

**Fighting unconstitutional changes of government or merely
politicking? A critical analysis of the African Union response.**

**Submitted in partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa) Faculty of Law, Centre
for Human Rights, University of Pretoria**

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PLAGIARISM DECLARATION

I, Rumbidzai Dube, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

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DEDICATION

I dedicate this work to my father who has always been my pillar of strength. It is him who cultivated within me an appreciation of history, past and present. This Masters has cemented that appreciation. Thank you Baba. I will always strive to make you proud.

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
APRM	Peer Review Mechanism
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
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
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

1 Introduction

1.1 Background

The transfer of power to African leaders, at the end of the colonial era gave birth to authoritarian regimes.¹ 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 of 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.²

One scholar, Kufuor, argues that the overarching, constant and noticeable feature when one assesses African politics is the 'rarity of constitutional change in government.'³ It is mostly in Africa that political leaders 'unilaterally alter constitutions, bully weak legislatures and judiciaries and openly manipulate and rig elections.'⁴ 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 1998.⁵ Seventy-eight of these took place between 1961 and 1997.⁶ 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 conflict in which individuals or groups fought and continue to fight for power using unconstitutional and undemocratic means. Violent seizures of power have exposed populations to suffering and massive violations of human rights.

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

¹ JA Wiseman 'Democracy and the new political pluralism in Africa: causes, consequences and significance' 14 Third World Quarterly, 3 (1993) 439.

² Wiseman (n1 above) 439.

³ KO Kufuor 'The AU and recognition of governments in Africa: Analysing its practice and proposals for the future' 17 American Universal International Law Review (2001-2002)369.

⁴ NJ Udombana 'Can the leopard change its spots? The African Union Treaty and Human Rights' 17 Am. U. Int'l L. Rev. (2001-2002) 1222.

⁵ M van der Linde 'Emerging Electoral Trends in the Light of Recent African Elections' International African Human Rights Law Journal (2000) 127 &128.

⁶ 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.

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)⁷ and the Constitutive Act of the African Union (the Constitutive Act).⁸ The third instrument dealing with UCG's; the African Charter on Democracy, Elections and Governance (ACDEG) has not yet come into force.⁹ The Ezulwini Framework document on improving the AU response to UCG's, developed recently by the Peace and Security Council (PSC) is hoped to instrumentally improve the quality of the response.¹⁰

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.¹¹ The ACDEG adds onto the definition of UCG's 'any amendment or revision of the constitution or legal instruments contrary to principles of democratic change of government.'¹²

UCG's are often characterised by forceful and violent seizure or resumption of power by individual civil or/and military figures' who circumvent or completely do away with pre-defined democratic procedures to obtain or retain power.¹³ 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 are suspended or ignored upon the commission of UCG's, coups in particular.¹⁴ UCG's

⁷ 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.

⁸ 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.

⁹ Adopted in Addis Ababa, Ethiopia by the 8th Ordinary Summit of the AU in January 2007 but has not yet entered into force.

¹⁰ 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

¹¹ See definition in the Lomé Declaration.

¹² ACDEG Article 23(5) .

¹³ 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.

¹⁴ W Sonyika "We the people-our dignity and the constitution' in *Constitutionalism and society in Africa* (2004) 160.

therefore undermine efforts to improve the realisation of civil and political as well as social and economic rights.¹⁵

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 2000-2010), the AU has had to contend with 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.¹⁶

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 castigating the latter exposes them and puts 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

¹⁵ Articles 4, 5, 6, 9, 10, 11 and 13 of the African Charter respectively.

¹⁶ Institute for Security Studies 'A critical assessment of security challenges in West Africa'
< <http://www.iss.co.za/uploads/18Oct2010WestAfrica.pdf>> (accessed 21 October 2010).

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.¹⁷

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.¹⁸ 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.¹⁹ 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 so emasculated that they are almost useless,²⁰ 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.”²¹

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.

¹⁷ KW Abbot 'Toward a Richer Institutionalism for International Law and Policy' (year) 1 Journal of International Law & International Relations (1-2) 33.

¹⁸ EF Quashigah & OC Okafor 'Legitimate governance in Africa: the responsibility of the international community' (1999) 464.

¹⁹ Udombana (n 4 above) 1264.

²⁰ Udombana (n 4 above) 1263.

²¹ <<http://www.crisisstates.com/download/wp/wpSeries2/WP57.2.Moller.AU.pdf>> (accessed 12 October 2010).

1.2 Problem statement

Additional to the fact that the normative framework on UCG's is 'scattered apart like the pearls of a snapped necklace',²² this study is sceptical about the possibility that the response of the AU to UCG's will achieve tangible results in pushing the democratisation agenda on the continent without real effective commitment. AU 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 endeavours to address these concerns.

1.3 Preliminary 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'.²³ 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'.²⁴ 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 2007.²⁵ 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, 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.²⁶

²² Udombana (n 4 above) 1270.

²³ 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.

²⁴ Udombana (n 23above) 92.

²⁵ CA Odinkalu 'Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government' Open Society Justice Initiative in Africa (January 2008).

²⁶ ML Ajong 'African Charter on Democracy, Elections and Good Governance: Changing Times or another Mirage? The Seriousness of a Challenge.'

Ajong argues 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.²⁷ 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, 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 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.²⁸ McMahon poses the question whether the AU 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.

1.4 Significance of the study

This study interrogates the nature and impact of the AU response to UCG's from a legal but also social dimension. The study appreciates that addressing the symptoms and not the causes of UCG's may only drive the democratisation agenda up to a certain point. 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 insightful manner on the dangers of failing to address these fundamentals to be more effective..

1.5 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

²⁷ 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).

²⁸ 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.

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, 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. Unstructured interviews were conducted with AU staff and embassy representatives.

This discussion is premised within the realm of international law. It is therefore trite to understand the principles and rules of international law regarding its sources to address methodological inquisitions 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. These are international conventions, international custom, 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.²⁹

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 agreement 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.³⁰ 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 or not binding is determined by its status in the hierarchy of sources. That status in turn determines whether

²⁹ D Kennedy 'The Sources of International Law' (1987) 2 Am. U. J. Int'l L. & Pol'y 3.

³⁰ J Starke *An introduction to International Law* (1977) 457.

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.³¹

The ACDEG has not yet come into force.³² When it does it shall be the focal binding instrument prescribing norms and methods of responding to UCG's. However in the absence of the required number of ratifications, African states must still respect its provision. The 53 member states of the AU unanimously adopted and signed the ACDEG.³³ 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 object and purpose of the treaty.'³⁴ 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.

1.6 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.

1.6.1 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.³⁵ 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 people]³⁶

Others define 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.³⁷ Lindberg defines democracy as

³¹ VCLT Article 11.

³² Article 48 'This Charter shall enter into force thirty (30) days after the deposit of fifteen (15) instruments of ratification.'

³³ 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) xi.

³⁴ VCLT Article 18.

³⁵ OA Obilade 'The idea of the common good in legal theory' in IJA Motola (Ed) *Issues in Nigerian Law* (1990).

³⁶ 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).

...an attribute of a political system [whose] core value...is...self-government...and [whose] three necessary attributes are equality of political participation, free political competition and procedural legitimacy.³⁸

Although there are many definitions of 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.³⁹ 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 outrightly 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 fulfilment 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.⁴⁰ 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 Democratic Republic of Congo, Uganda and Sudan resulted in increased perpetration of sexual violence against women,⁴¹ recruitment of child soldiers⁴² and starvation of millions⁴³ respectively.

³⁷ A Przeworski *Democracy and the market: Political and economic reforms in Eastern Europe and Latin America* (1991)10.

³⁸ S I Lindberg *Democracy and Elections in Africa* (2006) 21

³⁹ Lindberg (n 40 above) 21.

⁴⁰ 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.

⁴¹ Institute for war and peace reporting 'Sexual Violence in the Democratic Republic of Congo' <<http://www.ceipaz.org/images/contenido/Sexual%20violence%20in%20the%20Democratic%20Republic%20of%20Congo.pdf>> (accessed 18 October 2010).

⁴² World Vision 'Northern Uganda Crisis Caution: children at war'

< <http://www.worldvision.org/content.nsf/learn/globalissues-uganda> > (accessed 12 October 2010)

⁴³ J Prendergast 'Obama must halt starvation in Darfur'

< http://www.realclearpolitics.com/articles/2009/03/obama_must_halt_starvation_in.html> (accessed 21 September 2010)

1.6.2 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.⁴⁴

1.6.3 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.”⁴⁵ 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.’⁴⁶

1.7 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.

1.8 Delineation of the study

This study shall focus on case studies between 2000 and 2010, 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 AU ought to have responded. Rather, it will focus on a few cases which best illustrate the orientation of the AU response.

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.

⁴⁴ Sonyika (n 14 above) 162.

⁴⁵ T Vanhannen *Prospects of democracy: A study of 172 countries* (1997) 31.

⁴⁶ 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.

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 1

This chapter shall provide the background and basic structure of the study including the methodology, literature review, limitations, delineation and significance of the study.

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 presents 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 Mauritania, Madagascar, Guinea Conakry, Kenya and Zimbabwe 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 presents 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 agenda 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

This chapter presents the author's conclusions. It gives recommendations on how the AU can maximise the framework to strengthen the response to UCG's.

Chapter Two

2 The framework

2.1 Introduction

The framework consists of three elements. First is the definition of unconstitutional changes, second are the means prescribed to respond and third are the institutional actors mandated to implement the measures. 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.⁴⁷ 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.⁴⁸ 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 interconnectedness 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 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 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.⁴⁹ In the Algiers Declaration⁵⁰ and the Declaration on the Principles Governing Democratic Elections in Africa,⁵¹ the unacceptability of coups was concretised. They were viewed as 'anachronistic

⁴⁷ OAU Charter Article 3 (2).

⁴⁸ M Samb 'Fundamental Issues and practical challenges of human rights in the context of the African Union.' (2009) 15 Ann. Surv. Int'l & Comp. l61.

⁴⁹ Decision AHG/ Dec. 137 (LXXV).

⁵⁰ Algiers Declaration on Unconstitutional Changes of Government OAU Doc. AGH/Dec (XXXV) 1999.

⁵¹ 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.

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 lays foundations for the establishment of democratic governance on the continent.⁵²It was necessitated by the OAU member states' concern towards the resurgence of coups in Africa.⁵³ 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.⁵⁴

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.⁵⁵ They include 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 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.'⁵⁶ 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,

⁵² KF Kufuor 'The AU an the recognition of governments in Africa: analysing its practise and proposals for the future'17 Am. U. Int'l . L. Review (2002—2003) 393.

⁵³ Para 2.

⁵⁴ Para 6.

⁵⁵Para 10.

⁵⁶ Para 3.

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 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 introduced 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

⁵⁷ Gawanas (n 43 above) 139.

⁵⁸ Article 3(g).

⁵⁹ Article 4 (m) & (p).

⁶⁰ t Article 30.

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

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

The Constitutive Act provides for the establishment of the Pan-African Parliament (PAP)⁶⁴ as an advisory body in promoting the principles of human rights and democracy in Africa.⁶⁵ 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."⁶⁶ 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.

2.3.3 The Protocol on the PSC

The PSC was established with the mandate to prevent, manage and resolve conflicts.⁶⁷ The PSC's objectives include anticipating and preventing conflict, peacemaking and peace-building through diplomatic and coercive means.⁶⁸ It also seeks to 'promote and encourage democratic practices, good governance and the rule of law...'.⁶⁹ 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

⁶² Article 4(h).

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

⁶⁴ 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.

⁶⁵ Article 3(2).

⁶⁶ Article 11(1).

⁶⁷ 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

⁶⁸ Articles 2, 3(b) & 6.

⁶⁹ Article 3(f).

discretion to apply these means to situations of both potential and actual conflict.⁷⁰To fulfil its functions, the PSC can institute sanctions in consultation with the Chairperson of the AUC.⁷¹

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.⁷² The Ezulwini document extrapolates elements of the ACDEG. The Preamble acknowledges UCG's as a setback on the democratisation processes but also as a threat to peace and security on the continent.⁷³ 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.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ The Chairperson of the AUC is mandated to oversee the implementation of the framework.

⁷⁰ Article 9(1).

⁷¹ Article 7 (g) & (l).

⁷² 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.

⁷³ Similar to Para 8, ACDEG Preamble.

⁷⁴ Para 5.

⁷⁵ Similar to Articles 25 (4) & (6) of ACDEG.

⁷⁶ Para 6 (ii) (b) & (d).

⁷⁷ Para 6 (iii) b.

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.

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 dependant 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.⁷⁸ 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.⁷⁹ 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.⁸⁰ Usually in a case of constitutional transfer of power such

⁷⁸ 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.

⁷⁹ TM Franck *The power of legitimacy among nations* (1990) 3.

⁸⁰ 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 practise 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 1966.⁸¹ 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.⁸² 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.⁸³

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.

2.5. Conclusion

The framework is a comprehensive intervention which needs backing by practice..⁸⁴ 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 through interfering in the internal affairs of member states. The Ezulwini framework takes a bold step to create an immediate solution to the non-ratification of ACDEG by extrapolating parts of it that strengthen measures of responding to UCG's.

⁸¹ Kufuor (n 57above) 372.

⁸² Kufuor (n 57 above) 379.

⁸³ Kufuor (n57 above) 383.

⁸⁴ Gawanas (n 43 above) 139.

Chapter Three

3 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.⁸⁵ 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 with abhorrence to coups being a consistent tenet.

3.2 Case Studies

The following examples endeavour 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 of brevity 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.

3.2.1. Mauritania

On 6 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 Aziz.⁸⁶ 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

⁸⁵ 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>> (accessed 21 October 2010).

⁸⁶ "Coups leaders form new state council in Mauritania". France 24. 2008-08-06. <http://www.france24.com/en/20080806-president-prime-minister-arrested-apparent-mauritania-coup-soldiers&navi=MONDE> (accessed 6 February 2010).

suspected terrorists.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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 25 2006, the AU engaged the coup leaders to restore a constitutional government.⁹⁰ A month later the PSC released a statement demanding the former President; Abdallahi's "unconditional restoration" by 6 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 2007.⁹¹ In response to this statement the members of Parliament supportive of the coup announced on 26 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 mayors and the majority of people support[ed] the changes of 6 August "⁹² The leader of the coup, Abdel Aziz, also rejected the AU PSC's demand.⁹³

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

⁸⁷ 'Mauritanian Junta: A year of Empty European Condemnation' Can Europe sanction Mauritania with its new oil finds? Monday 24 November 2008 <<http://www.afrik-news.com/columnist1641.html>> (accessed 27 October 2010).

⁸⁸ On 7 August 2008, a day after the coup in Communiqué PSC/PR/Comm. (CLIV).

⁸⁹ PSC/MIN/Comm.2 (CLI) Para 4 & 6.

⁹⁰ 'Al-Qaeda denounces Mauritania's 'infidel' military junta: report', AFP, August 25, 2008 <<http://afp.google.com/article/ALeqM5h3Y4v950M3sDatRltzZNX8R03glQ>> (accessed 6 February 2010).

⁹¹ PSC/PR/Comm (CLIV).

⁹² "Pro-coup lawmakers in Mauritania reject AU ultimatum", AFP, September 26, 2008 <<http://afp.google.com/article/ALeqM5hNzLtlwuchBmUX1ZtUFLyvHZxw>> (accessed on 6 February 2010).

⁹³ "Mauritanian coup leader rejects AU ultimatum", AFP, September 27, 2008 <<http://afp.google.com/article/ALeqM5iAPV5wvH4evDM3CelqAtlDNbs9zQ>> (accessed on 6 February 2010).

processes in Africa."⁹⁴ 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 5 February 2009 as the deadline by which they ought to have restored constitutional rule or else face sanctions.⁹⁵ The sanctions applied to members of the High Council of State, the government and any other persons whose conduct supported the coup government.⁹⁶ 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.⁹⁷ The interventions of the AU also faced the socio-structural challenges that the military government had obtained effective control over the territory and had the support of the people.

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 "mark[ed] 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."⁹⁸

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.⁹⁹ 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.¹⁰⁰ 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

⁹⁴ Report of the Chairperson to the African Union Commission PSC/MIN/3 (CLXIII) Para 41.

⁹⁵ PSC/MIN/Comm.3 (CLXIII) Para 9, this decision was affirmed in February 2009 in PSC/PR/ (CLXVIII) Para 2.

⁹⁶ PSC/PR/COMM (CLXXXII) Para 4.

⁹⁷ K Aning 'The African Union's Peace and Security Architecture: Defining an emerging response mechanism' (2008)) 7 Lecture series on African Security 3 Kofi Annan International Peacekeeping Training Centre, Accra, Ghana <<http://www.nai.uu.se/research/nai-foi%20lectures/calendar2009/aning.pdf>> (accessed 22 October 2010).

⁹⁸ PSC/PR/BR (CLXXIX) Para 3.

⁹⁹ PSC/PR/Comm. (CCVIII) .

¹⁰⁰ PSC/PR/BR (CLXXIX) Para 4.

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 outcome agreements of the summit. This then led to the decision by the AU PSC to impose sanctions on the Rajoelina government.¹⁰¹ 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.¹⁰² They also included the freezing of 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.¹⁰³ The third aspect of the sanctions was to be the diplomatic isolation of the de facto authorities. The AU urged 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.¹⁰⁴ One wonders 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.

3.2.3Guinea Conakry

Following the coup d'état in Guinea Conakry (Guinea) on 24 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.¹⁰⁵ Two days later, on 26 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.¹⁰⁶

¹⁰¹ 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).

¹⁰² Para 8(i).

¹⁰³ Para 8(ii).

¹⁰⁴ Para 8(iii).

¹⁰⁵ PSC/PR/Comm. (CLXIV) .

¹⁰⁶ PSC/PR/Comm. (CLXV) .

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.¹⁰⁷ 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 Captain Camara and all other individuals in support of his position.¹⁰⁸ Eventually constitutional rule was restored with the holding of elections although the process could have been expedited with more cohesive means.

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. Whereas the elections were held on 27 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 Kenyan stability was compromised.¹⁰⁹

Even then the response was an expression of concern over the violence in Kenya and its consequent results.¹¹⁰ The closest an 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."¹¹¹ The PSC then urged a resolution through the power-sharing agreement.¹¹² The PSC even acknowledged the Presidential status of the disputed winner, Mwai Kibaki.¹¹³

¹⁰⁷ PSC/PR/BR (CLXXXIII).

¹⁰⁸ PSC/PR/Comm. (CCIV) which decision was confirmed in PSC//AHG/COMM.2(CCVII) Para 4.

¹⁰⁹ 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.

¹¹⁰ PSC/PR/BR (CIX) .

¹¹¹ PSC/PR/BR (CIX) Para 7.

¹¹² The Agreement on the Principles of Partnership of the Coalition Government which then solidified into the National Accord and Reconciliation Act of 2008.

¹¹³ PSC/PR/BR (CXIII).

The Assembly expressed concern with the perpetration of violence against the civilian population of Kenya.¹¹⁴ 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.¹¹⁵

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 29 March 2008 Zimbabweans went to the polls to elect their President, 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 27 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 fraud but 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.¹¹⁶

¹¹⁴ Decision on the situation in Kenya following the presidential election of 27 December 2007 Assembly/AU/Dec.187 (X) 2008.

¹¹⁵ Decision on the situation in Chad Assembly/AU/Dec.188 (X) 2008.

¹¹⁶ The negotiations were facilitated by the then Chairperson of SADC and President of the Republic of South Africa, Thabo Mbeki.

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 that 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 property¹¹⁷ that characterise African politics,¹¹⁸ 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 discovered that the protocol register, which lists how many voting books were used and the numbers, was missing.¹¹⁹

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 concern 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,"¹²⁰ since the GPA

¹¹⁷Teodoro 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.

¹¹⁸ The recent incidents in Niger where the incumbent President Mamadou Tandja changed the Constitution so he could have another term in office. <http://www.guardian.co.uk/world/2010/feb/19/niger-military-junta-coup>

¹¹⁹ D Matyszak 'Another inconvenient truth' A complete guide to the recount of votes of votes in Zimbabwe's harmonised elections' (2008)15 Research and Advocacy Unit < www.kubatana.net>.

¹²⁰ 'Prime Minister's Maiden Speech to Parliament' 4 March 2009
<<http://www.zimdaily.com/news/pm7.6977.html>> (accessed 17 May 2010).

committed the parties to "...the democratic values of justice, fairness, openness, tolerance, equality, respect for all persons and human rights,"¹²¹ and to "adhere to the principles of the rule of law."¹²² This has however not been the case.¹²³

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.¹²⁴ Again the appearance of an AU that promotes incumbency rather than democracy is magnified.

3.2.6 Niger

On 19 February 2010 the military junta, calling itself the Supreme Council for the Restoration of Democracy (CSRD), staged a coup against President Mamadou Tandja and his ministers.¹²⁵ 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 and resulted 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.¹²⁶ 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."¹²⁷ The President became the head of the army, had the prerogative to name the Prime Minister and had complete control over the cabinet.¹²⁸ 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

¹²¹ GPA Preamble Para 7.

¹²² GPA Article 11.1(b).

¹²³ With continued reports of human rights violations on farms, against women political activists and human rights defenders see <www.rau.org.zw>.

¹²⁴ The Colonel had taken over power after the disputed outcome of the June 2007 elections.

¹²⁵ D Smith 'Military Junta seizes power in Niger coup' <http://www.guardian.co.uk/world/2010/feb/19/niger-military-junta-coup> (accessed 3 July 2010).

¹²⁶ 1999 Constitution of the Republic of Niger Article 121.

¹²⁷ Smith (n 179 above)

¹²⁸ Smith (n 179 above)

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 stipulated in Article 136 of the Nigerien Constitution.

On 25 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 that President Tandja could not extend his term in office. The President dissolved the 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 willy-nilly. 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.¹²⁹

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 9 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.¹³⁰ 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. 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.¹³¹ They based their prediction on Niger's

¹²⁹ K Curtis Foreign Policy Blogs Network Feb 20,2010

¹³⁰ Curtis (n183 above).

¹³¹ R Moncrieff, (West African analyst) International Crisis Group (ICG).

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.

The coup, as predicted took place a few days 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 legal 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."¹³²

3.3 Conclusion

The cases above illustrate a pattern of a prompt, forceful and concerted AU intervention where coups or rebellions take place but 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 response to ensuring democratic governance is therefore in question. This brings the discussion to 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 their governments have remained in power by using 'political tricks' keeping the real winners out.¹³³ This is a gross violation of the right of citizens to freely participate in the governance of their own countries.¹³⁴ The AU failed to take cogent steps to entrench this principle in the aftermath of the 2007 Kenyan and 2008 Zimbabwean elections, promoting incumbency as against opposition with Kibaki and Mugabe on one hand and Odinga and Tsvangirai on the other.

¹³² 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 (accessed 13 October 2010)

¹³³ A Lachance' *The road to democracy in Sub-Saharan Africa* < www.idrc.ca/books > (accessed 21 September 2010).

¹³⁴ Guaranteed in Article 13 of the African Charter among other human rights instruments.

Chapter Four

4 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 aptly identifies issues that defeat democratic processes and prescribes solutions. However without practically implementing these provisions, the norms remain mere rhetoric. Real commitment is in actions not words hence the AU 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 governance.¹³⁵ 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 from doing the same.

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 remains so at the time of the completion of this study. 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.¹³⁶ 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.¹³⁷ The rebel movement of Foday Sankoh; the Revolutionary United Front (RUF) of Sierra Leone also comprised dissidents trained in Libya.¹³⁸

¹³⁵ Ebobrah (n 163 above)' 131.

¹³⁶ M Boas 'Liberia and Sierra Leone-Dead ringers? The logical neo-patrimonial rule' 22 Third World Quarterly (2001) 721.

¹³⁷ V Thompson & R Adloff 'Conflict in Chad '(1981) J Wright 'Libya, Chad and the Central Sahara' (1989).

¹³⁸ I Abdulla & P Muana The Revolutionary United Front of Sierra Leone in C Clapham (ed) *African Guerillas* (1998) 175-177.

Despite this background African leaders honoured Colonel Qaddafi with the Chairmanship of the AU between 2000 and 2005, 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.¹³⁹ Questioned by reporters after the 2010 AU summit in Addis Ababa-Ethiopia, the then newly-elected AU Chairperson, Malawi's President Bingu WA Mutharika, 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.'¹⁴⁰ 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 government.¹⁴¹ His report to the press is 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 the pie of leadership.

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 argument borders on Afro-pessimism, the adage 'leadership by example' finds its relevance in these circumstances.

¹³⁹ Decision on the situation in Chad Assembly/AU/Dec.188 (X) 2008.

¹⁴⁰ Voice of America 'New AU Chief Sets Political Stability, Food Security as Priorities' Addis Ababa 02 February 2010 <<http://www1.voanews.com/english/news/africa/New-AU-Chief-Sets-Political-Stability-Food-Security-as-Priorities>> (accessed 30 July 2010).

¹⁴¹ Voice of America (n 177 above)

Second, the CEWS is weak. A response that is reactive and not preventive is bound to fail. The ACDEG which proposes a more comprehensive early warning system has not come into force because the same states that should be driving the process of democratisation have not ratified it. Given the enormous implications that ACDEG will have on improving democracy, good governance as well as peace and security, its non-ratification is a weakness in the AU response.

Third, the PSC 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 is a situation where leaders that hold onto power unconstitutionally are made judge over their own cases. The objectivity of the PSC in imposing sanctions is 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 ludicrousness of offending authorities being given the discretion to impose sanctions on themselves weakens the response. 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 weaken 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. This brings the discussion to 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."¹⁴² 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 ACDEG is an innovative step by the AU aimed at entrenching a culture of peaceful, constitutional and regular change of government through free, fair and transparent elections conducted by independent, competent and impartial regulatory bodies.¹⁴³ It is an invaluable

¹⁴² Udombana (n 4 above) 1177.

¹⁴³ Preamble Para 7.

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 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,¹⁴⁴ 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.¹⁴⁵ The case studies discussed above confirm this assertion. In identifying the interconnectedness between political governance and conflict the ACDEG enables a comprehensive audit of governance trends in Africa. Access to political power has connotations on development patterns in Africa because political control determines resource control.¹⁴⁶ 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.'¹⁴⁷ This element bridges the gap in deficiencies affecting constitutional transfer of power.¹⁴⁸ 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.¹⁴⁹ 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 that 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

¹⁴⁴ Article 2(1), (2) & (4) as read with 3(1).

¹⁴⁵ Preamble Para 8.

¹⁴⁶ G Chamberlain 'Sao Tome coup linked to oil reserves' The Scotsman. (Edinburgh) July 17, 2003.

¹⁴⁷ Article 23(5).

¹⁴⁸ Article 5.

¹⁴⁹ Article 3(2).

the gains that the framework has achieved thus far.¹⁵⁰ 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 popular participation in effecting constitutional amendments. As Young argues, democracy in Africa remains 'in arrested adolescence',¹⁵¹ 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'.¹⁵²

Amendments that remove presidential term limits are common in Africa.¹⁵³ The Zimbabwean Constitution has been amended 19 times since 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.¹⁵⁴ The removal of term limits allows incumbents to become free to rule for as long as they can keep themselves in power. Timely and voluntary relinquishing of power is a crucial aspect of a democratic polity. 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'.¹⁵⁵

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 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,¹⁵⁶ or infringe upon the equality and dignity of all mankind;¹⁵⁷ or oppose values of

¹⁵⁰ C Young 'Competing images of Africa: Democratisation and its challenges' in *Constitutionalism and Society in Africa* 145.

¹⁵¹ Young (n 150 above) 141.

¹⁵² Young (n 150 above) 141.

¹⁵³ Chad referendum June 2005 removed constitutional term limits in, Ugandan Constitution amended 2005 to secure Yoweri Museveni a third term, Niger's amendments resulted in a coup, Cape Verde November 1995 revision increased presidential powers
<<https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html>> (accessed 26 October 2010).

¹⁵⁴ J Hatchard, 'Perfecting Imperfections: Developing Procedures for Amending Constitutions in Commonwealth Africa', 36 *J. Modern African Studies*. 381, 385 (1998).

¹⁵⁵ Soyinka (n 43 above) 160.

¹⁵⁶ C L Kelbley, 'Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality', 72 *Fordham Am. L. Rev.* 1487, 1535 (2004).

¹⁵⁷ J Mazzone, 'Unconstitutional amendments', 90 *Iowa L. Rev.* 1747, 1838-39 (2005).

constitutional democracy are unacceptable amendments and therefore invalid.¹⁵⁸ Pan-African leaders such as former head of state for Tanzania, Julius Mwalimu 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.'¹⁵⁹

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, ACDEG addresses a fundamental gap, emphasising the need to maintain deliverance of human rights obligations by a suspended state notwithstanding its suspension.¹⁶⁰ 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, ACDEG extends the imposition of sanctions on 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.¹⁶¹

Sixth, perpetrators of UCG's are prohibited in ACDEG from holding elections in which they are officially elected into power,¹⁶² what most scholars refer to as auto-legitimation.¹⁶³ Currently there are African leaders who have come to power in that way, first staging an coup then presenting a fallacy of elections in which they were then 'democratically elected. The fact that ACDEG unequivocally rejects them enhances the substance of the AU response.

Seventh, 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,¹⁶⁴ the fact that ACDEG provides for creates the impetus for one of these courts to have that competence..

¹⁵⁸ W F. Murphy, 'An Ordering of Constitutional Values', 53 S. Cal. L. Rev. 703, 754-57 (1980).

¹⁵⁹ J Nyerere 'Good governance for Africa' Paper delivered on 13 October 1998 as Chairman of the South Commission

¹⁶⁰ Article 25(2).

¹⁶¹ Article 14(3).

¹⁶² Article 25(4).

¹⁶³ 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.

¹⁶⁴ Ebobrah (n 163 above)

Chapter Five

5 Conclusions and recommendation

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 should rather be more about setting precedents that are sustainable. A progressive AU response that is operating against a reactionary African polity needs interventions that are innovative. motivating constructive cooperation of all stakeholders including member states, organs of the AU, populations within AU member states and international partners.¹⁶⁵

The response has been evolving with time. The first generation of the response was limited to coups, and it does appear as if that orientation was motivated by leaders' wish to safeguard their power.¹⁶⁶ The response 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 than the causes."¹⁶⁷ However the reason for the response 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.¹⁶⁸ Importantly, the evolvement 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.

¹⁶⁵ Kufuor (n3 above) 401.

¹⁶⁶ Interview with Mr Chris Ayangac at the African Union Headquarters in Addis Ababa, Ethiopia, 20 October 2010.

¹⁶⁷ Interview with Mr. Ayangac (n 188 above).

¹⁶⁸ Whereas in previous decades Africa experienced an average of twenty coups, the decade from 2000 to 2010 only had ten.

This study concludes that there are certain issues that hinder the emergence of a wholesome response to UCG's. First, are 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 ACDEG ratification 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 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 polity is based on governments founded on control of resources. The AU does not have any economic incentives to use as a 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.

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.¹⁶⁹ The AU has not exhaustively applied itself to putting African leaders in their place and simply reminding 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.¹⁷⁰ The response of the AU does not operate in a vacuum. It works against groups, individuals and societies with divergent views and interests.

¹⁶⁹ Interview with Mr Salim Latib (n 173 above).

¹⁷⁰ Interview with Mr Ayangac (n188 above).

Societal culture influences policy implementation and hence societal forces and influences cannot be isolated from the policy dimensions. The current polity in Africa is characterised by leaders' sustenance of power through their ability to distribute patronage. African populations have complicitly with 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; 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.¹⁷¹ For instance, despite its firm establishment, the zero-tolerance approach to coups has been faced with the application challenge of popular coups. In the March 1991 coup by Amadou Toumani Touré ousting dictator 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.¹⁷² However that is not always the case. It is fact that no autocracy can outlast the will of the people.¹⁷³ 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 redundant¹⁷⁴

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.

¹⁷¹ Interview with Mr. Latib (n 173 above) 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.

¹⁷² Similarly the coup which ousted President Konan Bedie of Ivory Coast and brought General Robert Guei to power (RIP) was viewed by many Ivorians 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.

¹⁷³ The liberation of the African continent from the yoke of colonialism resonates of this assertion.

¹⁷⁴ The response of the Mauritanian coup-plotters to the sanctions as explained earlier is instructive on this.

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.¹⁷⁵ 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 member states.¹⁷⁶ 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.'¹⁷⁷ 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,¹⁷⁸ 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 best placed to exercise them.¹⁷⁹ The same could be argued for political governance. A regionally driven agenda to ensure democratic governance could best ensure success than country-oriented strategies. The AU needs to do the following:

5.2.1 Ratifying ACDEG

The first step of commitment is for AU member states to ratify the ACDEG. Ratification indicates the intention to be bound by the provisions and the decisions that come in the implementation of the ACDEG. Ratifying 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.¹⁸⁰ The Court based its decision on the Constitution

¹⁷⁵ Thousands of Zimbabwean political refugees and economic migrants have settled in South Africa leading to xenophobic attacks and increased criminal activities.

¹⁷⁶ K Aning 'The African Union's Peace and Security Architecture: Defining an emerging response mechanism' (n above) 10.

¹⁷⁷ 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.

¹⁷⁸ K W Abbott 'Toward a Richer Institutionalism for International Law and Policy' Journal of International Law & International Relations Vol. 1(1-2) 18 .

¹⁷⁹ 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).

¹⁸⁰ M A Estrada, 'Honduras' non-coup', The Los Angeles Times (July 10, 2009) A29.

itself which only allows fundamental changes to the constitution through a national referendum approved by the legislature (the Congress) and not the executive (the President).¹⁸¹ 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.¹⁸² 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.¹⁸³

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 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 state. 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 African Governments to ratify the ACDEG or to make the implementation of the framework on UCG's stronger and more effective. To date only six states; Mauritania, Ethiopia, Sierra Leone, Ghana, Lesotho and Uganda have ratified.

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 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.¹⁸⁴ The former because it compromises a branch of government that should pledge its support and protection to the state and not a particular government and the latter because it stifles real participation. Both scenarios have been used by incumbents to stay in power.¹⁸⁵ 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.

¹⁸¹ M A O'Grady, 'Honduras defends its democracy', The Wall Street Journal (June 29, 2009) A11.

¹⁸² Article 239 of the Honduras Constitution.

¹⁸³ D B Gatmaitan 'Can Constitutionalism Constrain Constitutional Change?' 3 Nw. Interdisc. L. Rev. 22 2010.

¹⁸⁴ J Hatchard & others *Comparative constitutionalism and good governance in the commonwealth: An Eastern and Southern African perspective* (Cambridge: Cambridge University Press, 2004)24.

¹⁸⁵ 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.

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 fact that certain variables of constitutionalism must not be abrogated from within a democracy. It is also 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.¹⁸⁶

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.¹⁸⁷ 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 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.¹⁸⁸ 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 is for some constitutional changes if they place democracy under threat then they must not be executed.

¹⁸⁶ Interview with Mr Ayangac (n 183 above).

¹⁸⁷ Ojwang & Franceschi (n 47 above) 56.

¹⁸⁸ I Currie & J de Waal 'The Bill of Rights Handbook' (2005) 8.

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.¹⁸⁹ 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.¹⁹⁰ 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.

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.¹⁹¹ 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 polity, 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

¹⁸⁹ M Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) 12.

¹⁹⁰ *Acquisition of Polish Nationality* (Reparations case) International Court of Justice 174 & 184.

¹⁹¹ *Kesavananda Berati v The State of Kerala*

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.’¹⁹²

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 inappropriateness 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 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 amended¹⁹³ or an amendment that goes against the ‘spirit’ of the constitution is invalid and must not stand.¹⁹⁴ The aim is to promote constitutionalism; being the idea that a government’s powers should derive from and be limited by a constitution.¹⁹⁵

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 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 evolvement 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

¹⁹² S Krishnaswamy: *Democracy and constitutionalism in India: A study of the basic structure doctrine* (2009) 244.(publisher)

¹⁹³ See R G Wright, ‘Could a Constitutional Amendment be Unconstitutional?’ 22 LOY. U. CHI. L.J. 741-64 (1991).

¹⁹⁴ R Albert, ‘Non-constitutional Amendments’, 22 CAN. J.L. & JURIS. 5-6 (2009).

¹⁹⁵ Currie & de Waal (n 212 above)8.

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 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, to reconstitute 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.¹⁹⁶ 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 favour 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 judiciary¹⁹⁷, then all stakeholders, incumbents, legislatures, independent observers, civil society and the general public included will have a forum to complain against an UCG.¹⁹⁸

5.2.5 Pairing legal solutions with dialogue

The AU should adopt a multi-dimensional approach. The framework lays out the consequences of non-conformance to the framework, such as positive and negative sanctions, naming and shaming. However the greater level of commitment is in bringing the

¹⁹⁶ The Court is a part of the Treaty Framework of the Central American States fostering democratic security.

¹⁹⁷ 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).

¹⁹⁸ S Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 468 (2008).

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 polity.

6. 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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