Global Political Agreement (GPA), a noble but inappropriate response to the UCG. Power-sharing discourages popular participation and undermines the outcome of elections in democratic governance. Mr Tsvangirai hoped the negotiations would not be just about power-sharing but rather "the restoration of democracy and the return of the rule of law,"¹¹⁷ since the GPA committed the parties to "...the democratic values of justice, fairness, openness, tolerance, equality, respect for all persons and human rights,"¹¹⁸ and to "adhere to the principles of the rule of law."¹¹⁹ This has however not been the case.¹²⁰

The innovativeness that the AU showed in the Comoros when it launched military intervention in the island of Anjouan barely two months earlier in March 2008 to oust Colonel Mohamed Bacar was not present in this case.¹²¹ Again the appearance of an AU that promotes incumbency rather than democracy is magnified.

¹¹⁶ D Matyszak 'Another inconvenient truth' A complete guide to the recount of votes in Zimbabwe's harmonised elections' (2008) Research and Advocacy Unit. Available at <www.kubatana.net>. Last Accessed 17th October 2013

¹¹⁷ 'Prime Minister's Maiden Speech to Parliament' Available at <http://www.zimdaily.com/news/pm7.6977.html> Last Accessed 17th October 2013

¹¹⁸ GPA Preamble Para 7.

¹¹⁹ GPA Article 11.1(b).

¹²⁰ With continued reports of human rights violations on farms, against women political activists and human rights defenders . Available at <www.rau.org.zw>. Last accessed 17th October 2013

¹²¹ The Colonel had taken over power after the disputed outcome of the June 2007 elections.

3.2.6 Niger

On 19th February 2010 the military junta, calling itself the Supreme Council for the Restoration of Democracy (CSR), staged a coup against President Mamadou Tandja and his ministers.¹²² They seized power and identified their leader as one of the squadron chiefs, Chief Salou Djibo. The coup in Niger came against a background of increasing tensions precipitated by the actions of President Tandja in August 2009 when he changed the Constitution to allow himself to stay in power beyond the existing legal term limit. The change in the Constitution provoked the opposition resulting in a political crisis that culminated in the coup.

In terms of the 1999 Constitution the presidential term was limited to five years and one could be re-elected once only.¹²³ President Tandja had thus served his ten years since 1999 and his mandate was set to expire in 2009. The proposed new constitution amending the 1999 Constitution would remove presidential limits and create a fully presidential republic. It also widened the powers of the President by making him the "sole holder of executive power."¹²⁴ The President became the head of the army, had the prerogative to name the Prime Minister and had complete control over the cabinet. The amendment changed the Constitutional court quorum from seven to nine and gave the President the power to appoint five of these judges whereas previously he could only appoint one. The new constitution created a two-chamber parliament, bringing the idea of a senate. The amendments were in grave breach of the principle of separation of powers. Although the President was authorised in terms of the 1999 Constitution to call for a referendum on any matter he could not do the same for constitutional amendments as stipulated in Article 136 of the Nigerien Constitution.

On 25th May 2009 the Nigerien Constitutional Court, the highest court in Niger, held that the President's plan to hold a referendum to effect the amendment would be unconstitutional. The Court stated that the Constitution was clear that a president could only serve two-five year terms and therefore President Tandja could not extend his term in office. The President dissolved the

¹²² D Smith 'Military Junta seizes power in Niger coup' Available at <http://www.guardian.co.uk/world/2010/feb/19/niger-military-junta-coup> Last Accessed 17th October 2013

¹²³ Article 121 of the 1999 Constitution of the Republic of Niger.

¹²⁴ Ibid 117

Constitutional Court in June 2009 after this judgement was passed. In August 2009 President Tandja also dissolved Parliament which opposed the idea of a referendum to change the Constitution in a manner that would extend his Presidential term. Although he was entitled to dissolve Parliament once every two years under the Constitution such dissolution could not be made haphazardly. He then assumed emergency powers, ruling by decree for a minimum period of 3 years before assuming powers under the new constitution as amended by the referendum. President Tandja justified his actions on the basis that he was fulfilling “the will of the people” and was overseeing two deals that were crucial for Niger’s economy; a uranium deal with the French and an oil deal with the Chinese.¹²⁵

President Tandja’s extension of his mandate indefinitely was condemned both at home and internationally except by the AU. The Nigerien opposition condemned the Referendum and resolved to continue to defend the Nigerien Constitution of 9th August 1999. The Economic Community of West African States (ECOWAS) suspended Niger from participating in its activities and refused to recognise President Tandja as the lawful leader of the Nigerien Republic.¹²⁶ The European Union (EU) and the United States of America (USA) government suspended non-humanitarian aid to Niger. Although the AU later endorsed the decisions of the ECOWAS, failure to take its own solid position against the constitutional amendment is quite disconcerting. The Lomé Declaration identifies the separation of powers as one of the principles of democratic governance and given that the essence of the amendment by President Tandja distorted the demarcations between the roles of the executive, legislature and judiciary, the AU should have strongly condemned his actions.

The Early Warning System as established under the PSC failed to pre-empt the warning signs of the repercussions of President Tandja’s actions. Independent political analysts issued early warnings of an impending coup arguing that President Tandja’s actions to extend his rule would incite instability in Niger.¹²⁷ They based their prediction on Niger’s political history characterised by coups and reckoned the military would justify a coup on the President’s actions. Despite this prediction the AU did not initiate any visible response.

¹²⁵ K Curtis Foreign Policy Blogs Network

¹²⁶ Ibid 120

¹²⁷ R Moncrieff, (West African analyst) International Crisis Group (ICG).

The coup, as predicted took place a few days later after thousands of protestors had gathered demanding a reversal of the constitutional amendments. The coup was hence not met with much indignation from the general Nigerien public. President Tandja's actions had eroded the democratic gains that Niger had experienced. The coup-plotters argued that they were not actually unseating a democratic, legal government because the government of President Tandja had ceased to be so when he made the unconstitutional amendment.

Upon the occurrence of the coup the AU immediately condemned it demanding a restoration of constitutional order. However such censure has not changed the situation as political instability still reigns in Niger. Given this scenario, one is inclined to agree with the position that "African leaders have shown no genuine commitment to engage in substantive democratic practices."¹²⁸

3.3 Conclusion

The above cases rather than illustrate a pattern of a prompt, forceful and concerted AU intervention where coups or rebellions take place, instead depicts a rather reluctant and measured approach to refusals to vacate office. Given that the former are threats and the latter shields to incumbents' stay in power, the commitment of the AU to ensuring democratic governance is therefore in question. This begs the discussion on the manner in which such response could be improved. African citizens ought to have confidence in elections as a guarantee of democratic change of governments. However there are governments that have remained in power by using 'political tricks' and thus keeping the real winners out.¹²⁹ This is a gross violation of the right of citizens to freely participate in the governance of their own countries.¹³⁰

¹²⁸ W Okumu 'Mapping the path for democratization of Africa'(22 April 2005)4 of 6 Available at http://www.newsfromafrica.org/newsfromafrica/articles/art_10235.html Last Accessed 18th October 2013

¹²⁹ A Lachance' *The road to democracy in Sub-Saharan Africa* Available at < www.idrc.ca/books > Last Accessed 18th October 2013.

¹³⁰ Guaranteed in Article 13 of the African Charter among other human rights instruments and Constitutions world over.

CHAPTER FOUR

4.0 Enhancing the response to UCG's

4.1 Introduction

Theoretically, the framework on UCG's reflects an AU that is committed to ensuring democratic governance. It identifies issues that defeat democratic processes and prescribes solutions. However without practically implementing these provisions, the norms remain mere rhetoric. The AU's actual commitment will be evidenced in its actions and not mere words and the AU thus needs to map out a clear strategy of implementation to meet the objectives of the framework. To strengthen the response, first there is need to identify its current weaknesses.

4.2 Problems with the current response

A number of aspects make the AU response weak. First, the AU censures new coup d'état governments but does not have a mechanism to move those already in power to conform to the current culture and trends. As **Ebobrah** argues, a framework that does not challenge the legitimacy of incumbent leaders and does not question their ascension to power condones their stay in power and defeats the purpose of democratic governance¹³¹. It destroys the trust and confidence of the governed in those who govern. The AU should challenge leaders that came into power before the framework existed. Failure to do so gives the impression of double standards whereby incumbents who came into power unconstitutionally, criticise aspirant power-holders for doing the same.

¹³¹ ST Ebobrah 'The African Charter on Democracy, Elections and Governance: a new dawn for the enthronement of legitimate governance in Africa?' Open Society Institute, AfriMAP (May 2007).

The AU appears to even reward such leaders. For instance Colonel Muammar Qaddafi, the head of state and government of the Great Socialist Libyan Jamahiriya (Libya) came to power in a military coup in 1980 and remained so until his death on 20th October 2011 . It is well documented that he funded political insurgencies which perpetrated acts constituting UCG's. Charles Taylor and his military group which terrorised the Liberian population were trained in Libya.¹³² Libya funded, trained and armed the rebel movement of the National Liberation Front of Chad aggravating the divisions between the North and South of Chad.¹³³ The rebel movement of Foday Sanko, the Revolutionary United Front (RUF) of Sierra Leone also comprised dissidents trained in Libya.¹³⁴

Despite this background African leaders honoured Colonel Qaddafi with the Chairmanship of the AU in 2009, at a time when African leaders were pledging their commitment to democratic governance and airing their abhorrence to UCG's. The Assembly also mandated Colonel Gaddafi to engage the Chadian rebel groups and the government to facilitate an end to the fighting and find a durable solution.¹³⁵ Questioned by reporters after the 2010 AU summit in Addis Ababa-Ethiopia, the then newly-elected AU Chairperson, Malawi's President Bingu wa Mutharika, startlingly said he would oppose any move to limit the chairmanship to only constitutionally-elected heads of states. He went on to state that the AU does not 'insist that someone must necessarily be democratically elected in their country but when the takeover of government happens through unconstitutional means the AU will oppose it.'¹³⁶ Barely hours earlier wa Mutharika had, in his closing address to the summit, waged a war against unconstitutional power grabs. He resolved to take strong and necessary measures against all authors of coups and those that provide them the means to unseat constitutionally elected

¹³² M Boas 'Liberia and Sierra Leone-Dead ringers? The logical neo-patrimonial rule' 22 *Third World Quarterly* (2001) 721.

¹³³ V Thompson & R Adloff 'Conflict in Chad' (1981) J Wright 'Libya, Chad and the Central Sahara' (1989).

¹³⁴ I Abdulla & P Muana The Revolutionary United Front of Sierra Leone in C Clapham (ed) *African Guerrillas* (1998) 175-177.

¹³⁵ Decision on the situation in Chad Assembly/AU/Dec.188(X) 2008

¹³⁶ Voice of America 'New AU Chief Sets Political Stability, Food Security as Priorities' Addis Ababa. Available at <<http://www1.voanews.com/english/news/africa/New-AU-Chief-Sets-Political-Stability-Food-Security-as-Priorities>> Last accessed 20th October 2013

governments.¹³⁷ His report to the press was therefore perplexing creating the impression that the framework on UCG's is not meant to cultivate democratic governance on the continent but to protect incumbents from threats such as coups and rebel movements. This weakens the response when used against perpetrators as they perceive it as a tactic to prevent them from partaking in their share of the leadership pie.

UCG's are a reflection of deficits in democratic governance in African states. Their resolution requires commitment at the highest levels of the organisation within the AU, namely the heads of states themselves. The exhibition of good practices and adherence to democratic processes by incumbent leaders fosters a culture of respect for processes of democracy. It also cultivates a general culture of intolerance towards those inclined to perpetrate UCG's. However if the current leaders themselves are to be the perpetrators of these unconstitutional changes, this compromises the integrity and impact of the framework in achieving its intended objectives. This paradox between the theoretical and practical assertions of the AU speaks of limited commitment to the effective implementation of the framework on UCG's. Although some may argue that this borders on Afro-pessimism, the adage 'leadership by example' then finds its relevance in these circumstances.

Second, the Continental Early Warning System is weak. A response that is reactive and not preventive is bound to fail. The ACDEG proposes a more comprehensive early warning system and thus has enormous implications on improving democracy, good governance as well as peace and security on the African continent.

Third, the Peace and Security Council sits at three levels; member states, ministerial and secretariat levels. It has the mandate of imposing sanctions on perpetrators of UCG's including situations where incumbents are the perpetrators. The result more often than not, is a situation where leaders who hold onto power unconstitutionally are made judges over their own cases. The objectivity of the PSC in imposing sanctions is therefore questionable probably explaining why some rebel movements ignore its decisions. As it stands, the PSC appears to be a club of peers protecting each other from getting ousted from power. The irrationality of offending authorities being given the discretion to impose sanctions on themselves weakens the response.

¹³⁷ Ibid 5 Voice of America

An objective body with no direct political interest would be more appropriate to implement fully the framework on UCG's.

Fourth, the absence of cohesive measures to ensure respect for the framework weakens the response. As described in the Mauritania case study, perpetrators of UCG's have no reason to fear AU sanctions because they are not comprehensive. The AU is neither a strategic trade partner nor an influential donor to coup or rebel governments. In the continued absence of effective cohesive measures, the response remains a parroting of condemnation with no real substantial influence on behavioural change. Thus, bringing into the discussion the added value within the ACDEG.

4.3 The added value within the ACDEG

Referring to the adoption of the Constitutive Act of the AU, Udombana stated that, African rulers had "...presented Africans with a freshly baked cake...teasing and tempting, though one [could not] at the moment, determine if it [was] nutritious."¹³⁸ Udombana's statement spoke of hope in the normative value of the instrument and its ability to achieve the set objectives. The same analogy can be drawn with the cake being the ACDEG.

The African Charter on Democracy Elections and Governance is an innovative step by the AU aimed at entrenching a culture of peaceful, constitutional and regular changes of government through free, fair and transparent elections conducted by independent, competent and impartial regulatory bodies.¹³⁹ It is an invaluable tool for the AU in pursuing the continental agenda for democracy, good governance and fostering peace and security. It restates the AU's position with regard to UCG's, consolidating and enhancing previous instruments and decisions on UCG's including the 1999 Algiers Declaration, the 2000 Lomé Declaration, the Constitutive Act, the 2002 OAU/AU Declaration on Principles governing Democratic Elections in Africa and the 2003 PSC Protocol. It complements other African governance initiatives such as the

¹³⁸ Udombana

¹³⁹ Preamble Para 7

African Peer Review Mechanism (APRM) that is being implemented within the framework of the New Partnership for Africa's Development (NEPAD).

Besides prohibiting, totally rejecting and condemning UCG's,¹⁴⁰ the ACDEG adds value to the AU response in a number of ways. First, it recognises UCG's as an 'essential cause' of insecurity, instability and violent conflict on the continent.¹⁴¹ The case studies discussed above confirm this assertion. In identifying the relation between political governance and conflict the ACDEG enables a comprehensive audit of governance trends in Africa and confirms that access to political power has connotations on development patterns in Africa because political control determines resource control¹⁴² and as such, groups and individuals will go to war, demonstrate, assassinate leaders and engage in general outbreaks of violence to attain such resources. The ACDEG precipitates a process of self-introspection in which states internally audit their resource allocation as a means of preventing UCG's.

Second, the ACDEG expands the definition of UCG's to include 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.'¹⁴³ This element bridges the gap in deficiencies affecting constitutional transfer of power.¹⁴⁴ It limits legitimate access to power to that obtained in accordance with the constitution of the state party and the principle of the rule of law.¹⁴⁵ Effectively with ACDEG, constitutional amendments will no longer be within the sovereign discretion of states. The mechanisms put in place such as sanctions shall also apply to incumbents who amend constitutions, as much as they apply to coup-plotters, rebel groups and mercenaries.

Third, the provision on constitutional amendments is particularly important because failure to address it could plunge the continent back into the abyss of coups and military rule; reversing the

¹⁴⁰ Article 2(1), (2) & (4) as read with 3(1).

¹⁴¹ Preamble Para 8.

¹⁴² G Chamberlain 'Sao Tome coup linked to oil reserves' *The Scotsman*. (Edinburgh) July 17, 2003.

¹⁴³ Article 23(5).

¹⁴⁴ Article 5.

¹⁴⁵ Article 3(2).

gains that the framework has achieved thus far.¹⁴⁶ It compels governments to conduct self-introspection into their legitimacy through questioning their level of adherence to principles of rule of law, the spirit and purpose of constitutions and the populaces' participation in effecting constitutional amendments. As Young argues, democracy in Africa remains 'in arrested adolescence,' and one of the biggest challenges lies in the ability of 'wily incumbents' to 'embrace democracy and enjoy democratic legitimacy without subjecting themselves to the notorious inconveniences of democratic practice.'¹⁴⁷

Amendments that remove presidential term limits are common in Africa.¹⁴⁸ The Zimbabwean Constitution has been amended 19 times since her independence in 1980. Hatchard argues that these amendments have resulted in a Zimbabwean Constitution in which the executive is authoritarian and the legislature nothing more than a caricature of the executive.¹⁴⁹ The removal of term limits allows incumbents to become free to rule for as long as they can keep themselves in power and yet timely and voluntary relinquishing of power is a crucial aspect of a democratic policy. It reflects a responsible and legitimate leadership which prioritises the interests of the populace above their own self-aggrandisement. Presidential term limits prevent arbitrary and violent rule which is often associated with lifelong leadership. They indicate the availability of choices which allow for the movement of power between political contenders from one election to another and prevent the personalisation of power and patronage. As Soyinka alludes to; no limits create the problem of elected leaders who are 'a menace of such dimensions that the survival of the people is imperilled.'¹⁵⁰

The inclusion of this provision in ACDEG will force the AU to define a mechanism of addressing the problem in its response. Amendments that constitute 'infringements on the

¹⁴⁶ C Young 'Competing images of Africa: Democratisation and its challenges' in *Constitutionalism and Society in Africa* 145.

¹⁴⁷ Ibid 15 C Young

¹⁴⁸ Chad referendum in June 2005 removed constitutional term limits, in Uganda the Constitution was amended 2005 to secure Yoweri Museveni a third term, Niger's amendments resulted in a coup, in Cape Verde a November 1995 revision increased presidential powers. Available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/ly.htm>> Last Accessed 20th October 2013

¹⁴⁹ J Hatchard, 'Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa', 36 *J. Modern African Studies*. 381, 385 (1998).

¹⁵⁰ Ibid Soyinka

democratic principles of government' have been the subject of scholarly scrutiny. Some have described them as amendments that negate constitutional freedoms and fundamental human rights,¹⁵¹ that infringe upon the equality and dignity of all mankind;¹⁵² and oppose values of constitutional democracy are thus unacceptable amendments and therefore invalid.¹⁵³ Pan-African leaders such as former head of state for Tanzania, Mwalimu Julius Nyerere emphasised the need for African governments to respect their national constitutions and not to make amendments that would effectively extend 'the term of office of the current office-holder' and 'cheapen the Constitutions of their states.'¹⁵⁴

Fourth, whereas the Lomé Declaration maintains ties with a member state for the sake of ensuring continuity of that state's financial contributions to the AU, the ACDEG addresses a fundamental gap, emphasising the need to maintain deliverance of human rights obligations by a suspended state notwithstanding its suspension.¹⁵⁵ This ingenuity in the norms is indicative of a theoretical commitment by the AU to foster democratic governance in which the respect for human rights is paramount.

Fifth, the ACDEG extends the imposition of sanctions onto member states that instigate or support a UCG in another state. This strengthens the AU response by encouraging cooperation among states to eradicate UCG's.¹⁵⁶

Sixth, perpetrators of UCG's are prohibited in the ACDEG from participating in elections to restore democracy in their countries,¹⁵⁷ what most scholars refer to as auto-legitimation.¹⁵⁸

¹⁵¹ C L Kelbley, 'Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality', 72 *Ford Am. L. Rev.* 1487, 1535 (2004).

¹⁵² J Mazzone, 'Unconstitutional amendments', 90 *Iowa L. Rev.* 1747, 1838-39 (2005).

¹⁵³ W F. Murphy, 'An Ordering of Constitutional Values', 53 *S. Cal. L. Rev.* 703, 754-57 (1980).

¹⁵⁴ J Nyerere 'Good governance for Africa' Paper delivered on 13 October 1998 as Chairman of the South Commission

¹⁵⁵ Article 25(2).

¹⁵⁶ Article 14(3).

¹⁵⁷ Article 25(4).

¹⁵⁸ Quoted in ST Ebobrah 'Is Democracy Now an Issue in Africa - An Evolution of the African Charter on Democracy, Elections and Governance' 1 *Malawi L.J.* (2007) 131.

Currently, there are African leaders who have come to power in that way, first staging a coup then presenting a fallacy of elections in which they were then 'democratically' elected. The fact that the ACDEG unequivocally rejects them enhances the substance of the AU response.

Seventh, the ACDEG provides for the trial of perpetrators of UCG's before the competent court of the AU. Although such a competent court does not exist because the statutes of the African Court of Human and Peoples' Rights (AfCHPR) and the African Court of Justice and Human Rights (ACJHR) do not furnish these courts with such a jurisdiction,¹⁵⁹ the fact that the ACDEG provides for such a court creates the impetus for one of these courts to have that necessary competence.

¹⁵⁹ Ibid Ebobrah

4.4 Conclusion.

From the above discourse, it is evident that the AU response leaves a lot to be desired and even more to be done by the AU in creating a response that is as effective in its execution as it is in its wording. However, the ACDEG does provide a response as highlighted which if adhered to and thus given the arena to prove its effectiveness, may prove to be the adequate backing that the AU needs to give more bite to its bark.

CHAPTER FIVE

Conclusions and Recommendations

5.1 Conclusions

The process of the democratisation of Africa has been an arduous journey. The collective framework created by the AU to engage the issue of UCG's is one of the means of dealing with the numerous challenges threatening the consolidation of democracy on the continent. The combined efforts of the AU organs and member states and the African populace showing and demanding, respectively, greater commitment will lead to the fruition of the framework. It is not in doubt that in evolving its response to UCG's the AU has demonstrated commendable pro-activeness and preparedness to address the challenge of UCG's. Most importantly however, the mandate to address UCG's is not only about creating legitimacy but also should rather be more about setting precedents that are sustainable. A progressive AU response that is operating against a reactionary African policy needs interventions that are innovative, motivating, constructive and requiring the cooperation of all stakeholders including member states, organs of the AU, populations within AU member states and international partners.¹⁶⁰

The AU response has been evolving over time. The first generation of the response was limited to coups, and it does appear as if that orientation was motivated by leaders' wishes to safeguard their power.¹⁶¹ The response then, did not take into consideration the structural dimensions of the problem of UCG's. Instead it adopted a legalistic approach, failing to come up with real political solutions to the political problem at hand. The structure of the response did not emanate from a carefully thought-out orientation but rather a sudden trend by which member states thought they could resolve the immediate threat to their power. Indeed coups are the symptom of what is wrong elsewhere within the democratic structure of member states. Addressing them without developing democratic structures does seem "like a fire brigade responding to the symptoms rather than the causes."¹⁶² However the reason for the response

¹⁶⁰ Ibid Kufuor

¹⁶¹ Interview with Mr Chris Ayangac at the African Union Headquarters in Addis Ababa, Ethiopia

¹⁶² Interview with Mr. Ayangac

must not overshadow its substance. What African leaders have achieved in the 'zero-tolerance' approach is the firm establishment of a strong culture of intolerance towards coups.¹⁶³ Importantly, the evolution of the quality of the response is a sign of maturity and commitment on the part of the AU to tackle UCG's. The new-found assertiveness when the AU immediately condemns, resolutely suspends and promptly imposes sanctions on coup- plotters reflects the progression of the response.

This study concludes that there are certain issues that hinder the emergence of a wholesome response to UCG's. First, are the three levels of incapacitation within the AU.

The first level is that of the political intricacies involved in dealing with UCG's. The intervention of 53 member states is not as simplistic in reality as it is on paper. The AU responds within the constraints of the bilateral and multilateral frameworks that exist among its member states. Without the complete ratification of the ACDEG then it is difficult to implement it. The PSC has been innovative in extrapolating parts of the ACDEG into the Ezulwini Framework but the whole instrument needs ratification by all the member states because its added value in fighting UCG's does not lie so much in the section dealing with UCG's but in its ability to build a democratic culture.

The second level is the punitive capacity to censure member states when they go astray. The construction of the African policy is based on governments founded by control of resources. The AU does not have any economic incentives to use in the carrot and stick formulae to force perpetrators of UCG's to restore democratic rule. The AU is neither an indispensable trade partner nor a crucial financial partner for member states. The function of the AU is rooted in moral values which are not punitive. The capacity of the Sanctions Committee must be strengthened. Africa as a continent also needs to move from its marginal position to occupy influential positions within the global security architecture. This will ensure effective solicitation of international cooperation when it comes to implementing sanctions against perpetrators of UCG's. It follows therefore that the success or failure of the AU response cannot be based on the objective that is given in justifying the setting up of the framework. Rather it must be based on the capacity of the AU to do what the framework says it must do.

¹⁶³ Whereas in previous decades Africa experienced an average of twenty coups, the decade from 2000 to 2010 only had ten.

The third level relates to the technical capacity of the AU to act as guarantors of the respect of the framework. Heads of States have articulated a policy within the various instruments that have been discussed in earlier parts of this study. The AUC is the institution that must oversee adherence to these principles. The institution lacks technical competence and capability to serve such a purpose because it has been permeated by politics. It has become synonymous with most African civil services, incompetent and docile.¹⁶⁴ The AU has not exhaustively applied itself to putting African leaders in their place and simply reminds them of their obligations when they act outside the framework that they themselves created.

Second, it is trite to state that the AU cannot import democracy; it can only build and sustain democracy based on a justified rationale.¹⁶⁵ The response of the AU does not operate in a vacuum. It works against groups, individuals and societies with divergent views and interests.

Societal culture influences policy implementation and hence societal forces and influences cannot be isolated from the policy dimensions. The current policy in Africa is characterised by leaders' sustenance of power though their ability to distribute patronage. African populations have been complicit in this practise. The masses are thus as equally culpable for the outcome of UCG's in their individual states as the leadership. If the society within which leaders come from has not reached a level of sophistication to hold its leaders accountable; to support and demand sustenance of a culture of constitutionalism and resist manipulations based on patronage then Africa shall continue to be plagued by UCG's.¹⁶⁶ For instance, despite its firm establishment, the zero-tolerance approach to coups has been faced with the application challenge of popular coups. The March 1991 coup by Amadou Toumani Touré ousting Moussa Traore in Mali remains one of the most popular coups. Commendably, the General organised elections, left office without rancour within 15 months, and beget Mali a new Constitution. Fortunately for Mali, Alpha.Oumar Konare, who won the elections, stayed in office for the constitutional two terms only.¹⁶⁷ However that is not always the case. It is a fact that no autocracy can outlast the

¹⁶⁴ Interview with Mr Salim Latib

¹⁶⁵ Interview with Mr Ayangac

¹⁶⁶ Interview with Mr. Latib in which he stated that a sizeable portion of the Zimbabwean population supports ZANU-PF despite the party's bad economic policies, corruption and bad governance.

¹⁶⁷ Similarly the coup which ousted President Konan Bedie of Ivory Coast and brought General Robert Guei to power (RIP) was viewed by many Ivoirians as a Christmas present and received with jubilation in the streets of all the major towns in the country. This was also the case in the Central African Republic in 2008 and in Niger in 2010.

will of the people.¹⁶⁸ Hence forces operating within societies which lead to inaction to or complicity with perpetrators of UCG's sometimes make the cohesive impact of the AU response redundant¹⁶⁹

Third the absence of, and in a few cases failure to sustain, governmental structures that allow for effective free and fair change of governments fuels the commission of UCG's. As **Hutchful** points out; closed democratic space and structural barriers preventing political competition through constitutional means have resulted in the 'democratisation of violence' and the rise of non-state formations such as rebel groups, insurgents and rebellions. Electoral processes have been reduced to rubberstamping exercises with predetermined victors. Democratic processes must not be made so redundant that those desiring to contest for power have no other option than to grab it violently. More so, relations between governments and their armies should ordinarily be balanced. Like any other governmental department the military is a body of the state and not the government. It must maintain some level of autonomy. It must not be an instrument of the government to stay in power or be the government itself.

5.2 Recommendations

There are a number of reasons for suggesting a regionally driven solution to UCG's. First, the interest of fellow African states in preventing political upheavals in another state is legitimate. The relationship between Zimbabwe and South Africa is an example of how political and economic upheavals can destabilise neighbouring countries.¹⁷⁰ Hence pre-empting such instability by fostering democracy is justified. Second there is an assumption that regional organisations have genuine interest in resolving crises that erupt on the territories of

¹⁶⁸ The liberation of the African continent from the yoke of colonialism resonates of this assertion.

¹⁶⁹ The response of the Mauritanian coup-plotters to the sanctions as explained earlier is instructive on this.

¹⁷⁰ Thousands of Zimbabwean political refugees and economic migrants have settled in South Africa leading to xenophobic attacks and increased criminal activities.

member states.¹⁷¹ There is no agenda for neo-colonialism or suspicion of other interests besides fostering democracy.

Third, the African Renaissance is shaped by the concept of formulating ‘African solutions for African problems.’¹⁷² At the same time policy specialists are advocating governance strategies involving multiple actors and strategies moving away from solutions that are based on national sovereignty,¹⁷³ arguing that moving such authority from the internal sovereignty of states to an era of ‘global public policy’ in economic governance will place responsibility into the hands of actors with the ability and who are best placed to exercise them.¹⁷⁴ The same could be argued for political governance. A regionally driven agenda to ensure democratic governance could best ensure better success than country-oriented strategies. The AU may need to do the following:

5.2.1 Complete Ratification of the ACDEG

The first step of commitment is for AU member states as a whole to ratify the ACDEG. Ratification indicates the intention to be bound by the provisions and the decisions that come with the implementation of the ACDEG. Ratifying the ACDEG will provide a solid base for African states to effectively defend basic constitutional principles that affect their democratic rule. For instance, in 2009 an independent Honduras Supreme Court successfully ordered the removal of its President (Manuel Zelaya) from office for his attempts at amending the Constitution to remove provisions on presidential limits.¹⁷⁵ The Court based its decision on the Constitution itself which only allows fundamental changes to the constitution through a national

¹⁷¹ K Aning ‘The African Union’s Peace and Security Architecture: Defining an emerging response mechanism’.

¹⁷² M Samb Fundamental issues and practical challenges of human rights in the context of the African Union 15 Ann. Surv. Int’l & Comp. L. (2009) 74.

¹⁷³ K W Abbott ‘Toward a Richer Institutionalism for International Law and Policy’ Journal of International Law & International Relations Vol. 1(1-2) 18 .

¹⁷⁴ W H Reinicke, *Global Public Policy: Governing Without Government?* (Washington, DC: Brookings Institution Press, 1998) at 64-5 (incongruence of economic and political ‘geography’), 85-90 (global public policy).

¹⁷⁵ M A Estrada, ‘Honduras’ non-coup’, The Los Angeles Times (July 10, 2009) A29.

referendum approved by the legislature (the Congress) and not the executive (the President).¹⁷⁶ The Constitution only allows Presidents to serve a single term and any attempts to change that basic rule results in the removal from office of the one who tries to change it.¹⁷⁷ The decision of the Supreme Court came about at the request of the Honduran Attorney General initially to warn the President to stop his attempts at holding the referendum and when he ignored that Court order, ordering his removal by the military as affirmed by the Congress and replacing him with a constitutional leader.¹⁷⁸

The ability of the different bodies in Honduras; namely the judiciary, the prosecution in the form of the attorney general, the legislature and the military to serve their constitutional roles independent of each other and of the executive is a vision that Africa aspires to make a concrete achievement through the ACDEG. The AU must ensure that regional commitments filter down to the national level by monitoring, enforcing and censuring in an open and inclusive manner offending states. The fear that the rampant abuses of power that they are currently exercising and enjoying without censure will be curtailed, probably explains the reluctance of some African Governments to ratify the ACDEG or to make the implementation of the framework on UCG's stronger and more effective. To date only fifteen states including Mauritania, Ethiopia, Sierra Leone, Ghana, Lesotho, Rwanda and Cameroon have ratified the ACDEG.

5.2.2 Expanding the definition of UCG's

The definition of UCG's must not be restricted to that within the Lomé Declaration and the ACDEG only. Public declarations or pledges of support by the army to civilian governments and manifestly flawed elections should be part of the definition of UCG's.¹⁷⁹ The former because it compromises a branch of the government that should pledge its support and protection

¹⁷⁶ M A O'Grady, 'Honduras defends its democracy', *The Wall Street Journal* June 29, 2009 A11.

¹⁷⁷ Article 239 of the Honduras Constitution.

¹⁷⁸ D B Gatmaytan 'Can Constitutionalism Constrain Constitutional Change?' 3 *Nw. Interdisc. L. Rev.* 22 2010.

¹⁷⁹ J Hatchard & others *Comparative constitutionalism and good governance in the commonwealth: An Eastern and Southern African perspective* (Cambridge: Cambridge University Press, 2004)24.

to the state and not a particular ruling government and the latter because it stifles real participation. Both scenarios have been used by incumbents to stay in power.¹⁸⁰

Incorporating these elements will test the commitment of incumbents to implement provisions that work against them. Given the evolving nature of the response there is hope the framework is not mere window dressing. The AU must therefore adopt a protocol to the ACDEG adding these forms of UCG's to the definition.

5.2.3 Developing a basic constitutional framework for Africa

In relation to constitutional amendments, a safe conclusion would be to say that states must be judged according to the standards they set in their own constitutions since currently there are no international standards anywhere in the world on constitutionalism. However it is a fact that certain variables of constitutionalism must not be abrogated from within a democracy. It is also a fact that such abrogation is rampant within AU member states. The culture of the AU has been to set broad parameters which states must follow. However the progressive nature of the response requires a narrowing of these parameters to be almost prescriptive. Innovations such as the African Governance Architecture indicate the AU is moving from setting collective norms to consolidation, implementation and standardisation.¹⁸¹

The AU should set up a framework that will guide its response to constitutional amendments. **Ojwang** and **Franceschi** point out there are some basic elements that must be contained in the document of a constitution for it to guarantee constitutional rule. They cite among others procedural stability, division of power and representation. Procedural stability would speak to issues of certainty in the way things are done.¹⁸² Hence where a constitution prescribes a four year term as the presidential limit then the expectation is that a new President shall be elected every four years. Division of power would impute demarcations of responsibilities hence the

¹⁸⁰ The pledge by the three leaders of the Defence forces, the air force and the prison services of Zimbabwe to support Robert Mugabe and never to salute the Opposition leader Morgan Tsvangirai if he ever came into power is one such example.

¹⁸¹ Interview with Mr Ayangac

¹⁸² Ojwang & Fransceschi

role of the different bodies in the governance of a state would be clearly defined, protected and respected. The judiciary should be able to exercise its role without fear or favour and its decisions should be respected or else challenged through the proper legal channels. This also means that the role of Parliament must be clear and that role should not be interfered with by the executive through abuse of procedures on the dissolution of parliament.

The essence of a constitution in relation to democracy and good governance is that a constitution sets the framework for the establishment of a government with adequate authority to govern but not to give excess powers that could be prone to abuse.¹⁸³ In its framework the AU declares that constitutions are there to protect democracy, the rule of law and human rights. To determine whether constitutional amendments infringe principles of democratic change of government then one must look at the objective, purpose and true intention of having specific provisions in the Constitution. However justified or however wide the popular support for some constitutional changes may be, if they place democracy under threat then they must not be executed.

Some will argue that the creation of constitutional values at the regional level is a preposterous idea. **Finnemore** argues that states can learn new norms from international institutions and the international institutions can instruct states in what they should want.¹⁸⁴ Regional organisations have the ability to foster democracy and democratic transitions through institutional techniques in which they tie the hands of leaders at the regional level to implement certain values at the national level. It is also an established principle of international law that every organisation has, as of right, the authority to demand that its members comply with the obligations that they incurred when they joined the organisation if doing so is in the interest of the proper functioning of the organisation.¹⁸⁵ The AU has a basis for prescribing constitutional values to its members because doing so promotes democratic governance and discourages UCG's. These are two of the founding principles that shape the identity of the AU in its founding document; the Constitutive Act.

¹⁸³ I Currie & J de Waal 'The Bill of Rights Handbook' (2005) 8.

¹⁸⁴ M Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) 12.

¹⁸⁵ *Acquisition of Polish Nationality* (Reparations case) International Court of Justice 174 & 184.

This then brings this discussion to the **Basic Structure** doctrine. This doctrine was first expounded by the Supreme Court of India in the *Kesavananda* case.¹⁸⁶ The principle behind the doctrine was that certain provisions within the Indian Constitution were inviolable and could not be amended. If the substantive impact of the amendment contradicted the spirit of the constitution, even with Parliament following the normal amendment procedures, the Court would strike it down. In other words the Court exercised supremacy over Parliament by declaring that even though Parliament had the mandate to amend statutes including the Constitution; they could not do so if the effect of such amendments altered ‘the basic structure of the constitution.’ Although the judges of the Supreme Court of India could not agree on what components made up the basic structure of the Indian Constitution they raised pertinent elements that are fundamental to a democracy. These included; *supremacy of the constitution, maintenance of the separation of powers, the democratic character of the policy, essential features of individual freedoms, the provision of socio-economic and political justice, equality of status and opportunity and liberty of thought, expression, belief, faith and worship.*

These basic tenets can be the starting point upon which the AU can develop the model constitution. States must conform to this standard and not provide any less in their constitutions. When a government amends a constitution such an amendment must have a purpose. That purpose must not be to take away the protection of human rights or drastically and negatively change the form of government. It must not neutralise the extent to which the balance of powers between branches of government is protected. In the language of the seven judges of the Supreme Court of India ‘the power to amend a constitution should and does not mean the power to alter the basic structure of the constitution so as to change its identity.’¹⁸⁷

The basic structure doctrine questions the constitutionality of certain constitutional amendments. In other words, it uses the spirit and purpose of a constitution as a yardstick to assess the appropriateness or lack thereof of a constitutional amendment. The principle behind the doctrine is important for the AU to use in identifying constitutional amendments that fit the description of ‘infringements of principles of democratic governance’ and constitute

¹⁸⁶ *Kesavananda Berati v The State of Kerala*

¹⁸⁷ S Krishnaswamy: *Democracy and constitutionalism in India: A study of the basic structure doctrine* (2009) 244.(publisher)

unconstitutional changes. The general agreement amongst scholars who support the phenomenon of unconstitutional-constitutional changes is that any amendment which is significantly inconsistent with the existing constitution sought to be amended¹⁸⁸ or an amendment that goes against the 'spirit' of the constitution is invalid and must not stand.¹⁸⁹

The aim is to promote constitutionalism; being the idea that a government's powers should derive from and be limited by a constitution.¹⁹⁰

5.2.4 Establishing a Constitutional Chamber within the ACJHR

At the municipal level the judiciary is supposed to be a critical and strategic watchdog of the legitimacy and legality of government actions. Courts ought to scrutinise government actions violating human rights and constitutional amendments that infringe democratic principles. Courts have the mandate to disregard and declare actions unconstitutional. National courts however seldom function in this effectively. Judiciaries are compromised by partisan appointments.

It is from this standpoint that I find a structural solution to the implementation of the framework on UCG's to be the transcendence of the AU from an intergovernmental organisation into a supranational body. This task requires the evolution of structures and culture over time. The immediate solution would be to enable existing institutions to have that supranational character. The AU has pledged to create a criminal chamber within the African Court as a reflection of their commitment to ending impunity for heinous crimes. They can also create a constitutional chamber as a commitment to end unconstitutional changes. That chamber will develop jurisprudence that enhances democratic change of government. It must exert pressure on perpetrators of UCG's to succumb to the will of the people. This idea is not premised on an ideal situation in which African leaders are willing to cooperate with a court whose decisions they do not like. It is rather a pragmatic solution aimed at developing effective

¹⁸⁸ R G Wright, 'Could a Constitutional Amendment be Unconstitutional?' 22 LOY. U. CHI. L.J. 741-64 (1991).

¹⁸⁹ R Albert, 'Non-constitutional Amendments', 22 CAN. J.L. & JURIS. 5-6 (2009).

¹⁹⁰ Ibid Currie & de Waal

remedies for victims of UCG's. It creates the carrot and stick scenario which sanctions states and has cohesive effect. The court should have the ability to impose and execute fines, redeemable from the personal accounts of perpetrators of UCG's and or even to reimburse states for all economic losses suffered during the period of upheaval. In this, the cooperation of international partners will be required.

Some will question the feasibility of this Chamber. With the view in mind that the provisions in the framework on UCG's are not merely targeted at heads of states who seek to extend their terms of office but are there to further democratic governance, African states stand to benefit from the development of a culture of democratic governance. An example of this is the Central American Integration System (SICA). They developed a Central American Court of Justice (CCJ), which has jurisdiction over complaints regarding issues such as constitutional amendments.¹⁹¹ Among the cases that the Court has adjudicated upon is the petition brought to it by the Nicaraguan President Enrique Bolafios. The complaint alleged that the Nicaraguan parliament sought to effect amendments that would limit the President's powers. Such an amendment violated the prescribed amendment procedures and undermined the principle of separation of powers. The Court held in favor of the President, arguing that the proposed amendments could overhaul the system of government and pose security and stability threats to the democratic processes within Nicaragua and the whole region. The ability of the Court to make this decision was largely a consequence of its independence. If the AU designs a similar structure based on principles of the AU with regard to the independence of the judiciary¹⁹², then all stakeholders, incumbents, legislatures, independent observers, civil society and the general public included will have a forum to complain against an UCG.¹⁹³

¹⁹¹ The Court is a part of the Treaty Framework of the Central American States fostering democratic security.

¹⁹² As contained in the African Commission Resolution on the Respect and the Strengthening of the independence of the judiciary Adopted by the African Commission during its 19th Ordinary Session at Ouagadougou, Burkina Faso (1996).

¹⁹³ S Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 468 (2008).

5.2.5 Pairing legal solutions with dialogue

The AU should adopt a multi-dimensional approach. The framework lays out the consequences of not conforming to the framework, such as positive and negative sanctions, naming and shaming. However the greater level of commitment is in bringing the political leadership to an understanding that it is in their interest to implement the framework. Through dialogue, confidence in the system is built. Dialogue creates a sense of ownership of processes. Coercive means of achieving results sometimes have the same effect as contracts concluded under duress. They do not invoke a deep sense of commitment in the players and hence are easily breached. This therefore makes the POW a very important actor within the AU response, fostering a culture of dialogue to encourage constitutional changes.

5.2.6 Developing and consolidating a culture of democracy

The AU intervention and approach towards UCG's should be driven by the understanding that democratisation is a process not an event. The response should therefore aim to push states to promote a healthy competitive environment allowing for democratic changes of government. Developing such a culture will address the societal forces that sometimes work against the fruitful implementation of the framework on UCG's. A democratically conscious society will demand accountability from its leaders and will not allow regressive developments to occur within their policy.

5.3 Conclusion

Combining the evolving CEWS within the PSC with the new Constitutional Chamber, the AU will build a formidable response. One envisages a response that is as follows. The CEWS will identify potential situations of instability. The POW will attempt to prevent the threat turning into an UCG though dialoguing with the relevant actors reminding them of the commitments in the norms. When mediation efforts fail to prevent the UCG from being perpetrated then the matter can be referred to the Constitutional Chamber. The finding of the Chamber must link to the PSC to impose sanctions on the perpetrators, pass a motion of non-recognition of the government and suspend them from the AU. As was the case in the Comoros, where the UCG is done violently then the AU SBF can intervene to restore legitimate order. This is the envisaged response to UCG's in the future.

One would ask why incumbents, rebels, mercenaries and coup-plotters should adhere to a framework that seems to want them out of power and weakens their political influence. The response is that it is in their interest to do so. The framework protects ideals and not individuals. It therefore ensures security of office for whoever is in authority at a given time and promises the same for aspirants if their ascension to power is constitutionally legitimate. The responsibility now lies with the AU to use the existing framework, consistently. The continued evolution of the response is a welcome development allowing for innovative protection of democratic ideals in an environment fraught with many challenges.

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