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**Addis Ababa University**

**SCHOOL OF LAW AND GOVERNANCE**

**Post Graduate Studies, Public International Law Stream**

**AU ENFORCEMENT MECHANISM AGAINST UNCONSTITUTIONAL  
CHANGE OF GOVERNMENT**

**By**

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**January 2018**

**Addis Ababa, Ethiopia**

**AU ENFORCEMENT MECHANISM AGAINST  
UNCONSTITUTIONAL CHANGE OF GOVERNMENT**

**Thesis Submitted in Partial Fulfillment of the Requirements of Masters of  
Laws (LL.M) Degree in Public International Law**

Advisor: WONDEMAGEGN TADESSE (PhD), Assistant Professor

**January 2018**

**Addis Ababa, Ethiopia**

## **Declaration**

By submitting this thesis, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof and that I have not previously in its entirety or in part submitted it for obtaining any qualification

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# Approval Sheet

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## Abstract

Unconstitutional Change of Government in Africa is acknowledged not only as a primary cause of conflict but also regarded as a threat to democratization processes, peace, security and stability of the continent. The first three decades after independence were characterized by inaction and indifference in internal affairs of member states but in the last two decades AU is determined to stem the occurrence of UCG through a set of continental and sub-regional norms and collective action. Unlike its predecessor OAU, the African Union (AU) through normative instruments has committed itself to avert or end UCG occurrence to fundamentally entrench a culture of democracy and good governance. Its pronouncements and active engagement in UCG situations have been forthright.

This paper looks into the foundational understanding of UCG situations, and available enforcement mechanism under AU norms against UCG to evaluate the manner of enforcement of its instruments to achieve the overall objectives. It comparatively analyze AU enforcement to identify lessons learnt so far to evaluate its enforcement.

In conclusion, the thesis identifies AU enforcement challenges that need to be addressed first in order to deal effectively with unconstitutional changes of government and finally achieve the intended objectives

## Acronym

ACDEG	African Charter on Democracy, Election and Governance
ACJHPR	African Court of Justice and Human and Peoples Rights
AMISOM	African Mission in Somalia
APSA	African Peace and Security Architecture
ASF	African Standby Force
AU	Africa Union
AUEOM	African Union Elections Observation Mission
CA	Constitutive Act
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
IAEA	International Atomic Energy Agency
ICCAS	Economic Community for Central African States
IO	International Organization
OAS	Organization for American States
OAU	Organization of African Union
OPCW	Organization for the Protection of Chemical Weapons
PSC	Peace and Security Council
R2P	Responsibility to Protect
REC	Regional Economic Community
SADC	South African Development Community
UCG	Unconstitutional Change of Government
UN	United Nations
UNAMID	United Nation/African Union Mission in Darfur
UNSC	United Nations Security Council

## CHAPTER ONE

### AU ENFORCEMENT MECHANISMS AGAINST UNCONSTITUTIONAL CHANGE OF GOVERNMENT

#### 1.1. INTRODUCTION

Africa is marked with occurrence of coups in its post-colonial decades. From the years of independence from colonialism, in the late 1950s and 60s up to 2016, more than 91 coups and situations considered or classified as UCG by the African Union has occurred in Africa.<sup>1</sup> Before the end of Cold War, coups are the common modes of leadership change in the continent. Right after independence, multi party system and election but after the late 1960s, one party states, authoritarian rule, military regimes and big man's politics became the symbol of the continent.<sup>2</sup> By late 1990s more than 120 elections were held across Africa though the elections are labeled as 'sham' and used to rubber stamp the incumbent dictators, authoritarian single party rulers and big mans stay in office.<sup>3</sup> Third Wave of democratization, which is defines as a 'group of transitions from non-democratic to democratic that occur within a specified period of time and that significantly outnumber transitions in the opposite directions in that period' swept across Africa after the end of Cold War.<sup>4</sup> During this period it is understood in Africa that it is more viable option to be governed by legitimate, democratically elected leaders than by self-proclaimed dictators.<sup>5</sup> With the third wave of democratization come high expectations of the end of corrupt and despotic authoritarianism and dictatorship, which gave the continent notoriety for

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<sup>1</sup> Solomon Ayele Derso, Unconstitutional Change of Government and Unconstitutional Practice in Africa, World Peace Foundation, African Politics, African Peace, Summary Paper From The Program on African Peace Missions, Paper No.2, Report on the Future of Peace Missions in Africa, June 2016.

<sup>2</sup> Morne Van der Lind, "Emerging Electoral Trends in the Light of Recent African Elections," African Human Rights Journal, 2001, P. 127-139

<sup>3</sup> Solomon Ayele Derso, (cited above at note 1); the election held in Ghana in 1992 is the most genuine in which military regime is replaced by civilian rule. Elections held in Sao Tome, Benin, and Zambia in 1991 has also witnessed change in government through electoral vote. This is also repeated in Kenya in 1992. All-inclusive vote is held in South Africa, which ended Apartheid Regime in 1994

<sup>4</sup> Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century, University of Oklahoma Press (1991), Norma and London, p. 15

<sup>5</sup> Ek. Quashigha & E. Okafar, Legitimate Governance in Africa: International and Domestic Legal Perspective, 1999, 496, cited in Morne V. supra not 2

instability, civil war, famine and so forth, was close.<sup>6</sup> Added to this is the desire of leaders to earn credibility from the donor western states on one side, and the masses, on the other side, pressured the making of improvements to constitutions or radically change them. The need of protecting the emerging trends of democracy and constitutionalism,<sup>7</sup> and the prevalence and toleration of coups d'état in Africa caught OAU on crossroad in the 1990s, giving rise to the concept of unconstitutional change of government (UCG hereinafter).

The concept of UCG is post Cold War concept yet in development related to the interpretation of the concept of threats to international peace and security mainly related to promote democratic governance.<sup>8</sup> In Africa, it is associated with the shift-off of one party rule and military regime to a system of government based on party pluralism and election during this period, though their legitimacy is questioned.<sup>9</sup> To protect the new governments, which assumed power through generally free election from the target of military coups, OAU was faced with the need for preventing the menace of coups from derailing the democratization process in the 1990s.<sup>10</sup>

Coup d'état in Sierra-Leone in 1997, which overthrow the democratically elected government of Ahmed Tejan Kabbah, is the turning point for OAU and the concept of UCG in Africa. OAU Council of Ministers proposed a measure for the restoration of constitutional order against the coup by calling African and international communities to refrain from recognizing or assisting the coup leaders which had overthrown the democratically elected government.<sup>11</sup> Strong and unequivocal condemnation and rejection of the coup cleared the road for the Lome Declaration on the measures against UCG and consecutive instruments deviating from the principle of non-interference and African brotherhood practiced under OAU by African leaders. It is also the base for the fight against impunity, which is deep rooted in the continent. OAU after deliberating on the various methods of change in government in the continent unanimously

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<sup>6</sup> Samuel Huntington (above note 5)

<sup>7</sup> Constitutionalism as mentioned here is to refer not only to the process of having a constitution which is labeled as supreme law of the land but also to the process of play by the rule of law including all the aspect of democracy and respect for human rights

<sup>8</sup> Solomon Ayele Dersso, (cited above at note 1),

<sup>9</sup> *ibid*;

<sup>10</sup> *ibid*

<sup>11</sup> CM/Dec\_356(LXVI) SIERA LEONE-(DOC.CM/2004(LXVI)-C-), adopted by Council of Ministers, 66<sup>th</sup> Ordinary Session, 28-31 May 1997, Harare, Zimbabwe, CM/Dec\_330-363(LXVI)

rejected UCG as a contradiction to democracy at Algiers Summit in 1999. OAU urged those leaders who come to power between these meetings to return to constitutional order. UCG is further regarded as one of the essential causes of insecurity, instability and violent conflicts in Africa.<sup>12</sup> UCG become the only commitment of the Constitutive Act of AU [CA hereinafter]<sup>13</sup> that is backed by sanction under article 30 and article 7(g) PSC Protocol if it decided a situation in a member state amounts to UCG under article 4(p) of CA and African Charter on Democracy Election and Governance (ACDEG herein after) article 23.

The process of forging protections continentally for the emerging democracy continued through to Lome OAU annual summit in 2000. During this summit OAU adopted a declaration banning UCG and ordered to further codify the democratic ways of assuming power in Africa. A situation amounting to UCG and measures to curb their occurrence is defined under the declaration. These situations defined as UCG ended up in the final AU Charter to curb UCG in the continent with added fifth situation under Article 23 of ACDEG. Pending the entry into force of the ACDEG in 2010 AU Assembly of Heads of State and Government adopted a number of innovative provisions of the ACDEG that are not in the Lome Declaration.<sup>14</sup> The rejection of auto-legitimation of coup perpetrators through elections they ought to organize to restore constitutional order is among the adopted. Other adopted measures includes the condemnation of the act and warning of the perpetrators, requiring the restoration of constitutional order within six months, suspension from the activities of AU, and limited and targeted sanctions to be imposed upon failure to restore constitutional order.

ACDEG, the culmination of serious of initiatives to create stability and prosperity in Africa through democratization,<sup>15</sup> upgraded the norms against UCG by expanding the definitions

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<sup>12</sup> Preamble to African Charter on Democracy, Election and Good Governance, Adopted at 8<sup>th</sup> Ordinary Session of the Assembly, Addis Ababa, Ethiopia, 30 January 2007

<sup>13</sup> Article 4(p), African Union Constitutive Act, adopted at 36<sup>th</sup> Ordinary Session of the Assembly of Heads of States and Government, Lome, Togo, 11 July 2000.

<sup>14</sup> See 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), 31 January-2February 2010, Addis Ababa, Ethiopia

<sup>15</sup> Sekai Saungweme, "A Critical Look at the Charter on Democracy, Election and Good Governance in Africa," Open Society Institute Africa Governance Monitoring and Advocacy Project, AfriMAP, May 2007

of UCG and measures against UCG.<sup>16</sup> It added, “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.” to the situations of UCG.<sup>17</sup> Any substantial modifications to electoral laws in the last six months prior to elections without the consent of the majority of political actors is also added to situations of UCG.<sup>18</sup> Additionally the sanctions regime is also strengthened under the Charter.<sup>19</sup>

Though AU regime against UCG is strengthened by different decisions and resolutions, there exist gaps in their enforcement. In fact after the adoption of Lome Declaration, the occurrence of coups d'état is lowered which to some extent shows the deterrent effect of the Lome declaration.<sup>20</sup> Democratization in the 1990s continued in some countries while authoritarianism is legitimized through election to preserve the status quo in other countries.<sup>21</sup> The enforcement mechanism range from suspension from the activities of the union to prohibition of participation of the perpetrators in the coming election arranged to restore constitutional order to forcible intervention by AU under the pretext of responsibility to protect. It also makes the UCG an international crime for which perpetrators are to be accountable.<sup>22</sup> Non-legal mechanism or diplomatic mechanisms are also resorted in resolving situations of UCG occurred after election, which is recently witnessed in the Gambian post election crisis.<sup>23</sup>

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<sup>16</sup> Under the Lome Declaration on the Framework for an OAU Response to Unconstitutional Change of Government, AHG/Decl.5 (XXXVI) the situations of UCG are only four those listed under article 23(1-4) of ACEDG.

<sup>17</sup> Article 23(5) ACDEG

<sup>18</sup> Article 28E Protocol on Amendments to The Protocol on the Statute of The African Court of Justice and Human Rights, adopted by the 23<sup>rd</sup> Ordinary Session of the Assembly, Malabo, Equatorial Guinea, 27<sup>th</sup> June 2014

<sup>19</sup> See article 25 and 26 of ACDEG,

<sup>20</sup> See Issaka K. Souare, “The PSC and Unconstitutional Change of Government in Africa: A Critical Assessment,” in Tim Murithi and Hallelujah Lulie (eds.), *The African Union Peace and Security Council: A five Year Appraisal*, ISS Monograph, Number 187, pp. 145-164, p.153

<sup>21</sup> Tony Leon, “The State of Liberal Democracy in Africa: *Resurgence or Retreat?*” CATO Institute, Center For Global Liberty and Prosperity Development Policy Analysis, April 26, 2010, No.2, p.2; *See also* Ben Armstrong, *Ne Touche Pas Ma Constitution: Pressures and Presidential Term Limits*, Honors Thesis, Department of Political Science, Northwestern University, May 2011. The latest event is which is witnessed in Egypt the military chief after deposing the democratically elected government legitimized itself via election or its is easy to say changed uniform

<sup>22</sup> Article 25(5), and see also article 28E Malabo Protocol

<sup>23</sup> PSC/PR/COMM. (DCLIV), Peace and Security Council, 654<sup>th</sup> Meeting Addis Ababa, Ethiopia, 20 January 2017. Paragraph 8

## 1.2. Statement of the Problem

AU while strongly and unequivocally rejecting UCG and sticking to its norms against UCG, it lacks coherence in its actions to address UCG situations occurring in different member states. Solomon Ayele Dersso argues that inadequate or lack of definition and poor formulation of the five instances making situations of UCG are primary causes of inconsistency. Moreover when the constitutional order is said to have been restored creates confusion when AU reacts to these situations inconsistently. For instance, in the case of Madagascar, SADC and AU did not consider the restoration of the deposed president as a reinstatement of constitutional order, while the military leaders who spearheaded the coup to depose democratically elected government auto legitimized themselves through election.

Does the situations to be covered under article 23(5) of ACDEG include interpretative amendment by an empowered body, for example constitutional court, which has the effect of distorting the clear meaning and the spirit of the constitution. Burundi is a good example. AU issued several communiqués and press statements against the government before the decision of the Constitutional Court of Burundi that allowed President Pierre Nkurunziza to run for a third term. While at the same time it urged all stakeholders to respect the decision of the Constitutional Court. In addition before the situation is resolved the AU PSC has elected Burundi to PSC, which raises questions on procedures followed to elect members of the PSC, an organ empowered to follow up the situation of UCG. This allows one to ask whether the interpretation of the constitution or other relevant laws by independent judiciary (empowered by the provision of the constitution) fails under the fifth ground of UCG or not under the ACDEG and their contribution to the violation of the norms against UCG by relying on constitutional saving clauses under the norms of UCG.

The role of domestic judicial bodies in the process of determination of UCG situation is another area of confusion. ACDEG clearly aims at institutionalizing and strengthening independent electoral institutions and judicial organs in order to deepen the culture of democracy and peaceful transfer of power.<sup>24</sup> Its objective is to reduce the post electoral conflicts and remedy possible questions of irregularity in election process by those institutions domestically. This

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<sup>24</sup> Article 2 and 3 of ACDEG,

attracts question on procedures in determining clearly and convincingly a situation of UCG within a state. Further it creates doubt as to what the roles of domestic electoral institutions and independent judiciary would be in the process of classification of a situation as UCG against the norms of AU. In a recent event in the Gambia this irregularity has occurred. While the case of electoral irregularity is brought before the supreme court of the Gambia according to the Constitution of the republic and within the limits of the AU norms against UCG that stress the supremacy of national constitutions. But PSC classified the situation as UCG and supported the stand of the regional economic community, ECOWAS, which has prepared and ordered military intervention upon the end of his mandate and refusal to hand over power by the incumbent. This gives no consideration for the ongoing process of legally challenging the outcome of the election within the limits and objectives of the UCG norms of the union. The problem is then what roles do the states institutions have in the determination of the situation as a UCG? How are they going to participate in the process? What happens if the periods for outcome of independent judiciary empowered to decide on the case conflicts with end of the tenure of the incumbent like what happened in the case of Gambia again?

From the above highlighted points, it is clear that there exists inconsistency of enforcement by AU of its norms against UCG which in turn affects the objectives of deep rooting the culture of democracy and rule of law and democratic transfer of power and change of government; further affecting the economic, social, and political development of the continent. And also, these problems contribute for the persistent violations of human rights and lack of security and peace in the continent. Finally obstructing the ongoing process of democratization in the continent, which is among the primary objective of the African Union.

By exploring the areas of dissimilar enforcement of norms against UCG through legal and non-legal enforcement mechanisms available under AU, the research aims at clarifying the challenges faced by the current enforcement practice and pinpointing lessons learned so far.

### **1.3. Objective of the Study**

#### *1.3.1. General Objective*

The general objective of the study is to explore available enforcement mechanisms and current enforcement practice to outline challenges faced to achieve the overall objective of the

norms against UCG in Africa.

### *1.3.2. Specific Objectives*

- ✓ Exploring responses to the situations of UCG in Africa
- ✓ Exploring the effectiveness of the available enforcement mechanisms against UCG i.e. which one is effective in achieving the intended goal and which one is not effective as such.
- ✓ Examining the manner of enforcement of the norms against UCG in different member states, different circumstances and different geographic states: strong and weak (military and economically). Rich and poor. Other contributing factors will also be considered in the process.
- ✓ Understand the challenges faced, legal, non legal and new facts like popular revolt
- ✓ Pinpoint lessons learned

### **1.4. Research Questions**

This research will try to answer the following research questions.

- What are UCG and the situations of UCG under AU instruments?
- How does AU enforce its instruments against UCG?
- How AU enforces the norms of UCG? Consistently or inconsistently? Rationally or not?
- What are the challenges of AU enforcement?

### **1.5. Significance of the Study**

This research will contribute for the ongoing development of the AU frameworks on UCG. First, it will critically assess the understanding of the UCG existing in Africa. Secondly it will show the manner of enforcement of the norms of UCG and how the enforcement mechanisms and manner of enforcement affects the achievement of the overall objectives. Thirdly, the finding of the research will be an input for developing AU enforcement framework of the norms of UCG. Lastly, the research will overall, by evaluating the existing enforcement mechanism and

manner of its enforcement and its challenges, provide the concerned organs of the AU and member states to understand the area of problem and give direction for possible redress in the future.

#### **1.6. Research Methodology**

Doctrinal research is the primary method employed for this research. Charters, protocols, decisions, press statements and communiqués, reports of panels on situations of UCG in member states, decisions of African Court of Human and Peoples Rights, and decisions of RECs are analyzed. Besides this existing literature from related fields of study like Political Science and Constitutional law are consulted where appropriate. In addition, books, journals, articles, book reviews and commentaries, cases and case reviews will be used to gather available information

#### **1.7. Scope of the Study**

The scope of the study is limited to the enforcement mechanisms available under the AU norms against UCG and the manner of their enforcement by AU and its organs mandated to deal with the situations of UCG. The research will focus on situations of UCG happened after the year 2010 to evaluate the manner of enforcement of the norms against UCG, but in some instances may refer to earlier situations.

#### **1.8. Limitation of the Study**

The possible limitations to face the study are: lack or unavailability of information on situations of UCG in member states, limited capacity of accessible internet, financial constraint to gather the data due to exclusion from financial support to be provided by the University for research purpose for being self sponsored student. Limited access to books of important contributions for this paper and short period of time allowed to conduct the research are among the limitations for the study and of the researcher.

#### **1.9. Organization of the paper**

The paper has five chapters. Under the first chapter provides background of the paper, research questions, objectives and methodology of the study. Under the second chapter the development,

cause, definitions and type of UCG including the existing institutional and legal framework and their features are also discussed. The third chapter covers AU enforcement regime against UCG and organs responsible to enforce its instruments and decisions. Under the fourth chapter AU enforcement is comparatively analyzed by selecting cases to learn its current enforcement practice. The last chapter provides conclusion and identifies challenges AU enforcement.

## CHAPTER TWO

### THE DEVELOPMENT OF THE PRINCIPLE OF UNCONSTITUTIONAL CHANGE OF GOVERNMENT TO AFRICAN UNION

#### 2. General Overview of Postcolonial African States, and Change in government

##### 2.1. Overview of postcolonial African states

In the late 1950s and early 1960s, independence from colonialism energized African states and created a wave of hope to lift the population from political, economic, social and cultural oppression of colonialism. Pan Africanism that propounded the African independence sought to guide the solidarity and cooperation among independent and states under colonial rule to seek and achieve independence from colonialism, poverty and underdevelopment. In addition to Pan Africanism, Africans derived moral support from the Atlantic Charter that declared ‘the rights of people to seek self determination had to be respected and that they wished to see these sovereign right to self-government restored.’<sup>25</sup> With the independence of Ghana in 1957 and at the Conference of Pan African movement held in Accra in 1958, the unity of purpose and the right to independence of all African states not yet independent is proclaimed and the ideas and objectives of the previous Pan African movements are redefined.<sup>26</sup> Nkrumah affirmed this stating ‘the independence of Ghana is meaningless unless it is linked up with the total liberation of the African continent.’<sup>27</sup> This feeling of African nationalism inspired the formation of the Organization of African Unity (OAU) with primary objectives of promoting unity and solidarity among the member states;<sup>28</sup> eradication of all forms of colonialism;<sup>29</sup> improving the living standard of the inhabitants;<sup>30</sup> and defending the sovereignty, territorial integrity and independence of all member states;<sup>31</sup> in 1963.

The newly independent states are faced with various problems coupled with the ideological and dominance rivalry between the super powers of the Cold War. Though African

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<sup>25</sup> Atlantic Charter is signed by U.S. President Franklin D. Roosevelt and British Prime Minister Winston Churchill in 1941

<sup>26</sup> See Kwame Nkrumah, *Revolutionary Path*, PANAF (London, 1973), p.130ff.

<sup>27</sup> Kwame Nkrumah, *Axioms of Kwame Nkrumah* (New York, Nelson 1967), p.77,

<sup>28</sup> OAU Charter, Article II (1a)

<sup>29</sup> *ibid*; Article II (1d)

<sup>30</sup> *ibid*; Article II (1b)

<sup>31</sup> *ibid*; Article II (1c),

states agreed to recognize the existing colonial boundaries between states upon independence from the colonial powers<sup>32</sup>, internal conflicts and inter states conflicts became the descriptive symbol of Africa and became the fruits of independence struggle from colonialism, still after 50 years.

Instead of popular empowerment, participation, competition, and legitimacy, the governing authorities take the population for granted which further engendered the feeling of dispossession, alienation and domestic oppression by native leaders among the people.<sup>33</sup> The independence constitutions negotiated with the colonial leaders contained provisions on check and balance, guarantees political participation and fundamental freedoms and human rights are soon pushed into the corner. The colonial rule in Africa is authoritarian and paternalistic.<sup>34</sup> Postcolonial leaders inherited the organizational and bureaucratic institutions, laws and mechanisms of the colonial periods with little or no modifications and used it to consolidate their grip to power. As a result they became autocratic, corrupt and incapable to address the promise they made to the people (Ghana under Nkrumah, Gambia under Jawara and Tanzania under Julius Nyerere are examples) leading to the argument that Africa is not fit for democracy.<sup>35</sup>

Independent African state leaders resorted to stifling their own peoples using similar laws and techniques which the colonial powers have been using against them<sup>36</sup> forgetting the *raison d'être* they struggled for political, cultural, economic and social emancipation and empowerment of the people. These behaviors contributed for the forceful methods of change in government making postcolonial Africa worse than when the countries were under the colonial rule. The OAU failed to condemn the violation of human rights within its member states.<sup>37</sup> Interestingly,

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<sup>32</sup> OAU Doc: AHG/Res. 16(1) on the principle of inviolability of borders inherited at independence, which is adopted at the First Ordinary Session of the OAU Assembly of Heads of States and Government in Cairo, 1964. This principle is influenced by the doctrine of *uti possidetis juris*.

<sup>33</sup> A.B. Assensoh and Yvette M. Ales-Assensoh, African Military History and Politics: Coups and Ideological Incursions 1900-Present, Palgrave 2001, p. 33

<sup>34</sup> Chuka Onwumechili, African Democratization and Military Coups, PRAEGER 1998, p.17

<sup>35</sup> A.B. Assensoh and Yvette M. Ales-Assensoh (cited above at note 33), p. 39, 61-79; see also Arnold Zolberg, Creating Political Order: The Party States of West Africa (Rand McNally & Company: Chicago, 1966)

<sup>36</sup> Preventive Detention Act of Ghana during the Nkrumah regime allowed the newly elected leader to arrest and detain their citizens without trial. Similar laws were used in Kenya under Jomo Kenyatta regime and Tanzania under Julius Nyerere

<sup>37</sup> Godfrey L.Binaiasa, "Organization of African Unity and Decolonization: Present and Future Trends," ANNALS, American Academy of Political and Social Science, 432, (July, 1977), p.52-69, p.62

OAU members persistently condemn the violations of human rights in the states under apartheid regime.<sup>38</sup>

## 2.2. Methods of Change in Governments

Olesegun Obasanjo, Nigeria's former president stated, "Yet no sooner had colonial rule ended that our new rulers set about converting the revolution into one of fire and thunder against their own people."<sup>39</sup> African leaders resort to repressive behaviors, which could only be changed by resorting to force of any kind rather than elections. These contributed for the prevalence of corruption; mismanagement of human, natural and material resource that prompted the military and armed groups to stage coups.<sup>40</sup> Ethnic composition of the African states and the Cold War also contributed for the insecurity and undemocratic changes of government.<sup>41</sup> As a result of the distress felt by citizens and the existence of oppositions that benefits from the overthrow of the regime gives incentive for the military to intervene.<sup>42</sup>

In general, the mechanism of change in government became coup d'états and through bullets (liberation movements) not democratic election, for the reason that the unwanted leaders had the resource and ability to rob votes in national elections. Kwame Nkrumah in the *Revolutionary Path* (1973) wrote that "The Political action which led to independence deviated to become the sole monopoly and privilege of a reactionary 'elite' which deprives the masses of the right to political action, even in its pacific and constitutional form."<sup>43</sup>

A. B. Assensoh et. al argues that with the change of government through coups d'état and eagerness to secure their place by the new leaders, intimidation, repression and political detentions become rampant making dictatorship the order of the day in postcolonial Africa. While as to Dumont the reasons for descending to tyranny and dictatorship of Africa was that at

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<sup>38</sup> See Kwame Nkrumah, *Revolutionary Path*, PANAF (London, 1973), p.260ff

<sup>39</sup> Quoted from A. B. Assensoh et al (cited above at note 33), p. 33

<sup>40</sup> Ibid.

<sup>41</sup> Id., p. 101-109; coups d'état against Uganda's Milton A. Obote from Lango tribe by Id Amin of Kakwa tribe; Libyan Revolution of 1969 the leader of the revolution is from Bedouin tribe and King Idris from the Senussi ethnic group; See Kwame Nkrumah, *Revolutionary Path*, PANAF (London, 1973), p.310-340; With the announcement by President Nyerere in 1963 of its Socialist program and coup attempt after wards and Nkrumah's overthrow of 1966 are the results of these competition

<sup>42</sup> Id., p. 69

<sup>43</sup> Id., p. 484.

the time of independence the African countries with elected leaders exhibited only caricatures of democracy, but not true democracy, as it existed in America and Western nations. The democracy ensued upon independence in some African states like Ghana is crippled as a result of the behavior of the elected leaders leading to coup d'état setting the down turn for democracy. To avert the occurrence of undemocratic change of government, African politician should learn to tolerant dissents and meaningful criticisms. Otherwise since currently elections are rigged in favor of these rulers to perpetuate their stay in power, the only way open for political leadership change is through chaos and barrel gun, unconstitutional ways in general.

### 2.3. Waves of Democratization and Reverse Waves

The independence constitutions that rested mostly on the political pluralism and articulate democratic political ideals embedded in popular expectations did not last long.<sup>44</sup> Until early 1990s, constitutions are treated as documents that could provide popular legitimation for illegally acquired power or as symbols of the political authenticity and uniqueness of particular regimes.<sup>45</sup> Starting from early 1990s due to the changing circumstance, and combination of external and internal factors including brought about a broadening of political space. In this period, 'the third wave of democratization, 'happened transitions from one-party or military regimes to multi party systems through popular elections. Samuel Huntington provides for five major factors contributing to the transition to democracy: the deepening legitimacy problems of authoritarian regimes in a world where democratic values were widely accepted (performance legitimacy); global economic growth of the 1960s; striking shift in the doctrine and activities of the Catholic Church; changes in the policies of external actors; and Snowballing or the demonstration effect of transition earlier in the third wave in stimulating and providing models for subsequent efforts at democratization.<sup>46</sup>

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<sup>44</sup> Victor T. Lee Vine, "The Fall and Rise of Constitutionalism in West Africa", The Journal of Modern African Studies, Vol. 35, No. 2 (1997), pp. 181-206, p. 187

<sup>45</sup> New Constitutions are put in place in Nigeria (1967, 1976, 1984), Benin (in 1968, 1977), Burkina Faso (1970, 1977), and etc.

<sup>46</sup> Samuel P. Huntington, "Democracy's Third Wave," Journal of Democracy, Vol. 2 No. 2 (Spring 1991);

Open and inclusive constitutional reform processes, leading to the adoption of progressive constitutions, preceded the multi party elections.<sup>47</sup> This means constitutional reforms are considered as a crucial part of liberalization and democratization process in Africa. Constitutions are amended, rewritten or revived to lead countries towards democracy and constitutional rule.<sup>48</sup> Indeed the process of rejuvenating democratic constitutions went through the continent.

This process faced opposing challenges reversals or reverse waves i.e. changing from democracy to authoritarianism prompting OAU reaction. The most common forms are military coup d'état and executive coups in which democratically elected leaders effectively ended democracy by concentrating power in their hands.<sup>49</sup> And the civilian leaders who assumed power through democratic elections fall pray to the military coup d'états.<sup>50</sup> The reasons are among others according to Huntington: systematic failures of democratic regimes to operate effectively could undermine legitimacy; reverse snowballing; and emergence of various old and new forms of authoritarianism that seem appropriate to the needs of the times (China is good example in this context).

## **2.4. Unconstitutional Change of Government and its Introduction to Africa**

### **2.4.1. General Understanding of Unconstitutional Change of Government**

OAU is established with aim of primarily clearing colonialism from the continent.<sup>51</sup> This is achieved in the 1994 with the end of Apartheid regime in South Africa. It is guided by three principles which are: i) Non-interference (Article 3(2)); ii) the sovereign equality of all member states (Article 3(1)); and iii) the principle of the territorial integrity<sup>52</sup> of member states (Article 3(3)).

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<sup>47</sup> Adrienne LeBas, "Term Limits and Beyond Africa's Democratic Hurdles", *Current History*, May 2016, pp. 169-174.

<sup>48</sup> Sammy Adelman (1998), "Constitutionalism, Pluralism and Democracy in Africa", *The Journal of Legal Pluralism and Unofficial Law*, 30:42, 73-88, DOI: 10.1080/07329113.1998.10756515

<sup>49</sup> Samuel Huntington, (above note 4), p. 17-18

<sup>50</sup> Nigeria in 1993, Gambia in 1994 led by Yahya Jammeh, Cameroun under Paul Biya, Togo under Gnassingbe Eyadema, Niger in 1996, and etc.

<sup>51</sup> G. Aforika Nweke, "The Organization of African Unity and Intra-African Functionalism", *ANNALS, AAPSS*, 489, January 1987

<sup>52</sup> See OAU Doc: AHG/Res. 16(1) on the principle of inviolability of borders inherited at independence, which is adopted at the First Ordinary Session of the OAU Assembly of Heads of States and Government in Cairo, 1964.

OAU narrowly interpreted the notion of sovereignty and followed strict policy on ‘non-intervention in the internal affairs’ before the end of 1990s.<sup>53</sup> States repeatedly relied on these principles to suppress any discussion concerning their internal affairs including the methods of ascension to power. This understanding of the core principles, particularly non-interference in the internal affairs and territorial sovereignty of state made OAU an observer regarding states’ internal affairs.

After 1990s OAU reassessed its understanding of internal affairs and compatibility of its operations with changing circumstances particularly democratization, and respect for human rights. Paul D. Williams argues that this shift stem from the contradictions within the OAU’s own principles and the growing pressure to conform to transnational norms of liberal democratization and human rights.<sup>54</sup> These contradictions are the base for the formation of legal and policy frameworks currently in place in defense of democracy including norms and institutional frameworks developed to curb UCG.

Condemnation by the OAU Assembly of the coup d’état in Sierra Leone in 1997 makes the break away from the strict interpretation of sovereignty and non-interference.<sup>55</sup> President Mugabe of Zimbabwe, the then OAU chairperson, at the time said ‘the OAU merely used to admit coups had occurred, but now we want to address them. Democracy is getting stronger in Africa and we now have a definite attitude to coups and illegitimate governments.’ This indicates prior to 1990s, OAU tacitly approved that coups are among the accepted means of change in government.

By the Lome Declaration, OAU heads of States and Governments unequivocally rejected “any unconstitutional change as an unacceptable and anachronistic act, which is in contradiction to our commitment to promote democratic principles and conditions.” And they recognized that the principles of good governance; transparency and human rights are essential for building representative and stable government within this context and determined to promote strong and

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This principle is based on the doctrine of *uti possidetis juris*.

<sup>53</sup> Fredrick Cowell, “Preventing Coups in Africa: Attempt at the Protection of Human Rights and Constitutions”, The International Journal of Human Rights, Vol. 15, No. 5, June 2011, pp. 749-764

<sup>54</sup> Paul D. Williams, “From Non Intervention to Non Indifference: The Origins and Development of the African Unions Security Culture”, *African Affairs*, 106/423, 253-279, Oxford University Press (London 2007), p.266

<sup>55</sup> CM/Dec\_356(LXVI) SIERA LEONE- (DOC.CM/2004(LXVI)-C-), adopted by Council of Ministers, 66<sup>th</sup> Ordinary Session, 28-31 May 1997, Harare, Zimbabwe, CM/Dec\_330-363(LXVI)

democratic institutions to safeguard the principles.<sup>56</sup> The concept became the only guiding principles and obligation of AU Constitutive Act to be backed by sanction under article 30. Further in 2007, with the adoption of African Charter on Democracy, Election and Good Governance (ACDEG), the scope and content of UCG is expanded. The concept is further developed to the degree of an international crime in 2014 with the adoption of The Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human and Peoples Rights (Malabo Protocol).

Focusing to root the culture of democracy through constitutionalism these different instruments require states to adopt, maintain and adhere to democratic constitutions, separation of power and holding of regular free and fair elections among others. The concept of constitutionalism is that the powers of government should be exercised and limited by certain fundamentally established principles. Constitution reflects the ultimate source of governmental power and provides protection against unrestricted/arbitrary exercise of powers i.e. provide how, and when the powers are to be utilized and for what purpose.<sup>57</sup> Prior to its establishment, the existence fundamental political decision by the bearer of the constitution making power<sup>58</sup> is the other feature of democratic constitutions providing legitimacy.<sup>59</sup> Legitimacy enhances the bases for rule by consent than by coercion.<sup>60</sup>

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<sup>56</sup>See the 35<sup>th</sup> Ordinary Session of the OAU Assembly, Algiers, 12-14 July 1999, AHG/Dec. 141 (XXXV) and AHG/Dec. 142(XXXV).

<sup>57</sup> Carl Schmitt, *Constitutional Theory*, (Translated and edited by Jeffrey Seitzer), Duke University Press, Durham and London (2008), p.59; *ibid* p. 76-88; here the process of assuming power is covered under the guarantee against misuse of state power. And also violation of the provision of the constitution to hold state power for a period not allowed under the constitution is covered like extension of office term where they leaders are supposed to leave office.

<sup>58</sup> Constitution making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence. This always resides with the people in a democratic system.

<sup>59</sup> There are four types of legitimacy: 1) *process or input legitimacy*; 2) *output or performance legitimacy* (defined in relation to the effectiveness and quality of public goods and services); 3) *shared belief*, determinant factor here is the existence of *collective identity* in the concerned states; and 4) *international legitimacy* (recognition of the state's external sovereignty and legitimacy).

<sup>60</sup> Steven R. Levitsky and Lucan A. Way, "Beyond Patronage: Violent Struggle, Ruling Party Cohesion, and Authoritarian Durability", *Perspectives on Politics*, Vol. 10, No. 4 (December 2012), pp. 869-889, Published by American Political Science Association; Legitimate constitutions addresses: a) regulate and limit the powers of government, and provide mechanisms to secure the efficacy of such limitations; b) ensuring political pluralism; c) providing for the political accountability; d) ensuring that government is required to seek the mandate of the people at regular intervals through elections that are executed and administered by independent electoral authorities and in accordance with fair electoral laws; e) ensuring that the fundamental rights of the people are fully protected; f)

AU instruments focus on constitutionalism to build representative and constitutional democracy. This is a right direction to democratize the continent and make the people the ultimate political decision-making powerhouse, holder of constitutional making power and exercise of governmental power in accordance with the procedures of the constitutions. Hence AU intends to build and strengthen the institutional arrangement of arriving at political decision in which individuals acquire the power to decide by means liberal competition for the people's vote. It also aims at preserving and strengthening the infant and new democracies through regulating the democratic transfer of power in accordance with the procedures of legitimate constitutions; adoption of the democratic values and principles like representative democracy, human rights and fundamental freedoms, separation of power, guarantees against arbitrary exercise of power, and etc.

OAU/AU Constitutionalism hence denotes the existence of constitutions and exercise of powers in accordance with the procedures of the constitutions. Any action that deviates from the constitution's provisions and not justified is deemed to be unconstitutional. In pursuit of engraving democratic ascension to power, the rejection of UCG is consistently (institutionally and politically) supported principle and practice of OAU-AU since 1997.

#### 2.4.2. Legal and policy framework

AU acknowledged that conflicts constitute major impediment to the socio-economic development of the continent and the need to promote peace, security and stability as a prerequisite for the implementation of its policies.<sup>61</sup> UCG is among the primary causes of conflict in the continent. With the shift in principle towards non-indifference AU among others assumed responsibility to make the leaders behave according to the objectives and guiding

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providing for the elimination of all forms of discrimination; g) *ensuring that disputes, including those concerning the constitutionality of legislation and government acts are adjudicated impartially by regular ordinary courts that are independent or the protagonists*; h)ensuring that the ordinary laws applied in the execution of governance and adjudication of disputes are made in conformity with the provisions of the constitution and procedures for law making prescribed therein; i) encouraging the functioning of a non-partisan public service; and j) acknowledging the role and importance of civil society in national affairs, for without this it is doubtful whether good governance can take and secure roots.

<sup>61</sup> OAU Declaration on the Framework for an OAU Response to Unconstitutional Change of Government, AHG/Decl.5 (XXXVI); Constitutive Act of the African Union; To understand the effects of Coup d'état or insecurity in general, *see also* Augustin Kwasi Fosu, "Political Instability and Economic Growth: Implication of Coup Events in Sub-Saharan Africa", *American Journal of Economics and Sociology*, Vol. 61, No.1 (January 2002),

principles of the CA and the Union. Condemnation and rejection of UCG is one of such principles in addition to respect for democratic principles, human rights, the rule of law and good governance.<sup>62</sup> This signifies AU's shift from state protectionist principles of OAU (strict understanding of sovereignty and non interference) to human security sanctioning UCG situation as per Article 30 and 23 CA.

Abhorring UCG started with decision of OAU Council of Ministers adopted at its 66<sup>th</sup> Ordinary Session held in Harare Zimbabwe in 1997 strongly and unequivocally condemning the coup d'état in Sierra Leone.<sup>63</sup> OAU 35<sup>th</sup> Assembly of Heads of State and Government of July 1999 held at Algiers adopted decisions recognizing that the principles of good governance, transparency and human rights are essential elements for building representative and stable government and contribute to conflict prevention;<sup>64</sup> and reaffirmed the rejection of UCG calling governments that came to power through unconstitutional means after Harare summit to restore constitutional order.<sup>65</sup> Further OAU Assembly after deliberating on various methods of change in government in Africa, in 2000 adopted 'Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government' in which the assembly recognized that UCG is the culmination of a political and institutional crisis linked to non-adherence to the common values and democratic principles and identified four situations considered as a situation of UCG. This declaration institutionalized the ad hoc approach against UCG that later on the CA firmly strengthened by sanctioning it.<sup>66</sup> With the creation of African Union Peace and Security Council, and initiation of APSA (African Peace and Security Architecture) the institutional and legal response to UCG are further elaborated, institutionalized and incorporated deeply to AU policy understandings.

In 2007 AU Assembly adopted ACDEG to engrain the values and principles of democracy, constitutionalism and rule of law in member states to reduce UCG. ACDEG

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<sup>62</sup> Article 4(m) & (p) Constitutive Act of African Union (CA)

<sup>63</sup> CM/Dec. 356(LXVI)-C- Sierra Leone, adopted at 66 Ordinary Session, Harare Zimbabwe

<sup>64</sup> AHG/Dec.141 (XXXV); Francis N. (above note 37) argues that CSSDCA's first and second 'calabashes'- security and stability- had a direct influence of democracy and good governance. The core democratic principles of competitive and transparent multi party elections and human rights were first clearly articulate here which is reflected in later decision of OAU specially Lome Declaration

<sup>65</sup> AHG/Dec.142 (XXXV)

<sup>66</sup> Article 30 CA

enhanced, institutionalized, expanded and strengthened the principles and values acknowledged by other prior instruments. It seeks to deepen and consolidate the rule of law, peace, security and development in the member states through entrenching a political culture of change in government based on the holding of regular, free, fair and transparent elections and.<sup>67</sup> ACDEG added ‘any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government,’ to the situations designated as UCG by the Lome Declaration.<sup>68</sup> This addition is timely and forward looking initiative because between the adoption of Lome Declaration and 2007, constitutions with presidential term limits are threatened with the so called ‘third termism’<sup>69</sup> to amend the term limits to stay in power. The amendment plague did not spare constitutions with provisions on upper age limits to hold office. The inclusion of this situation is therefore a response from AU to these prevalent phenomenon soft coup d’états of the period. The Protocol on the Amendments to the Protocol creating the African Court of Justice and Human and Peoples Rights (Malabo Protocol) adopted in 2014 under article 28E defining the jurisdiction of the court with regard to the crime of UCG consolidates all the situations considered as UCG by separate OAU/AU instruments.

### **2.4.3. General Features of Legal and Policy Framework against UCG**

Primarily the legal and policy framework is pro-interventionist in general. The essentiality of the principles of good governance, transparency and human right for building representative and stable governments are at the center of all instruments.<sup>70</sup> AU acknowledged that UCGs are culmination of political and institutional crises linked to disregard for the common values and principles democratic governance; and requires strict adherence to these values and principles to reduce the risks of UCG.<sup>71</sup>

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<sup>67</sup> African Charter on Democracy, Elections and Governance (ACDEG), adopted by the Assembly of AU 8<sup>th</sup> Ordinary Session 29-30 January 2007 at Addis Ababa, Ethiopia, Assembly/AU/Dec.147 (VIII), Doc.EX.CL/310(X) Preamble paragraphs of African Charter on Democracy, Election and Good Governance (ACDEG)

<sup>68</sup> Article 23(5) ACDEG

<sup>69</sup> See for example Adrienne LeBas, (cited above at note 54)

<sup>70</sup> Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI) of July 2000 (the Lome Declaration)

<sup>71</sup> Ibid.

ACDEG provides a legally binding framework to build institutional and cultural foundations for democratization in Africa to address UCG, the main source of instability in the continent. AU concedes that some reasons for plotting UCG arise from poor governance, dictatorship and violation of human rights. This could make UCG a legitimate action in light of objective and recurrent societal realities negating strict adherence to constitutionality or legality. AU instruments focus on following the legally provided mechanisms for ascension to power, than actual conditions in practice in a state concerned to respond to UCG situations. But AU should evaluate the contributions of the recurrent politico societal facts in the country to balance the legality of the action with the legitimacy the action aspires from domestic and international actors.

The Lome declaration is silent on the acts of the incumbent governments while setting out practical responses by OAU to UCG disregarding the manner of exercise of power by incumbents. This exclusion makes the Lome Declaration pro government than pro human security. With slight deviation ACDEG prescribes for legitimate exercise of power without sanctioning the bad governance behaviors when setting out its sanctions regime's trigger factors, which is only the occurrence of UCG situations.<sup>72</sup> Indeed, though it acknowledged and included bad exercise of governmental powers it is by far pro-regime security than human security. But innovatively ACDEG combines preventive measures with post conflict responses (article 17 and chapter 9 articles 27-43 and chapter 8 after conflict) and upgrades the Lome Declaration's soft diplomacy mechanism by transforming it to law making treaty (chapter 4 and 5). In connection to this the sanctions regime is upgraded from persuasive diplomacy to a level of coercive diplomacy (chapter 8).

In general AU legal and policy framework against UCG are a set of common values and principles to institutionalize and strengthen democratic governance and rule of law (chapter 4 –

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<sup>72</sup> Article 10(2) ACDEG for example requires State Parties to ensure that the process of amendment or revision of their constitution reposes on national consensus; obtained if need be, through referendum. And also strengthening of institutional capacity of political parties, parliaments, judiciary, and other institutions for the enhancement and sustenance of democracy (Article 3, 27, ACDEG) separation of powers, checks and balance, constitutional subordination of all state institutions, including military and police forces, to a democratically elected civilian authority (Article 14(1), 32 ACDEG); *For triggering factors see for example* Article 25(1) 'when the Peace and Security Council *observes that there has been an unconstitutional change of government in a state party*, and that diplomatic initiatives have failed, it shall ...sanction such state accordingly(emphasis added).

chapter 7 ACDEG); definition of what constitutes an unconstitutional change (Lome Declaration and ACDEG chapter 8); measures and actions to be taken to respond to an UCG (article 23(2) & 30 CA, Lome Declaration, PSC Protocol and article 25 ACDEG); and an implementation mechanism (PSC Protocol Lome Declaration, and article 24, 25 and chapter 10 ACDEG).

## **2.5. Definition of Unconstitutional Change of Government**

### **2.5.1. Definition**

From the discussions in the previous sections it is clear that AU norms against UCGs aim at entrenching the culture of constitutionalism, in which power is assumed/transferred through fair, free and periodic election according to procedures laid down by the constitution, the supreme law of the land. From the *accontrario* reading of this sentence it is clear that the general definition of UCG is therefore, those situations/actions committed/omitted in breach of the provisions and procedures laid down under the constitution to ascend to power or retain power irrespective of the nature of the constitution. Whether the constitution is democratic or undemocratic is not the concern rather the existence of a constitution providing procedure for transferring or retaining or ascending to power is enough to designate a situation as UCG. What if the country does not have a constitution (Eritrea for example until this paper is written) is question left for further research. Taking the above general understanding I now look at definitions provided under AU instruments to appreciate the strengths and comment on weakness of the AU UCG definitions.

The definitions found in AU instruments attempted to define UCG by way of description.<sup>73</sup> ACDEG added one situation to the definitions provided by the Lome Declaration to include a new phenomenon that threatened the democratization process between the adoption of Lome Declaration and 2007 (adoption year of the charter), “any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government.”<sup>74</sup> The not yet entered in to force Malabo Protocol added one new definition,

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<sup>73</sup> Prof. Pacifique Manirakiza, “Insecurity implications of Unconstitutional change of government in Africa: From Military to Constitutional coups”, *Journal of Military and Strategic Studies*, Vol. 17, Issue 2, (2016), pp. 86-106, p.88

<sup>74</sup> Article 23 (5) African Charter on Democracy, Elections and Governance, adopted by The 8<sup>th</sup> Ordinary Session of the Assembly, Held in Addis Ababa, Ethiopia, 30 January 2007.

“any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the political actors” to the definitions of ACDEG.<sup>75</sup> But this addition can be covered by the definitions of ACDEG under its fifth ground.

Article 23 ACDEG defines UCG as illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union:

- A. A military putsch or coup d'état against a democratically elected government;
- B. Intervention by mercenaries to replace a democratically elected government;
- C. Any replacement of democratically elected governments by the use of armed dissident groups or rebel movements or political assassinations
- D. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair, and regular elections;
- E. Any amendment or revision of the constitution or legal instruments which is an infringement on the principles of democratic change of government;

To curb UCG AU gives emphasis to constitutionalism which has two components, one relating to the conducts of incumbent governments (i.e. manner of exercising constitutionally assumed power) and the other relating to the conduct of those aspiring to grab power (the process of ascending to power).<sup>76</sup> The AU definitions of UCG focus on the procedural dimensions of legitimacy. It prescribes how power must be acquired while disregarding how it should be exercised. Neither in the chapeau of article 23ACDEG nor in the listed situations reference is made to the manner of exercise of legitimate power in an illegitimate manner constitutes UCG. It disregards the substantive legitimacy (output/problem solving or justifiability). For example the two words in the chapeau of article 23 of ACDEG and 28E of Malabo Protocol, “accessing” or “maintaining”, reflect the process and intent of assuming power. “Accessing” is used to describe the conditions from 1<sup>st</sup> – 3<sup>rd</sup> paragraph, while “maintaining” is for the last three 4<sup>th</sup> and 5<sup>th</sup> paragraphs in which the incumbent or ruling party aims to retain power unconstitutionally either

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<sup>75</sup> Article 28E(f), Protocol on amendments to the protocol on the Statute of the African Court of Justice and Human Rights, Adopted by the 23<sup>rd</sup> Ordinary Session of the Assembly, Held in Malabo, Equatorial Guinea, 27<sup>th</sup> June 2014;

<sup>76</sup> Prof. Pacifique Manirakiza, (cited above at note 93)

by refusing to hand over after electoral defeat or amending/manipulating constitution in its favor or through judicial decisions. This does not cover power exercise to solve the problems of the people or exacerbating the existing problems through government action.

The strength of the definition is that the situations listed are committed or ordered to be committed against democratically elected government i.e. the victim government has procedural legitimacy. This can be used against recognized governments that lack legitimacy in assuming office. But this element again disregards performance legitimacy and other types of legitimacy, the interaction of which renders governments legitimate though it is procedurally legitimate. For example the ground of perpetrators of Egyptian coup in 2013 is that though the government has procedural legitimacy, elected through fair, and free election, it lacked output/performance legitimacy i.e. fails to deliver what is demanded of it. Taking this view I argue that, UCG against a government not elected democratically are not covered by AU instruments and deserve no protection from the Union. In fact this exists when element is viewed in light of other provisions prohibiting auto legitimization of UCG perpetrators. The question is that if auto legitimization is prohibited how would the other provisions of the norms against UCG apply to a government that fails to fulfill one of the criteria of the definitions of UCG, which is being democratically elected. Democratic election is already discussed as comprising mainly of fair, free and regular/periodic elections safeguarded by democratic constitution. In this circumstance the government that is not elected democratically (for example dynastic government) violates citizens' rights of political participation and representative government, which AU aims to entrench. It also violates the values and principles of the union of good governance, rule of law, respect for human rights and etc. Therefore, would the government violating the values and principles of the union deserve protection from the union or be sanctioned under article 23 CA is a question. I say sanction should be considered by the Union.

### **2.5.2. Types of UCG**

Scholars classify UCG to Classical UCG and Soft or Executive UCG depending on use of force and the identity of outer of the UCG i.e. is a government that assumed power

legitimately.<sup>77</sup> Classical UCG focus on the use of force while Soft or Executive UCG focus on the political manipulation of laws by the executive. This classification disregards the principle of separation of power that makes the judiciary independent of the second criteria and its role in effecting UCG. For this reason this paper classifies UCG into three groups as discussed below.

### 2.5.3. Classical Unconstitutional Change of Government

Traditionally the UCG is committed by the use or threat to use of force to overthrow a legitimate or democratic government.<sup>78</sup> Coup d'état, which is the sudden overthrow of a government against the general will (volonte generale) formed by the majority of the citizenry and usually carried out by small but well organized group that threatens, effectively uses, force to replace the top power echelon of the state,<sup>79</sup> is the most frequent form. This is a situation from 1<sup>st</sup> -3<sup>rd</sup> paragraph, all of which are effectuated by the use of force or threat to use force by an organized group outside the government. Classical UCG are becoming rare probably due to AU's consistent and toughening stance against them forcing leaders to resort to other methods of UCG.<sup>80</sup>

### 2.5.4. Soft Unconstitutional Change of Government

This is provided under 4<sup>th</sup> and 5<sup>th</sup> paragraphs of ACDEG. It is soft UCG because: i) the absence of violence in unconstitutionally seizing or maintaining power; ii) consists of some apparently legal but which devised to ensure continuity in the governance architecture through political manipulation of the fundamental legal provisions pertinent to accession to power; and iii) it is effected by the incumbent government which had been legitimately in power/has been recognized and aimed at retaining the power illegitimately.<sup>81</sup>

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<sup>77</sup> Prof. Pacifique M (cited above at note 93), p.89; *See also* Karim Forander, "Dealing with Unconstitutional Change of Government: The African Union Way," Master Thesis, Faculty of Law University of Lund, 2010

<sup>78</sup> C.E. Miller & M.E. King, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (Geneva: University for Peace in Africa, Geneva 2005, 2<sup>nd</sup> ed.), p.28

<sup>79</sup> Francis Nguendi Ikome, (cited above at note 50), p.7

<sup>80</sup> Prof. Pacifique M (cited above at note 93), p.112

<sup>81</sup> Francis Nguendi Ikome, (cited above at note 50), p.9

### 2.5.5. Judicial Unconstitutional Change of Government

By following the classifications of Prof. Pacifique M. and Karim Forander, 'Judicial UCG' which literally falls under the fifth ground 'any amendment or revision of the constitutions or legal instruments...' but differs in nature because it is effectuated by the other organ of the government separate from the focus of the soft or executive UCG. The focus of the first two types is the use of force (classic/type one) and branch of the government (soft/type two/executive), the executive using power in its hands. The focus of 'Judicial UCG' is following the same pattern of executive/soft UCGs, focuses on the interpretative capacity of the judiciary to effectuate the UCG, where the attempted executive coup is foiled by the legislative or through mass protest or any other means except judicial annulment, using the constitutional mandate of interpreting the laws without changing the substance of the law but amending or revising the meaning, spirit and effect of the laws including constitutions to circumvent the hurdles faced by the executive to effectuate UCG. The inspiration of the idea is taken from the Burundian Constitutional Court decision on the third term debate between President Nkurinziza and his opponents in 2015. Legislative blocked the amendment of the constitution for third term bid. The constitutional council by the power granted to it by the constitution to interpret the constitution circumvents the legislative and popular protest against third term bid allowing the President to run for office effectuating UCG that is neither classic nor executive rather judicial. Here the effect of the court's decision has the same effect with other type of UCGs. The difference is that under Judicial UCG neither the procedures of the constitution are violated nor the provisions of the constitution violated for example through enactment of laws or etc. The court is empowered to interpret the provisions of the constitutions and is also the final decision maker in giving effect to the words of the constitution. The procedure is legitimate under AU norms against UCG and is among the principles upheld by the union, the principle of separation of power and to settle conflicts through a legal means and independence of judiciary.<sup>82</sup> In such case, where the judiciary is deemed independent, capable and final decision maker in the country, how would its decision be challenged? Keeping in mind that there is no continental court to challenge the decision of the court on the base of continental instruments such decisions violate.

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<sup>82</sup> See for example Article 2(5), 3(5) and 17(4) ACDEG

## 2.6. Constitutional Amendment vis.-a-vis. Judicial interpretation

Among the new methods of UCG, constitutional amendment is the leading. It is clear that any amendment or revision of the constitution without the consent of the people is unconstitutional.<sup>83</sup> But this raises a number of challenges resulting from difficulty of differentiating legal and illegal constitutional amendment. From a legal and procedural perspective, so long as procedural requirement for amending constitutions as provided in the constitution are met, constitutional amendment or revision, for whatever reasons including remaining in power are perfectly legal. As long as it complies with the requirement of article 10 of ACDEG and provisions on its amendment, is not prohibited. Here, the constitutionality or democracy envisaged by AU does not limit the number and duration of term limits for African leaders,<sup>84</sup> rather constitutionalism as discussed under section 2.4.1.above. Violation of constitutional provisions only validates UCG definition of AU (Burundi crisis of 2015 not designated as UCG for this reason that no provisions is violated as interpreted by the court). ‘Third termism’ is manifestation of this.<sup>85</sup> But some argue that imposition of term limits will facilitate political stability by ensuring peaceful successive democratic changes of government and ensures respect for constitutional guarantees and human rights.<sup>86</sup>

The other new method of constitutional manipulation is interpretative amendment. President Pierre Nkurinziza used this method in Burundi after failing to secure amendment of term limiting provision of the constitution.<sup>87</sup> This additionally brings the role of Judiciary in

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<sup>83</sup> Article 10(2) ACDEG reads ‘state parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, *obtained if need be* through referendum’ (emphasis added). The phrase “*obtained if need be*” reflects that if the party proposing amendment to the constitutions deems such referendum necessary it will be held. Unless otherwise it does not matter as long as it is not challenged or if the government is strong enough to control or put dissent in check, AU is well with the amendment, which in this circumstance derogate the democratic nature of the institutions of the government contrary to article 24 ACDEG warranting PSC recommendation but thwarted because it is allowed under article 10 and 44 that states perform their actions in accordance with their domestic constitutions

<sup>84</sup> See Prof. Pacifique M. (cited above at note 93), p.95

<sup>85</sup> See Adrienne LeBas, (cited above at note 54); Uganda in 2005, Algeria & Cameroon in 2008, & Congo Brazzaville in 2015 are successful in eliminating term limits from the constitutions (third termism), while Rwanda (2016), Gabon (2003), Namibia in 1999 extended the term limits in the constitution to allow the leader to stay in power. Other leaders like Fredrich Chiluba of Zambia and Blaise Compaore of Burkina Faso are not successful.

<sup>86</sup> Stacy Ann Elvy, “Towards a New Democratic Africa: The African Charter of Democracy, Election and Governance”, *Emory International Law Review* 27, NO. 1(2013), p.88

<sup>87</sup> See Republic of Burundi Constitutional Council: RCCB 303; in the matter of constitutional interpretation requested by the senators the interpretation of articles 96 and 302, Judgment rendered on 4 May 2015; The President

effectuating UCG to fora (see discussion under Judicial UCG). Exclusion of a situation from the scope of UCG should be weighed in light of democratic values and principles of good governance and the rule of law.<sup>88</sup> This includes first, the level of popular participation in the amendment process.<sup>89</sup> The level of popular participation determines the degree of legitimacy such amended instrument carries. Article 10(2) ACDEG underscores the need of popular participation in the process for this reason. Limitation here is that referendum is not mandatorily provided reducing the level of human security below that of regime security under the Charter as a whole.

The second criterion is the outcome or impact of the amendment.<sup>90</sup> If the project can cause a serious threat to political instability and integrity of the country Prof. Pacifique says it is not worth it.<sup>91</sup> Under this requirement the judicial decision by the Burundian Constitutional Court of 2015 amounts to UCG because it is challenged by majority of the population and lead to insecurity and stability.

Therefore, UCG refers not only to sudden overthrow of government but also to the subversion of democracy as expressed by the will of the people through constitution making power, and manipulating the fundamental laws of the country not only by executive but also by the judiciary in order to extend the incumbency of a serving government.

If we take follow only forceful change of government, refusal of incumbent and amendment/revision of laws against the procedures prescribed by the constitution, the definition will exclude the role of the judiciary to interpret the laws or constitutions. This is because, in a democratic system with the principle of separation of power, the judiciary is independent and the primary organ of check and balance against the arbitrary power of the executive and legislative organs. This is not always the case when it comes to new/infant democracy like that of Burundi for instance. The influence of the executive is so huge that it makes the judiciary a pseudo judiciary and renders it under cover extension of the executive branch. Or the judiciary is not independent enough to coerce the executive to accept their decisions. This can happen where

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resorted to a self-serving interpretation of article 96 and 302 of the Constitution of Burundi by the Constitutional Court decided in favor of the President against article 302

<sup>88</sup> Prof. Pacifique M. (cited above at note 93), p.97;

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

there is a constitution under which fair, free and regular election can be conducted to assume or maintain power, as AU instruments demand to designate certain situations UCG.

The ACDEG aims at rooting democracy through constitutionalism without identifying the nature of constitutions and basing on the principle of separation of power to enable the judiciary play its conflict-solving role through legal mechanism. It is presumed that the judiciary is independent and renders justified decisions that satisfy and so acceptable by all the parties. Any interference in its works will destruct its work and hence result in miscarriage of justice. All peoples are presumed equal before the law and the court is impartial towards all citizens of the country. Therefore under the African union emphasizing separation of power, decision rendered by the judiciary is legal and will not fall under the scope of existing definition of UCG, which may always be. And attacking the decision of the judiciary is considered as attack on sovereignty of the state.

The complexity arises when decision given by the judiciary has same effect as of what the situations of UCGs have, which is not UCG under the AU instruments. The Burundian Constitutional Council Judgment rendered on 4 May 2015 in the matter on interpretation of articles 96 and 302 of the constitution of Burundi is an example.<sup>92</sup> The current president after serving for two terms is seeking for third term stating that the first round will not count under article 96 because he was not elected by universal suffrage rather elected under article 302 by the National Assembly. The president did not attack the constitution rather asked the Constitutional Court to clarify the meaning of these two provisions. Other peoples took to street in protest demanding the president has served his term and should not stand for third time relying on the other provision of the constitution than article 96. The Constitutional Court decided in favor of the president stating that the first election by National Assembly does not count under article 96 of the constitution and the president has right to contest for the third term attaching the decision to the exercise of his political right by the president. Bypassing the provision on term limit is

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<sup>92</sup> Republic of Burundi Constitutional Court: RCCB 303; (above note 107). Article 96 reads: “The President of the Republic is elected by direct universal suffrage for five years renewable once;” Article 302 reads: “Exceptionally, the first President of the Republic of the post-transition period is elected by the [elected] National Assembly and the elected Senate meeting in Congress, with a majority of two- thirds of the members. If this majority is not obtained on the first two ballots, it immediately proceeds to other ballots until a candidate obtains the suffrage equal to two-thirds of the members of the Parliament.

UCG under AU instruments but it is not when the court decides it is not violation of the constitution as empowered. The separation of power, which is one of the guiding principles of the Union, legitimizes the decision of the court irrespective of the independence of the court.

## **2.7. Reliance on states constitutions for implementation**

ACDEG Article 44 (1b) requires states to take measures in accordance with the constitutional provisions and procedures for the implementation of the Charter's obligations. This makes invocation of the norms against UCG conditional on the domestic constitutions so long as what it means with 'in accordance with the constitutional provisions and procedures' is not clarified. Where states act within the space provided in accordance with constitutions but their actions fall under article 23(5), for example, constitutional interpretation to benefit one person (Burundi case aimed at allowing president Pierre Nkurinziza), AU is locked out against such government and has nothing to do than sit and wait. Burundian case has the tendency to set in new mechanism through making constitutions open for legal contestation, which will later be exploited to embark on UCG while conforming to the AU requirements. So far the practice is that the mere existence of constitution is the criteria and states are allowed to do as they please as long as they follow the requirements of the ACDEG and the domestic constitutions. The constitutional saving clauses in the instruments of AU against UCG keep the governments from its influence and allow them to bypass the measures to be applied. Therefore, to circumvent these events, it should be understood in broader sense that the AU can respond to the situations within member states bypassing the constitutional saving clauses. AU can rely on making the constitutional saving clause qualified and democratic, not blanket reference to the constitutions provisions; and indexing the constitutions of member states as democratic, semi democratic and undemocratic in light of the norms against UCG to do so.

## CHAPTER THREE

### 3. AU ENFORCEMENT MECHANISMS

#### 3.1. Introduction

The reasons for the weakness, low-level enforcement and absence of coercion in international law emanate from the nature of its subjects and manner of their interaction (i.e. based on sovereign equality of states). The desire not to antagonize member state(s) also affects strict enforcement in international law.<sup>93</sup> International Organizations (IO hereinafter) created by states to safeguard their collective interests contributed most to acquire compliance apart from individual state's voluntary compliance. Currently states comply with their international obligations than yesteryears voluntarily to protect their interests collectively or individually. The UN system demonstrates this role of IO.

The primary subjects of international obligations are states and they are required to comply with the obligations; quasi-states, international organizations, persons and other entities can be subjects of international obligation required to comply with international law. Besides the primacy of voluntary implementation by its subjects, there are other mechanisms existing in the international law to acquire forced compliance and enforcement in case of default. To this end different types of enforcement mechanisms are formulated to prevent breaches of international obligations or to force into compliance a defaulting international law subjects. Enforcement mechanisms are used for different purposes including among others to avert UCG, ending a rebellion, invasion or external interference; restoring a legitimate or democratically elected government to power; facilitating the exercise or protections of human rights; to facilitate the establishment and consolidation of peace; promoting good governance; and etc.<sup>94</sup> Some IO's provide for specific type of sanction/s for specified breach (article 30 AUCA) while it is provided in general terms in other organizations (article 92 of UN Charter).

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<sup>93</sup> Henry G. Schermers and Niels M. Blockker, International Institutional Law: Unity within diversity, 4 Ed. Martinus Nijhoff Publishers, Leiden, Netherlands (2003), p.916

<sup>94</sup> Jeremy Matam Farrall, United Nations and the Rule of Law, Cambridge University Press (New York 2007), p.134-139

Enforcement Mechanism in this paper should be understood as an act of compelling observance of or compliance with a law, rule or obligation within or using an established process in the instruments of the Union against UCG by responsible and legitimate organ.

### **3.2. Types of Enforcement Mechanisms**

Self-help is a prevailing manner of enforcing international law i.e. the reaction by states to alleged breaches of international obligation by other states. But in addition to this self-help other enforcement mechanisms are devised or developed to enforce international obligations. These enforcement mechanisms depending on their nature, purpose and degree of coercion they exert on target to acquire compliance can/may be treaty based mechanisms,<sup>95</sup> positive enforcement mechanisms, negative enforcement mechanism without the use of force/war, intervention (negative enforcement mechanism with the use of armed forces), resolution based mechanisms; political, diplomatic, economic, targeted or limited sanctions, etc. Some of these mechanisms are discussed in the following paragraphs.

#### **3.2.1. Treaty based mechanisms**

These mechanisms are provided by treaty imposing the obligation to acquire compliance. These mechanisms are mostly used in human rights instruments. Its overall purpose is making states acknowledge the existence of non-compliance or failure to implement even though they are not followed by legal consequences.<sup>96</sup> For instance Supervision or follow up through supervisory bodies created by the treaty is a compliance acquiring mechanism.<sup>97</sup> These bodies provide guidance through different methods like general comments that benefit parties through the quality of their argument, availability of experts and etc. Supervision through inspection that is either continuous for the purpose of establishing facts on the ground or retrospective to verify

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<sup>95</sup> For general understanding see Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan and Alfred Zayas,(ed.), *International Human Rights Monitoring Mechanisms* (2<sup>nd</sup> rev. ed.), Martinus Nijhoff Publishers, Leiden, (2009),

<sup>96</sup> Henry G. Schermers and Niels M. Blockker (cited above at note 113), p.908

<sup>97</sup> For international and regional treaty supervisory mechanisms particularly related to human rights see Joanna Whiteman and Claire Nielsen, *Lessons from Supervisory Mechanisms in International and Regional Law*, *Journal of Refugee Studies*, Vol. 26, No. 3 (2003) available at <http://jrs.oxfordjournals.org>;

past violation is another mechanism used in treaty-based mechanism.<sup>98</sup> The practice of IAEA and OPCW are good examples.

Requiring state reports of their implementation at regular intervals after initial report following entry into force of the treaty is another mechanism. It helps to identify problems encountered during implementation and devise appropriate mechanism to remedy it. Eight of the Nine UN human rights treaties require regular state report.<sup>99</sup> Information collections by Human Rights Commission about human rights violation is crucial in the enforcement of human rights obligations under the UN and regional organizations human rights instruments.<sup>100</sup> AU instruments require report to be submitted after entry into force of the instruments for follow up purposes.<sup>101</sup>

Inter-state and individual communication is another treaty based enforcement mechanism. It is provided in the UN, EU and OAS human rights instruments.<sup>102</sup> Similarly the Malabo Protocol under article 16 provides for individuals to submit complaints before the court subject to declaration from the state declaring its competence to receive individual complaints.

### 3.2.2. Positive enforcement mechanisms

Positive enforcement mechanism (positive sanctions) is a non-coercive method used to induce certain behavior in the form of rewards or incentives for good behaviors given by organizations or states through bilateral agreement or through IOs.<sup>103</sup> ACDEG establishes Democracy and Electoral Assistance Fund to assist state parties carry out their obligations to positively induce member state implement its objectives. EU and US also provide assistance for third world states in the process of democratization and for the respect of human rights.

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<sup>98</sup> Gudmundur Alfredsson *et al.*, (cited above at note 115), p. 888;

<sup>99</sup> Article 9 ICERD; Article 40 ICCPR; Article 16 & 17 ICESCR; Article 18 CEDAW; Article 19 CAT; Article 44 CRC; Article 73 of ICMW; Article 8 of the Optional Protocol to the CRC on the sale of Children, Child Prostitution and Child Pornography; Article 35 ICRPD; and Article 29 of ICED

<sup>100</sup> Henry G. Schermers and Niels M. Blockker (cited above at note 113), p. 886

<sup>101</sup> Article 49 ACDEG; Article 62 African Charter on Human and Peoples Rights or Banjul Charter

<sup>102</sup> See for example article 14 CERD, CAT, Optional Protocol to ICCPR etc.; European Convention on Human Rights, Article 25; American Convention on Human Rights, Article 44

<sup>103</sup> David A. Baldwin, "The Power of Positive Sanctions," *Power Politics*, p. 24; see also Henry G. Schermers and Niels M. Blockker (cited above at note 114), p.913

### 3.2.3. Voluntary enforcement mechanism

Voluntary implementation of international obligation is the primarily desired enforcement mechanism. Article 44 of ACDEG for example provides for the commitments voluntarily entered by state parties to apply or respect the principles and obligations of the Charter. Voluntary contribution to the budget of an organization beyond the assessed amount is voluntary implementation carried out by such member state. These voluntary implementations as to Han arises from the “law abiding sentiment” i.e. decent respect for the opinion of the public, national and international and particularly the disinclination of states to incur approbation of states organized in a worldwide or regional organizations.<sup>104</sup> From AU perspective this understanding is not yet developed as required.

### 3.2.4. Negative Enforcement mechanism without the use of force

Negative enforcement mechanisms punish or coerce non-complying state through the use of force or coercion without war.<sup>105</sup> The purpose is to bring change in target’s behavior; to constrain a target from engaging in a proscribed activity; and to signal/stigmatize a target or others about the violation of international norm.<sup>106</sup> In other circumstance the sender use it punish the target for the behavior they considered unacceptable.<sup>107</sup> In other circumstances it is used for preventive function (to exert sufficient pressure to induce addressees not to violate the rules in the future) or for repressive function (to current violations).<sup>108</sup> Comprehensive economic and financial sanctions, targeted diplomatic and political sanctions are some examples.

Negative enforcement mechanism is disadvantageous when the defaulting state is unable to implement than refuse willingly to implement resulting from economic problems, a prominent reason for failure to implement international obligations in Africa and third world countries. It is also at odds with the overall purpose of the UN Charter if it causes civilian sufferings. Side effect

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<sup>104</sup> H. H. Han, *International Legislation by the United Nations* (1971), p. 131

<sup>105</sup> Oscar Schachter, Carl-August Fleischhauer, Frederic L. Kirgis, Jr. and Mary Ellen O’Connell, “Compliance and Enforcement in the United Nations System”, *American Society of International Law*, available at: <http://www.jstor.org/stable/25658596>

<sup>106</sup> The Effectiveness of United Nations Targeted Sanctions: Finding from the Targeted Sanctions Consortium (TSC), November 2013, p.12

<sup>107</sup> Jeremy Matam Farrall, (cited above at note 114), p.7

<sup>108</sup> Henry G. Schermers and Niels M. Blockker, (cited above at note 113) p. 912

of Comprehensive Economic Sanction imposed on Iraq in the 1990s that become subject of debate in light of UN Charter objective is a good example. UN Charter alternatively provides for varieties of negative enforcement mechanisms including collective or unilateral use of armed forces to acquire compliance with its obligations. Hence UN Charter Chapter VI mechanisms rely on the consent of the concerned states i.e. states enter into such mechanisms voluntarily and willingly. On the other hand Chapter VII use coercion or force against the defaulting state like the interruption of economic, political and diplomatic relations etc.<sup>109</sup>

### 3.3. AU Enforcement Mechanisms

Article 23, article 30 and article 4(h & j) of the CA together form AU's enforcement regime to acquire compliance and implementation of its obligations. Article 23(2) CA provides for measures to acquire compliance using coercion short of war for violations other than defaulting payment in contributions for the budget of the Union. These among others diplomatic, political and economic sanctions as determined by the Assembly.<sup>110</sup> Entry into force of measures adopted under article 23(2) is conditional on the expiry of time frame given for compliance and the continuation of noncompliance by the target state(s).<sup>111</sup> The use of war or intervention as an enforcement mechanism is reserved for the Union under article 4(h & j).<sup>112</sup> Intervention is invoked only against Burundi in 2015 but not adopted by the Assembly. Similarly article 30 to only suspend state for UCG situation before resorting to those measures under article 23(2).<sup>113</sup> Overall enforcement regime of AU comprises combination of voluntary, positive<sup>114</sup> or negative enforcement mechanisms including intervention.

Lome Declaration lists core values and principles to reduce UCG for member states to voluntarily incorporate in their constitution. ADCEG established Democracy and Electoral Assistance Fund, a positive enforcement mechanism to induce states implement its objectives

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<sup>109</sup> UN Charter, Article 41

<sup>110</sup> Rule 36(1) of the Rule of Procedure of the Assembly

<sup>111</sup> Rule 36(3) of the Rule of Procedure of the Assembly & PSC/MIN.Comm.3 (CLXIII), par. 9

<sup>112</sup> AU CA, Article 4(h) allows in for intervention in grave circumstance of war crimes, genocide and crimes against humanity. This article is only used against Burundi in 2015 but intervention not materialized

<sup>113</sup> PSC/PR/COMM. (CLXXXI), par. 4; PSC/PR/COMM.(CCLX), par. 8;

<sup>114</sup> See PSC/PR/Comm.3 (CXCII), par. 5 in which the Council requests the Commission to mobilize financial and technical support necessary for the smooth conduct of the electoral process and the coordination of the electoral assistance and observation

through extending assistance for states in carrying out democratic election. Negative enforcement mechanism to coerce non-complying state(s) through imposition of appropriate measures to acquire compliance is also included.<sup>115</sup> The exception here is that non-compliance should be for good and reasonable causes not to trigger enforcement mechanisms or sanctions under article 23.<sup>116</sup> Article 30 CA provides that any government that came to power through unconstitutional means shall not participate in the activities of the Union. Where UCG happens immediate suspension will occur and upon refusal by the new regime to restore constitutional order targeted sanctions like visa denials for the perpetrators of UCG, asset freeze, restrictions of governments to government contacts, trade restrictions, sanctions provided under article 23(2) of CA, and any other sanction recommended by the PSC will be imposed. Hence AU enforcement regime comprises of qualified enforcement regime that only targets specific type of violation, currently UCG situation and general enforcement regime for other violations. The qualified enforcement regime to curb the prevalence of UCG situation is the subject of this paper to be discussed in the following section.

#### **3.4. Enforcement Regime Against Unconstitutional Change of Government**

AU PSC is established as a standing decision-making organ for prevention, management and resolution of conflicts, and a collective security and early warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa including UCG.<sup>117</sup> PSC acts on behalf of member states and they agreed to accept and implement its decisions in accordance with CA among which is imposition of sanctions whenever UCG takes place as provided in the Lome Declaration and ACDEG.<sup>118</sup> Lome Declaration and ACDEG list down situation of UCG that trigger immediate application of article 30 CA and measures under article 23(2) or intervention as a last resort for enforcement purpose. Hence AU sanctions regime against UCG has a firm legal base built on Article 23(2) and 30 CA, article 2(1-3) and 7(e-g)

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<sup>115</sup> Article 46 ACDEG

<sup>116</sup> Rule 36(1) of the Rule of Procedure of the Assembly

<sup>117</sup> Article 2(1), Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of the African Union, Durban 9 July 2002, (AU-PSC Protocol)

<sup>118</sup> Article 2(2 & 3) PSC Protocol and Article 7(e-g) PSC Protocol and Article 24 ACDEG

PSC Protocol, and Lome Declaration and article 25 and 46 ACDEG to give effect to the decisions and policies of the Union against UCG.

#### **3.4.1. Sanction under article 30 CA: Suspension**

UCG is the only obligation under the AU CA backed by sanction. Upon the occurrence of a situation and its determination as UCG the target state will immediately be suspended from activities of the Union in accordance with Lome Declaration.<sup>119</sup> It has to be understood that suspension does not relieve the target state from fulfilling its obligations, particularly those relating to respect of human rights.<sup>120</sup> And also not alter membership status meaning that basic obligations including financial contributions to the regular budget of the Union is not precluded.<sup>121</sup>

#### **3.4.2. Sanctions under Article 23(2)**

Article 23(2) CA is the base for AU sanctions regime to enforce decisions and policies of the Union. This article is coined in a broad manner that it easily responds to the new developments in the sanctions regime of the Union. AU sanctions regime as an enforcement mechanism is not yet developed to the level required to exert the amount of influence required to pressure member states in the enforcement process of the Union. AU can learn a lot from the experience of the UN sanctions regime that is developed over a period of time particularly after the end of the Cold War and first decade of the 21<sup>st</sup> century. Article 23(2) CA is formulated in a similar manner with article 41 of the UN Charter making the bases for its sanctions regime as an enforcement mechanism. Similar to article 41 UN Charter, article 23(2) encompasses a range of different types of sanctions applicable to enforce decisions and policies of the assemblies. The measures are listed illustratively that the assembly owing to the factors particular to each situations has discretion to devise a mechanisms that are effective to curb that particular situations. In other words the wordings of the provision are broad enough to develop the sanctions regime of the Union in a similar manner to that of the UN.

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<sup>119</sup> Rule 37(1&4e) of the Rule of Procedure of the Assembly & Article 7(g) PSC Protocol

<sup>120</sup> Article 25(2), ACDEG, Rule 37(4e) of the Rule of Procedure of the Assembly, Lome Declaration

<sup>121</sup> Lome Declaration, Par. (a)

Enforcement mechanisms under article 23(2) CA can be grouped into two broad categories; economic and non-economic measures. The Ezulwini Framework expanded the measures applicable in case of UCG occurrence.<sup>122</sup> The effectiveness of the sanctions regime requires identification of the general target.<sup>123</sup> Though they are of different nature and imposed for different purposes sanctions are complementary to each other i.e. they are more effective if taken in a way that political sanctions complement economic sanctions and vice versa to achieve the desired objective. Upon occurrence of UCG, measure is diplomatic i.e. immediate condemnation and non-recognition of the action and suspension of the state concerned.<sup>124</sup> The assembly is further empowered to impose measure of political and economic nature including limited and targeted sanctions it thinks appropriate upon failure to return to constitutional order.<sup>125</sup>

#### **3.4.2.1. Non- Economic Sanctions**

Non-economic sanctions aim at interrupting a target's relations with the external world in areas other than basic trade.<sup>126</sup> Diplomatic and representative sanction i.e. severance or reduction of diplomatic and consular relations; transportation sanction; travel sanctions; aviation sanctions; cultural, sporting and scientific sanctions; and telecommunications sanctions are among the types of non-economic sanctions.<sup>127</sup> Condemnation is the primary measure of non-economic nature to be employed in case of UCG.<sup>128</sup> Suspension under article 30 CA follows condemnation and other diplomatic and representative sanctions by the Union and individual member states follows accordingly. Diplomatic and representative sanction restricts government-to-government relations. It conveys non-recognition and limits the ability of the new government to engage in dialogue to convince other states the 'acceptability' of the unconstitutional means of ascension to power. Severing diplomatic relations, recalling representative and expelling the representatives

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<sup>122</sup> Par. 4(x), Ezulwini Framework for the Enhancement of the Implementation of the Measures of the African Union in Situation of Unconstitutional Changes of Government in Africa, Ezulwini, Kingdom of Swaziland (17-19 December 2009);

<sup>123</sup> Jeremy Matam Farrall, (cited above at note 114), p.129-132

<sup>124</sup> Rule 37(4a,b) of the Rule of Procedure of the Assembly

<sup>125</sup> Rule 37(5), of the Rule of Procedure of the AU Assembly and Lome Declaration, par. (b)

<sup>126</sup> Jeremy M. F, (cited above at note 114), p.123

<sup>127</sup> Id., 123-128

<sup>128</sup> Lome Declaration, Rule 37(4a) of the Rule of Procedure of the Assembly

of target state(s), not recognizing the new government is the manifestation of non-recognition and restriction on government-to-government contacts.

Transportation sanction, travel sanction, aviation sanctions, sporting, cultural and scientific sanctions, telecommunication and communication sanction etc. are other types of non-economic sanctions to be employed as an enforcement mechanism within the scope of article 23(2).<sup>129</sup> Transportation and travel sanctions are used to interrupt the flow of transportation and limit the ability to travel of individuals associated with UCG situation through visa denial and target individual and entities that are designated by the sanctions regime. They are used as a part of targeted sanctions in most of UNSC sanctions. AU imposed targeted sanctions on 109 civilian and military personnel with sanctions on Madagascar.<sup>130</sup> Sporting, Cultural and Scientific Sanctions intend to put moral pressure on the target by prohibiting participation in international sporting, cultural and scientific events.<sup>131</sup>

To sum up “...denial of transport and communication links” of article 23(2) CA encompasses broad category of sanctions of non-economic nature in addition the sanctions illustratively discussed above. Non-economic sanctions intend to pressure the target by denying them roots of communication and mobility to disseminate information to legitimize UCG through propaganda or diplomacy conducted through these channels of communication.

#### **3.4.2.2. Economic and Financial Sanctions**

Economic Sanctions are measures that aim to prevent the flow of commodities or products or supplies to or from a target.<sup>132</sup> Financial sanctions on the other hand focus on prohibiting the flow to and from the target of financial and economic resources rather than commodities, products or supplies.<sup>133</sup> AU Assembly, when it deems appropriate by denoting the qualifications of the sanctions to be imposed, may impose economic sanctions to enforce its

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<sup>129</sup> Article 23(2) CA; See for general understanding Jeremy M. F, (cited above at note 114),

<sup>130</sup> PSC/PR/COMM.1 (CCXVI) AND PSC/PR/COMM.1 (CCXXI)

<sup>131</sup> Ibid.

<sup>132</sup> Jeremy M. F, (cited above at note 114), p. 107;

<sup>133</sup> Ibid.

decisions and policies.<sup>134</sup> Economic sanctions can be comprehensive or targeted economic sanctions.

Comprehensive economic sanction prevents the flow to and from a target of all commodities and products. Indeed it incorporates all the forms of particular and financial sanctions.<sup>135</sup> Comprehensive economic sanction/ trade restrictions target all economic activities, import and export, from which target generates economic income.

Comprehensive economic sanction inflicts unwanted sufferings on all peoples living in the target state through which it intends to pressure the target states into submission.<sup>136</sup> The side effects of general trade embargoes witnessed from sanctions on Haiti, Iraq and Yugoslavia, resulted in subsequent innovation and adoption of targeted sanctions by SC to reduce such side effects.<sup>137</sup> In addition exemptions of humanitarian and other nature are provided to comprehensive economic sanctions.<sup>138</sup>

Targeted sanctions apply coercive pressure on specific decision-making elites and the companies or entities they control, thereby avoiding unintended humanitarian consequences; and also deny access to specific products or activities that are necessary for repression and war.<sup>139</sup> They are broadly grouped into six categories: Individual/entity sanctions, diplomatic sanctions, arms embargoes, commodity sanctions, transportations sector sanctions and financial sanctions.<sup>140</sup>

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<sup>134</sup> Rule 37(5c) of the Rule of Procedure of the Assembly; Article 25(6 & 7) ACDEG; Lome Declaration; limited sanctions under Lome Declaration correspond to particular economic sanctions and targeted sanction denote the concept of smart sanctions under the UN SC sanctions regime.

<sup>135</sup> Jeremy M. F, (cited above at note 114), p. 107

<sup>136</sup> SC Res. 661, 665, 666, and 670 (1990); For General Understand of the Iraq Sanctions See David M. Malone, *The International Struggle Over Iraq: Politics in the UN Security Council 1980-2005*, Oxford University Press 2006

<sup>137</sup> Jeremy M. F, (cited above at note 114) p.108-9; Humanitarian Exemptions include medical supplies, educational equipment and material, informational material, foodstuffs, petroleum and petroleum products and clothing. Other exemptions are mostly a limited amount of export for the sanctioned country to pay for the exemptions allowed under humanitarian exemptions

<sup>138</sup> Ibid.

<sup>139</sup> David Cortright, George A. Lopez and Linda Gerber-Stellingwerf, "The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990," pp. 205-226, p. 213, in Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (Ed.), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, Oxford University Press, 2008; Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* Cambridge Studies in International and Comparative Law, (Cambridge University Press, 2011), p. 302

<sup>140</sup> The Effectiveness of United Nations Targeted Sanctions: Finding from the Targeted Sanctions Consortium (TSC), November 2013, p.15; See also Jeremy M. F, (cited above at note 91), p.121-143;

UNSC overtime developed the capacity and mechanism through which lists of designated targets individuals and entities are kept and updated timely in cooperation with member states to effectively impose and implement targeted sanctions. It subjects individuals and entities on these designations to asset freeze, travel bans, and other financial sanctions and visa bans as authorized by the resolution imposing the sanction. Learning from the trends of the UNSC in developing its current sanctions regime AU provided for, in addition to general trade sanction, limited and targeted sanctions. Targeted, particular or limited economic sanctions in contrast to comprehensive economic sanction focuses on particular activity generating vital economy without which the sanctioned entity cannot survive. Arms sanctions/embargos; petroleum sanctions; sanctions against trade in forms of transport: aircraft, vehicle and watercraft sanctions, diamond sanctions, chemical sanctions, timber sanctions, luxury goods sanctions etc. are some forms of targeted economic sanctions. For example see SC Res. 1306(2000) that sanctioned trade in diamond to end conflict in Sierra Leone.

Generally, the AU sanctions regime against UCG is developed in a way that enables the Union flexibility and capability to adapt to new development in the implementation of its policies and decisions. AU's sanctions regime strength is that it learned from the weaknesses encountered by the UNSC. Its effectiveness to achieve the intended goal is yet to be tasted. So far targeted sanction used against Mauritania failed to achieve its objectives alerting the Union to look into how it implement and develop its sanctions regime effectively.

### **3.4.3. Intervention (Article 4(h) and (j) of Constitutive Act)**

Non-intervention and sovereign equality of states are among the core guiding principles around which AU CA is formulated. It upholds the principle of the UN Charter forbidding the use of force by states. But the CA reserves the right to use force for the Union in two circumstances. The first circumstance is upon its own motion or initiation under Article 4(h) in case of grave circumstances of genocide, war crimes, crimes against humanity and to restore peace and stability to a member state.<sup>141</sup>

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<sup>141</sup> For general understanding on AU's right to intervention and motives for its inclusion see Ben Kioko, "The right of intervention under the African Union's Constitutive Act: From non-interference to Non-intervention," *International Review of Red Cross (IRRC)*, December 2003, Vol. 85 No. 852, PP 807-825;

Based on the objectives of the Union, “serious threat to legitimate order and to restore peace and stability to the member state of the union” of article 4(h) CA is broadly formulated and will enable the union to intervene in case of UCG. The addition of this situation is considered by many as a move, by the African Union, from human security to regime security.<sup>142</sup> To understand how intervention benefits implementation of the norms against UCG, the Gambia crises of 2016 is a good place to start. Threat to Intervene when used in addition to other mechanisms (diplomatic/preventive diplomacy or economic and political sanction), it makes them effective to coerce the defiant to weigh the consequences, if intervention is materialized which it will finally lose whatever the cost may be. Intervention used at appropriate time and with other appropriate mechanisms will strengthen AU diplomatic and economic sanctions capacity to implement as witnessed in the Gambia in January 2017. The success of the preventive diplomacy in the Gambia is owed to threat of intervention used legitimately within the scope of article 4(h) CA to abort threat to legitimate order and exercise of power. Refusal by the incumbent to leave after electoral defeat qualifies UCG and is a threat to legitimate exercise of power by the elected president, which legalizes intervention under article 4(h) CA and recommendation under PSC Protocol article 7.

The second circumstance for intervention is upon the request from member states of intervention under article 4(j) to return the requesting state to order and stability.<sup>143</sup> This type of intervention is to assist the legitimate government in case its peace and order is threatened from non-legitimate groups like terrorist groups. For example AU deployed a mission to assist the Malian government to repel the terrorist groups who controlled northern part of the country.

Indeed, the right to intervention under the AU rests on protection responsibilities of the state, international assistance and capacity building, and timely and decisive response<sup>144</sup> and responsibility to prevent, react and rebuild<sup>145</sup> needed to effectuate AUs objectives of rooting

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<sup>142</sup> K.Sturman and E. Baimu, “Amendment to the African Union’s right to Intervene: A shift from human Security to regime security,” *African Security Review*, Vol. 12, No. 2, 2003, p.5

<sup>143</sup> For general understanding of Intervention by Invitation see Erika de Wet, “Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force,” *The European Journal of International Law (EJIL)*, Vol. 26 No. 4 PP. 979-998

<sup>144</sup> Article 2 and 7 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union

<sup>145</sup> Tim Murithi, “The African Union’s Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect?” IPG/2009, p.91

democracy. This extends to UCG under the fourth ground of interventions to give value for the voice of the peoples expressed through ballot box where such voice of the citizens are violated by governments and prevent disorder and conflict.

### **3.4.4. Other Enforcement Mechanisms**

#### **3.4.4.1. Criminal Responsibility**

AU instruments make commission and attempt to commit UCG an international crime within the jurisdiction of African Court of Justice and Human and Peoples Rights (ACJHPR) by the Malabo Protocol.<sup>146</sup> All member states are responsible to bring the UCG perpetrators to trial or cooperate in their prosecution.<sup>147</sup> This is a good start for the AU to entrench democratic culture. But apparent limitation is that ACDEG and the Malabo Protocol did not specify what charges are to be brought against UCG perpetrators apart from answering jurisdictional question. Further Malabo protocol provides immunity from prosecution for any serving AU Head of State or Government or anybody acting or entitled to act in such capacity or other senior state officials based on their functions or actions during their tenure in office.<sup>148</sup> This weakens the position of the Union to bring to justice African leaders for crimes committed during their tenure. In addition African leaders are thwarting entry into force of the instrument by not ratifying the instrument.

#### **3.4.4.2. Prohibition of auto-legitimization**

Political sanction or Prohibition from political participation to restore constitutional order is another type of targeted sanction. ACDEG and the Ezulwini Framework prohibit UCG perpetrators from participating in the political theatre to restore democratic order after they commit or participated in the commission of UCG situation. This aims at ending auto legitimization committed through election and legitimation of the new government that came to power unconstitutionally by readmitting. If converted to work and AU stick consistently to this requirements it is a good start for the Union to entrench democratic culture of power transfer. It

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<sup>146</sup> Article 28A(1)(4) and Article 28E, Malabo Protocol

<sup>147</sup> Article 14(2 & 3), ACDEG;

<sup>148</sup> Article 46ABis, Malabo Protocol

also facilitates the process of bringing to justice the perpetrators of UCG before the judicial bodies of the Union or domestic bodies. By passing this prohibition assists the perpetrators to avoid other responsibilities arising from their participation in the commission of UCG situation including criminal responsibility under ACDEG and the Malabo Protocol.

#### **3.4.4.3. Election Observation Mission**

ACDEG mandates the Commission, at the request of a member state<sup>149</sup>, to provide assistance or support for states in the electoral process through the Democracy and Electoral Assistance Unit and Electoral Assistance Fund.<sup>150</sup> All state members are obliged to inform the Commission of the scheduled elections and invite it to send an electoral observer mission.<sup>151</sup> What happens if the state did not want to invite observer mission? Can the Commission send observer on its motion? The Commission's hand is tied as long as an observer mission depends on the state's willingness to invite it. States that are not democratic will not invite the commission at all though they may report the scheduled election. It is also at the mercy of the inviting state for the Observer mission to conduct its business. The existence of the mechanism is a good move but its effectiveness depends on the willingness of inviting states to perform its actions. Exploratory mission is the first to be conducted by the Commission prior to the elections and Electoral Observation Mission follows depending on the outcome of this mission. What if the state reports the scheduled election a period that will not allow for this exploration of the conduciveness of the election environment? No way the Commission or the Union can force states to do. From economic perspective also AU offers very little or no economic incentive to lure in states, which they don't need to lose for failing to invite for observer mission or limiting its performance. Therefore, though it provides for this implementation mechanism it is not effective at monitoring state behavior. It depends on the will of the states whether they want it or not. The Union has no way to force himself on its motion to conduct election observer mission.

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<sup>149</sup> Article 18(1), ACDEG

<sup>150</sup> Article 44(2A), ACDEG

<sup>151</sup> Article 19(1), ACDEG

## CHAPTER FOUR

### AU ENFORCEMENT MECHANISM IN PRACTICE: LESSONS AND CHALLENGES

#### 4. AU ENFORCEMENT MECHANISM IN PRACTICE

##### 4.1. Case Selection

Evaluating the implementation of AU instruments needs an assessment of selected situations. For this purposes six situations, in which AU instruments are violated triggering enforcement interference with or without the use of force, are selected. They are selected depending on but not only the types of UCG situation as categorized under chapter two above and definitions provided by AU instruments, manner of AU's enforcement reactions, the occurrence of new events that puzzled AU in enforcing its norms against UCG like popular uprising and conflict of national constitutions and the norms of the Union.

##### 4.1.1. NIGER (2010)

###### *Background*

President Mamadou Tandjas' third term bid through constitutional amendment is the root cause of the crisis that precedes the coup. The president dissolved Nigerien Constitutional Court for deciding the presidents' plan for referendum unconstitutional on 25 May 2009 and the Parliament in August 2009 for opposing the idea of referendum on constitutional amendment.<sup>152</sup> New constitution that opposition called a 'constitutional coup.' is adopted on August 4, 2009 through referendum that did not diffused the crisis and strong protest against the president's move. Using this pretext the Supreme Council for the Restoration of Democracy (CSRD) ousted the president on 19 February 2010 receiving countrywide support.<sup>153</sup> CSRD pledged to organize elections and promised that no members of the armed forces would contest

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<sup>152</sup> Cour Constituionnelle du Niger, avis No. 2/CC, 25 May 2009, cited in Niger: Another Weak Link in the Sahel? International Crisis Group Africa Report N0. 208, 19 September 2013, Translation from French, p. 13

<sup>153</sup> D Smith 'Military Junta seizes power in Niger coup' <http://www.theguardian.com/world/2010/feb/19/niger-military-junta-coup> (accessed 26 April 2017)

in the election.<sup>154</sup> Accordingly new constitution is adopted on 31 October 2010 and, legislative election, which AU and other international observer accepted as transparent and fair, is held on 31 January 2011.<sup>155</sup> Mr. Mahamadou Issoufou won the presidential election of 12 March 2011.

### *AU Reactions*

AU did not react to the incumbent's action dissolving constitutional or parliament while ECOWAS suspended Niger and refused to recognize president Tandja as a lawful leader of the Nigerien Republic after he dissolved the parliament and constitutional court to hold referendum.<sup>156</sup> The president's action qualifies UCG situation under the manipulation of basic laws for personal benefit by the incumbent or governing party under ACDEG. AU has many reasons to condemn the action by the president including the decision of the Nigerien Constitutional Court and the legislative body's rejection for its unconstitutionality. AU condemned and rejected the coup on 18 February 2010 demanding the speedy return to constitutional order and suspended Niger.<sup>157</sup> ECOWAS's position to preserve its democracy conventions as well as AU's objective is far more coherent and persuasive to achieve its objectives than AU. Reasons for such conflicting decision may arise from AU understanding of the concept of constitutionalism, UCG definition and contributing situations, AU political commitment etc.

AU Commission appointed Special Envoy to Niger, to strengthen efforts being made by AU and ECOWAS towards restoration of constitutional order after the coup. Joint tripartite AU/ECOWAS/UN mission visited Niger to ask the new authorities for a firm commitment to a rapid return to constitutional order<sup>158</sup> and decided to accompany the transition process.<sup>159</sup> This mission is to ascertain and remind the leaders not seek election in the process and also to

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<sup>154</sup> "Niger: Another Weak Link in the Sahel? International Crisis Group Africa," Report N0. 208, 19 September 2013, Translation from French, p.15; the decree signed by Salou Djibo the leader of the CSRD on March 2010 prevented the members of the CSRD and the transitional government from contesting the elections.

<sup>155</sup> *Id.*, p.16

<sup>156</sup> The Monitor, 'ECOWAS suspends Niger for Defying Election Ban', All Africa 22 October 2009 <http://allafrica.com/stories/200910220193.html> (accessed on 26 April 2017)

<sup>157</sup> PSC/PR/COMM.2 (CCXVI), par. 5

<sup>158</sup> PSC/PR/ BR.1 (CCXXXII), par. 3

<sup>159</sup> Assembly/AU/ 6(XV), par. 15, Conference of the African Union, 15<sup>th</sup> Ordinary Session, 25-27 July 2010, Kampala, Uganda.

pressure leaders commit to their promise. Presidential election of 12 March 2011 is considered free, fair and transparent and AU lifted sanctions on Niger on 16 March 2011.<sup>160</sup> AU is successful at prohibiting auto legitimation.

#### 4.1.2. EGYPT

##### *Background*

The Arab Spring in Egypt ended with the election of Mohamad Morsi in 2012. On one-year anniversary of Egypt's first democratically elected President protest started demanding President Morsi to step down that later spread across Egypt.<sup>161</sup> General Abdel Fatah El Sisi, Egyptian military leader, issued a 48-hour ultimatum to respond to peoples' demands that is refused by the president.<sup>162</sup> The military deposed the president on 3<sup>rd</sup> July 2013 and issued a roadmap to return to democracy that is met with jubilation and fireworks in support and counter protest and condemnation at the same time.<sup>163</sup> The military crushed the counter protest and condemnation using force. By the referendum of 18<sup>th</sup> January 2014 new constitution is adopted. General Abdel Fatah El-Sisi resigned from military to contest in presidential election of 3<sup>rd</sup> June 2014 that he has won.<sup>164</sup>

##### *AU Reactions*

AU expressed its solidarity with people's demand for democracy but suspended Egypt stating that the overthrow of democratically elected president violates Egyptian Constitution and relevant AU instruments.<sup>165</sup> Egyptian authorities objected the suspension arguing that the event of 3<sup>rd</sup> July 2013 is a full-fledged popular revolution that AU should take cognizance of its

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<sup>160</sup> PSC/PR/COMM (CCLXVI), par. 6

<sup>161</sup> PSC/AHG/4. (CDXV), Final Report of the African Union High Level Panel for Egypt

<sup>162</sup> "Egyptian Army Issues 48-hour ultimatum", *Al-Jazeera English*, July 1, 2013

<sup>163</sup> "Army Ousts Egypt's President: Morsi Is Taken Into Military Custody", *The New York Times*, July 3, 2013, accessed on 23, April 2017; "Egypt's coup: What we know so far, *CNN*, Thursday July 4, 2013

<sup>164</sup> "Egypt's El-Sisi bids military farewell, says he will run for presidency", *Ahram Online*, 26 March 2014; P. Kingsley 'Abdel Fatah al-Sisi won 96.1% of vote in Egypt presidential election, say officials' [www.theguardian.com/world/2014/jun/03/abdel-fatah-el-sisi-presidential-election-vote-egypt](http://www.theguardian.com/world/2014/jun/03/abdel-fatah-el-sisi-presidential-election-vote-egypt), (on 26, April 2017).

<sup>165</sup> PSC/PR/COMM. (CCCLXXXIV), par. 2 and 6; PSC/AHG/4.(CDXVI), par. 27

expressed solidarity.<sup>166</sup> AU Commission established High Level Panel for Egypt that visited Egypt to interact with different political groups and international stakeholders and made its final report on the situation.<sup>167</sup> In addition AU urged the new administration to engage in inclusive consultation for the organization of free, fair and transparent election. AUEOM observed the election and issued two contradictory statements in its report on the election. The first is that the election was conducted in a stable, peaceful and orderly manner, which allows willing voter to effectively participate.<sup>168</sup> In its other paragraph AUEOM concludes that the election was conducted within the context of limited space, rights and freedoms.<sup>169</sup>

Why contradicting statements? I say the first statement is an appeal to please the government of Egypt for the suspension that is objected to by the Egyptian interim government. It is also to provide procedural legitimacy needed by the Union to readmit Egypt. This is evident from the phrase reading “it should be viewed in light of the unique set of circumstances noted above.”<sup>170</sup> The second statement on the other hand provides an anti-dote to undermine precedent setting effect of readmission ending with auto-legitimation. This is supported by the driving considerations of the panel, which is primarily the place of Egypt in Africa and the need to act coherently in the implementation of its instruments regardless of the member state concerned.<sup>171</sup> AU did actually failed to do so while readmitting Egypt. Therefore, while readmission gives AU a relief not to antagonize its strongest member; the second statement combined with the Panels’ recommendation provides a leeway to undermine precedent effect of conflicting PSC decisions. Would this decision be reached against smaller and weaker states? For the writer the answer is “NO.” See Niger and Gambia cases. Had Niger been as strong as Egypt in military, economy and population size, would AU be successful at prohibiting auto legitimation?

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<sup>166</sup> PSC/AHG/4. (CDXVI), par. 49 (a); the military citing the preamble of the constitution of 2012 defended that the involvement of the armed forces in the July 2013 events emanated from their constitutional obligation to protect the nation and was in line with peoples demands.

<sup>167</sup> For the summary of the Panels’ activities see PSC/AHG/4. (CDXVI) V-VII; *See also* PSC/Min/BR.2 (CCCLXXXVII) for the mandate of the High Panel; see also PSC/PR/COMM/(CCCLXXXIV)

<sup>168</sup> PSC/AHG/4. (CDXVI), par. 64

<sup>169</sup> *Id.*, par. 66

<sup>170</sup> PSC/AHG/4. (CDXVI), par. 83; The noted circumstances for recommendation for readmission are i) the progress made and the steps taken by the Egyptian authorities to formally restore constitutional order in the country, ii) the fact that the suspension of the country for close to a year has sent a strong signal to the Egyptian stakeholders about AU’s attachment to its principles and instruments, and iii) the need for the AU to remain engaged with Egypt and to accompany the efforts of the Egyptian authorities for the full implementation of the Roadmap,

<sup>171</sup> PSC/AHG/4. (CDXVI), par. 69; PSC/PR/COMM.2 (CDXLII),

### 4.1.3. MAURITANIA

#### *Background*

Following the ousting of President Maaoya Sid'Ahmed Ould Taya by the Military Committee for Justice and Democracy led by Colonel Ely Ould Mohammad Vall in 2005, election was held in August 2007 in which non of the coup leaders participated led to the election of Ould Abdallahi as a president completing the process of restoring constitutional order. But soon before the celebration of AU success is over another coup rocked the streets of Mauritania. On 6<sup>th</sup> August 2008, Mauritanian military led by General Mohammed Ould Abdel Aziz ousted president Sidi Mohammed Ould Cheikh Abdallahi ending a prolonged political crisis in which 48 MPs quit following the vote of no confidence.<sup>172</sup> A demonstration in support of the coup was held across the country and majority of the MPs supported the coups. The coup leaders announced the formation of new governing Highest State Council comprising entirely of military officers and announced plans to hold election overseeing the process. Presidential election is held on 18 July 2009 in which the leader of the coup General Mohammed Ould Abdel Aziz won and became the president.<sup>173</sup>

#### *AU Reactions*

AU immediately condemned the coup and suspended Mauritania demanding the restoration of constitutional order.<sup>174</sup> PSC while expressing its concern welcomed the initiatives by AU Commission and other stakeholders including a consultative meeting held on the situation in Mauritania on 10<sup>th</sup> November 2008.<sup>175</sup> PSC demanded, on 22 September 2008, unconditional restoration of the overthrown president to return to constitutional order, rejected measures of constitutional, institutional and legislative nature taken and warned of targeted sanctions to

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<sup>172</sup> "Mauritanian parliament backs military coup", the guardian, Thursday 14 August 2008, available at: <https://www.theguardian.com/world/2008/aug/14/mauritania>

<sup>173</sup> "Coup Leader Wins Elections Amid Outcry in Mauritania", The New York Times, July 19, 2009 available at: <https://mobile.nytimes.com/2009/07/20/world/Africa/20mauritania.html>

<sup>174</sup> PSC/PR/Comm. (CLIV) 'AU to drop Mauritania after coup', BBC News, Saturday, 9 August 2008, available at: [new.bbc.co.uk/1/hi/world/Africa/7551531.stml](http://new.bbc.co.uk/1/hi/world/Africa/7551531.stml)

<sup>175</sup> PSC/PR/COMM (CLVI), par. 2; participants in the meetings are AU Commission, Arab League, UN, the International Organization for La Francophone, the Organization of Islamic Conference and EU.

follow upon failure to implement AU's demand.<sup>176</sup> On 22 December 2008 AU gave two weeks ultimatum for entry into force of warned of targeted sanction of visa denial, travel restrictions and freezing of assets of the perpetrators and their civilian supporters.<sup>177</sup> The sanctions become effective on February 5 with PSC demanding member states to implement it.<sup>178</sup>

The sanction is not effective in pressuring coup leaders abandon their claims. AU's weakness in identifying the targets especially of asset freeze is sanction on a paper due to the fact that the leaders had no asset to be frozen in foreign countries. This emanates from AU's weakness in identifying appropriate target and relevant effective type of sanction. The other is that effectiveness of the imposed sanction depends on member state's commitment to implement it that African states don't even think of due to the fear that their actions may or would set a precedent to be used against them in the future. The sanction and suspension is lifted on 1<sup>st</sup> of July 2009 as a result of steps taken to restore constitutional order before presidential election that is due on 18 July.<sup>179</sup> It can be concluded that AU's sanction regimes, as an enforcement mechanism is an infant regime for which a lot of side works should be accomplished before it is effective enough to compel states to the demand of the Union.

#### 4.1.4. BURKINA FASO

##### *Background*

What is faced in the Burkina Faso is a chain of interrelated events giving rise to one another. President Blaise Compaore assumed power removing President Thomas Sankara and led Burkina Faso for three decades. The president insisted to prolong his tenure by proposing an amendment to remove a provision limiting upper age for president of the republic. Protesters opposing President Blaise Compaore's proposal to amend the constitution to extend his tenure, particularly article 37, stormed into the parliament building that is set to vote on the proposal on 30 October 2014. The president withdrew the proposal and suspended the government, but on the

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<sup>176</sup> PSC/MIN/Comm.2 (CLI), par. 6 and PSC/MIN/Comm.3 (CLXIII), par. 7; "Mauritanian coup leader rejects AU ultimatum", AFP, September 27, 2008 available at: <http://afp.google.com/article/ALeqM5iAPV5wvH4evDM3CelqAtIDNbs9zQ>, (accessed on 10 May 2017).

<sup>177</sup> PSC/MIN/Comm.3 (CLXIII), par. 9

<sup>178</sup> PSC/PR/(CLXVIII)

<sup>179</sup> "African Union lifts sanction on Mauritania", Reuters, Wednesday July 1 2009, available at: [mobile.reuters.com/article/idUSTRE56021Z20090701](http://mobile.reuters.com/article/idUSTRE56021Z20090701), (accessed on 10 May 2017)

next day he is forced to resign by the military and the army chief took over power. Lieutenant Colonel Isaac Zida the leader of the army transferred power to Mr. Michel Kafando, a civilian transitional president on 21 November 2014. AU is satisfied with the event and did not suspend Burkina Faso. On 17<sup>th</sup> September 2015 the transitional government is overthrown and replaced by General Gilbert Diendere and its institutions were dissolved. The motive behind the coup is prohibition of the presidential guard leaders from political participation to be held to return to democracy. But weeks later the transitional president is reinstated.<sup>180</sup>

### *AU Reactions*

AU recognized people's right to revolt peacefully against oppressive political systems and expressed its solidarity for Burkina Faso's people.<sup>181</sup> AU expressing the validity of the constitution of Burkina Faso and welcoming the resignation of the president condemned the role taken by the military to lead the transition and demanded to step aside handing over power to a civilian authority.<sup>182</sup> AU also threatened to impose targeted sanctions against those who would frustrate efforts of civilian led transition and to suspend Burkina Faso.<sup>183</sup> The threat was later withdrawn with the appointment of civilian transitional government; tripartite joint mission of AU-ECOWAS-UN to facilitate for consensual settlement of the crisis and International support group is setup to assist successful transition to constitutional order.<sup>184</sup> AU is successful at forcing coup leaders transfer power unlike in Egypt and Mauritania. The success is attributable to the influence of ECOWAS (external factor), existence of popular protest against the coup (domestic factor), relative weakness of the country economically and militarily compared to those to withstand AU's influence (Egypt and Mauritania).

With the coup against the transitional civilian administration, AU threatening the coup leaders with targeted sanctions and designation as terrorists for failure to return status quo ante

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<sup>180</sup> "Burkina Faso coup sparks deadly street protests", *BBC News*, 17 September 2015, [www.bbc.co.uk/new/world-africa-34276807](http://www.bbc.co.uk/new/world-africa-34276807) (accessed on 14 May 2017); "Burkina Faso's president back in charge as coup fails". *REUTERS*, Wednesday September 23 2015, available at: [mobile.reuters.com/article/idUSKCN0RN0U120150923](http://mobile.reuters.com/article/idUSKCN0RN0U120150923)

<sup>181</sup> PSC/PR/COMM. (CDLXV), par. 3

<sup>182</sup> *Id.*, par. 9

<sup>183</sup> *Id.*, par. 14

<sup>184</sup> PSC/PR/COMM (CDLXVIII), par. 6

within 96 hours suspended Burkina Faso.<sup>185</sup> AU also for the first time stressed to bring to justice the perpetrators before the relevant national and international jurisdictions for actions taken against the demonstrators opposing the coups.<sup>186</sup> The threat bore a fruit and the coup is reversed with the reinstatement of the transitional government to power. Accordingly PSC lifted the suspension and put on hold other decisions against the perpetrators without prejudice to the prohibition on the participation of the perpetrators of UCG in the election to return to civilian order and hold political positions of their states.<sup>187</sup> AU coherently and effectively used suspension and combined threat of imposing targeted sanctions and criminal prosecution at international and national level to influence the coup leaders and successfully abort auto legitimization for the first time against coup leaders.

#### **4.1.5. BURUNDI**

##### *Background*

Long civil war ended in Burundi with the 2000 Arusha peace agreement, which led to the election of Pierre Nkurinziza ending the civil war and adoption of a national constitution. President Pierre Nkurinziza's decision to seek a third term on 25<sup>th</sup> April 2015 sparked conflict and mass protest across the country. The proposal for the amendment of the constitution to scrap off third limit is defeated by narrow margin in legislative house. The president then turned to the Constitutional Court for interpretation that is decided in favor of the President arguing that the first term doesn't count under the constitution because of his appointment by the legislative not elected under the constitution.<sup>188</sup> Popular demonstration is intensified with this decision across the country leading to the death of many civilians and displacement of many others. The crises also become the center of debate before international organization including AU and UN.

##### *AU reactions*

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<sup>185</sup> PSC/PR/COMM/3. (DXLIV), par. 11 & 12

<sup>186</sup> Id., par. 9

<sup>187</sup> PSC/AHG/COMM.3 (DXLVII), par. 9

<sup>188</sup> "Burundi court backs President Nkurinziza on third term," BBC 5 May 2015, [www.bbc.com/news/world-africa-32588658](http://www.bbc.com/news/world-africa-32588658), (accessed on 28 April, 2017)

AU is silent regarding the president's bid to amend the constitution under its instruments against UCG. Rather relied on preventive diplomacy to end the crisis like high-level delegation, a special envoy, human rights and military observers, and investigation into human rights violations while reaffirming its responsibilities as guarantor of the Arusha Peace and Reconciliation Agreement in Burundi of 2000.<sup>189</sup>

After the conflict is intensified, PSC issued MAPROBU (African Prevention and Protection Mission) requesting the deployment of 5000 military personnel's mandated with preventing deterioration of security and stability, protect civilians and to help create conditions needed for a credible inter-Burundian dialogue.<sup>190</sup> PSC gave 96 hours for Burundi to agree to the request. Upon failure to do so to request authorization from the General Assembly to intervene for the first time under article 4(h) CA.<sup>191</sup> Instead of authorizing MAPROBU, AU Assembly agreed to send high-level delegation led by South African President Jacob Zuma that ended with authorization of 100 human rights observers and 100 military monitors for Burundi.<sup>192</sup>

EAC, a REC that did not condemn the action of the president, took the leading role in the negotiation to end the crisis leaving PSC with the role of endorsing its decisions.<sup>193</sup> AU High- Level Delegation, which is recommended by AU Commission to enhance regional efforts within APSA, is dispatched on 9<sup>th</sup> May 2015 to facilitate immediate cessation of hostilities and dialogue to find lasting solution for the crisis.<sup>194</sup> PSC condemning the foiled coup of 13<sup>th</sup> May 2015 endorsed the outcome of EAC extra ordinary summit requesting the deployment of AU

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<sup>189</sup> "The African Union and the Burundi Crisis: Ambition Versus Reality" International Crisis Group, Briefing No. 122/Africa 28 September 2016. Available at <https://www.crisisgroup.org/Africa/central-africa/Burundi/African-union-and-burundi-crisis-ambition-versus-reality>

<sup>190</sup> PSC/PR/COMM. (DLXV), par. 13(aiii)

<sup>191</sup> The government declared MAPROBU as an 'invasion and occupation force' if happened and vowed to fight back to defend Burundi while AU, UN and Western officials called the PSC's decision a mistake and an insult on Burundian Sovereignty

<sup>192</sup> 'Zuma: African Union to Send Monitors to Burundi', *Al Jazeera English*, 28 February 2016, available at: <http://www.aljazeera.com/news/2016/zuma-african-union-send-monitors-burundi-160228035159349.html> (accessed 28 April 2017)

<sup>193</sup> PSC/PR/COMM. (DVII); PSC/PR/COMM. 2(DXV); PSC/PR/COMM.3 (DIII); in all this decision PSC endorsed the decision taken by the EAC

<sup>194</sup> PSC/PR/COMM. 3 (DIII); the mission is led by, Mr. Edem Kodjo former secretary-general of the OAU, former Togolese Prime Minister and Member of AU Panel of Wise.

military and human rights observers.<sup>195</sup> UN, AU, EAC, ECCAS and International Conference on the Great Lakes Region (ICGLR) cooperatively or individually participated at facilitating political dialogue to solve the crisis. Despite issuing or endorsing lots of statements, appointing different high level representatives and communiqués AU did not refer the Burundi Crises as UCG and applied sanctions under its instruments against UCG.

The Burundian government through different channels succeeded at convincing the international community that the crisis was legal one that should be settled through a legally pre-established procedure under the constitution i.e. through the decisions rendered by the Supreme Court than political one that needs dialogue. Hence while the government is successful at averting AU's influence, AU took a back step going as far as apologizing for the initiation of MAPROBU under article 4(h) as a mistake. Here the commitment from African states is also determinative at forcing AU's decision to back from pressuring Burundi. The role of the Supreme Court is also prominent that it allowed the government to shift the center of the debate from political to legal debate with which arose the enjoyment of right by the president than violation of peoples right by the presidents.<sup>196</sup> But the decision made the president to make concession not to bid another term, which is a good achievement for continued stability. AU PSC before the decision was rendered required all stakeholders to respect the decision of the court. This decision gives to internal actors like election commission and Supreme Court a determining role in the designation process of a situation a UCG or not under AU instruments that contradicts AU's silence in Niger case before the coup. Why didn't AU asked the president to abide by the decision of the court?

Despite all this debate and confrontation, AU did not classified the situation UCG and impose sanctions under its instruments against UCG. What is apparent is that the level of political commitment from the leaders (specially RECS), international allies position, the fear of continued insecurity if the president is removed and difficult diplomatic relations with the

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<sup>195</sup> PSC/PR/COMM. (DXXIII), par.4 & 5; among the steps agreed upon at the Dar es Salaam Summit is 1) the call to Burundian authorities to postpone the election for a period not beyond the mandate of the current government; 2) regional efforts aimed to restore peace and stability so as to ensure the return of refugees and the holding of elections in a peaceful, free, fair, transparent and inclusive manner; and 3) the cessation of violence by all parties.

<sup>196</sup> Id., p. 56

eventual winner by international community influences AU's decisions to uphold its instruments against violent states with allies.

#### 4.1.6. THE GAMBIA

##### *Background*

The Gambia crises started after President Yahya Jammeh announced on 9<sup>th</sup> December 2016 his intention to challenge the result of 1<sup>st</sup> December presidential election citing 'serious and unacceptable abnormalities during the election process.'<sup>197</sup> The president accepted defeat and congratulated his opponent on 2<sup>nd</sup> December accepting the result announced by the election commission. The electoral commission acknowledged the president argument but decided that the irregularities will not affect the overall result of the election outcome. Then the president lodged petition to before the Supreme Court challenging the election result as provided in the Gambian Constitution and demanded for new election. The president declared state of emergency and the parliament extended the stay of president Yahya Jammeh for three months.

##### *AU Reactions*

AU PSC rejected any attempt to circumvent or reverse the outcome of the presidential election of 1<sup>st</sup> December 2016 stating that it is a clear expression popular will and choice of the Gambian people. The Union called upon the outgoing president to keep the spirit of the speech delivered on 2<sup>nd</sup> December 2016, and to respect the Constitution of the Gambia, the ECOWAS and AU instruments specially ACDEG article 23(4) which makes refusal by the incumbent to hand over power an UCG.<sup>198</sup> AU did not paid attention to the requirement of its instruments on resolving conflict after election including challenging the election result which he did in case of Burundi demanding all stakeholders to respect the decision of the Court. The reasons are firstly, AU has learned from its failure in the Burundi crisis in which the Unions' influence is over powered by the decision of the Supreme Court to shift the focus of the debate from political one

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<sup>197</sup> "Gambia's Yahya Jammeh rejects result of presidential election," *Al Jazeera English*, 10 December 2016, [www.aljazeera.com/news/2016/12/gambia-jammeh-rejects-result-presidential-election-161210034606068.html](http://www.aljazeera.com/news/2016/12/gambia-jammeh-rejects-result-presidential-election-161210034606068.html)

<sup>198</sup> PSC/PR/COMM. (DCXLIV), in this speech the president Yahya Jammeh welcomed the maturity of democracy in the Gambia and congratulated the president elect, Adama Barrow.

to legal one limiting the Unions' scope of interference which the incumbent in the Gambia probably intended to do. Secondly, the judiciaries' credibility at delivering appropriate decision free of the incumbents' influence is absent owing to existing level of political openness, Courts' independence and past reputations of the incumbent. Therefore though AU should have paid attention to the domestic process of settling conflict through legal channel, its disregard sets good precedent for the future use against tyrant leaders. It is also a set back for ECOWAS and AU if the president reverses the result through the legal channel which is easy to manipulate.

AU reaffirmed its full support to the decision taken by ECOWAS<sup>199</sup> including consideration to use all necessary means including intervention if the incumbent insists not to leave office.<sup>200</sup> To ensure compliance AU decided the inviolability of the election outcome and as of 19<sup>th</sup> January 2017 AU will no longer recognize the incumbent as a legitimate President of the Republic of Gambia.<sup>201</sup> It further warned of serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian and human rights disaster.<sup>202</sup> UN SC endorsed AU and ECOWAS decision emphasizing on the need to ensure compliance primarily through political means.<sup>203</sup> Repeated negotiation is made by ECOWAS and AU to convince the incumbent to hand over power but the incumbent refused. This shows the relevance or effectiveness of the preventive diplomacy that AU primarily relied on to resolve crisis. On 19<sup>th</sup> January, when troops from ECOWAS standby force (ECOMIG) crossed the Gambian border, president Yahya Jammeh agreed to leave the country at last.<sup>204</sup>

The success of the AU's enforcement of its instrument in the Gambia depended on the combination of factors including the presence of persistent threat to use force from ECOWAS and its endorsement by AU and UNSC, level of commitment to democratic culture of member states of ECOWAS, the level of strength of the Gambia militarily, economically and in population size, the level of reputation of the incumbent and the lack of strong ally in Africa or

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<sup>199</sup> At its Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government, 17 December 2016, Abuja, Federal Republic of Nigeria;

<sup>200</sup> PSC/PR/COMM. (DCLIV), par. 6

<sup>201</sup> UN SC endorsed ECOWAS and AU decision by UN SC Resolution 2337(2017),

<sup>202</sup> PSC/PR/COMM. (DCXLVII), par. 5

<sup>203</sup> UN SC Resolution 2337(2017), par. 6

<sup>204</sup> The last time negotiation is made by Abdel Aziz (President of Mauritania), Alpha Conde (the President of Guinea), and Ibn Chambas

outside Africa.<sup>205</sup> Apart from implementing appropriately its instruments, the Gambia case showed the existence of double standard in the AU regarding consistency of decisions against stronger and larger states and weaker and smaller state. It also reflected RECs contributions in the implementation of the Union's instruments (ECOWAS against The Gambia vs. EAC against Burundi).

## 4.2. LESSONS FROM CURRENT PRACTICE

Effective implementation depends not only on the capacity of the organization but also on the consistency of decisions for similar circumstances happening in different states with different levels of strength and capacity economically, politically, and militarily. In fact, AU consistently rejected and condemned UCG situation in Guinea, Mauritania (2005-2007). AU's consistency so far is only related to condemnation.<sup>206</sup> There is no state that escaped condemnation upon occurrence of UCG situation. AU enforced its instruments against UCG against Burkina Faso after Blaise Compaore is removed from power. In other situations its consistency does not step beyond condemnation. But consistency only in rejection and condemnation does not make the purpose effective and attainable rather should be followed by consistent and similar application of decisions. In the above section different UCG situations and reactions from AU are highlighted. Now by comparatively looking in to AU's reactions I discuss what lessons to be learned from current practice of AU enforcement. This helps understand the strength and weakness of AU's implementation, and helps what should be done to improve the existing weakness and enhance the strengths. In short from current practice the following can be summarized:

### 4.2.1. Conflicting Decisions and Non Compliance with its own requirements

#### *Auto legitimation*

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<sup>205</sup> Christof Hartmann (2017), "ECOWAS and the Restoration of Democracy in The Gambia," *Africa Spectrum*, 52, 1, 85-99 available at <[www.africa-spectrum.org](http://www.africa-spectrum.org)>

<sup>206</sup> see Paul D. Williams, (cited above at note 193), p. 18

Auto legitimization is recognizing a government that comes to power in violation of AU instruments. AU Assembly Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations and article 25(4) ACDEG outlawed auto legitimization.<sup>207</sup> Both instruments aim at deterring auto-legitimization and impunity that the later is an obligation for ratifying states while the former is an obligation for all AU member states. Ratification of ACDEG eases its enforcement and AU can use the other decision to go against non-ratifying states. Either way auto legitimization is prohibited. It is appreciable to have such a flexible legal regime to achieve its objectives. But this needs an effectively consistent application and upholding its requirements to set precedent and have a deterrent effect.

AU High Level Panel for Egypt observed that the existence of prohibition of auto-legitimization pose a challenge to readmit Egypt depending on the holding of presidential election and formal handover where the perpetrators of UCG is the winner of the election.<sup>208</sup> Readmission requires cumulative observance of all requirements that are independent of each other independently. The same situation happened in Mauritania. General El Sisi (Egypt) and General Abdel Aziz (Mauritania) are coup leaders in their respective country exposing them to restriction on political participation under AU instruments. In the subsequent the perpetrators participated in violation of the prohibition and won the election. As a result AU readmitted both countries lifting all the sanctions imposed. Hence, readmitting Egypt and Mauritania auto legitimize the leaders in violation of AU's own prohibition of auto legitimization. Contrary to this, in Burkina Faso and Niger, AU effectively ended auto legitimization sticking to its prohibition of auto legitimization.

### *Suspension for some and Non-Suspension for Some Others*

In the application of article 30 there exists disparities to suspend countries for UCG situation. In some suspension is immediately applied (Egypt) while it did not in other (Burkina Faso before civilian transition). In Egypt and Burkina Faso popular protest against the

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<sup>207</sup> Par. 6ib(a) of Assembly/AU/Dec. 269(XIV) – Doc. Assembly/AU/4(XIV) Adopted by the 14<sup>th</sup> Ordinary Session of the Assembly in Addis Ababa, Ethiopia 2 February 2010

<sup>208</sup> PSC/AHG/4. (CDXVI), par. 75

incumbents is root cause for the military take over leading to UCG situations. AU acknowledged citizen's rights to revolt against oppressive governments in line with its goal of empowering the population as a determiner of their political fate in both situations. But when it comes to application of article 30 CA, AU suspended Egypt immediately and only warned Burkina Faso of suspension. Recent events failing within the definitions of UCG happened in Zimbabwe AU improved the manner evaluating situations on the ground triggering the UCG. But there are still gaps in relation to the acts of the incumbents prior to the actual occurrence of UCG.

From AU's acknowledgement and expressed solidarity with the peoples in both country, one can infer that the view of the majority from all walks of life expressed through peaceful popular revolt is one of the factor taken into consideration to determine whether the government is oppressive or not. Non-suspension of Burkina Faso is a must in this context while suspension of Egypt degrades the reliability of AU decision recognizing peoples right to revolt against oppressive governments.

#### **4.2.2. Preventive diplomacy vis. a. vis. fight against impunity**

Preventive diplomacy is AU's primary mechanism to solve conflicts including post election conflicts and ending or averting the occurrence of UCG. By the same token fighting impunity is one of its objectives to change the prevalent bad behaviors of African leadership that contributed at large for the cause of conflict. Going further AU made UCG an international crime to be prosecuted before the courts of the Union and also domestic courts.<sup>209</sup> This is to set a precedent that has a deterrent effect in the future and end UCG once and for all. Existence of a compromise, i.e. both sides should drop some part of their claims to get one in return, is a key component for the success of preventive diplomacy. This encourages leaders to play trial and error game against the Union that if successful extend their rule and if not secure protection from the Union against prosecution. For instance to convince President Yahya Jammeh abandon his claim AU guaranteed against future prosecution continentally as well as domestically for the crimes he perpetuated while he was in office. Burkina Faso's Compaore, and Niger's Tandja also

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<sup>209</sup> Article 14(2 & 3), article 25(5) ACDEG and Article 28E of Malabo Protocol

tried to perpetuate their stay in office, which they failed. But in return they secured guarantee against future prosecution from AU. Burundi's Nkurinziza tried and succeed to stay in office.

The complexity arises when success of preventive diplomacy is achieved at the expense of fighting impunity that abets criminals' escape from justice. Ending or preventing the escalation of conflict is a success as long as AU follows give and take principle of preventive diplomacy though AU abets the escape of criminal from prosecution for the victim society. Then what happens to the fight against impunity? Ending impunity is one of AU's objectives for which UCG commission or an attempt to commit is an internationally prosecutable crime before domestic courts and court of the Union.<sup>210</sup> Hence in principle AU is obliged to hold accountable the perpetrators of UCG not assist them escape justice. Guaranteeing protection against future prosecution contradicts/violates AU's obligation to fight impunity.

Therefore the advantages of preventive diplomacy should not be overshadowed by its disadvantages meaning that it should not be excessively used in a way that encourages impunity and set precedent for greedy leaders to play trial and error against the Union. With in this context preventive diplomacy is more advantageous if used to address the root causes of conflict than containing a conflict after it is instigated. Thence, AU should aim at quenching the cause of conflict than rush-in to contain after the situation became a full-blown conflict or after it is instigated which deserves holding accountable those responsible for the conflict. Once they are onboard the conflict they should be brought to justice to set deterring precedent. Indeed AU can reconcile the conflict between fight against impunity and preventive diplomacy by concentrating preventive diplomacy towards reducing the root causes of conflict before it become a conflict.

#### **4.2.3. Procedures for designation of UCG situations**

In the process of designating a situation of UCG, PSC relies not only on the instruments of the Union but also on the national constitutions in practice. AU Commission collects member state's constitutions 'for reference' and ultimate study to identify inconsistencies with good governance and standard constitutionalism.<sup>211</sup> The standard of constitutionalism against which the national constitutions are to be evaluated are not proscribed so far and also not included in

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<sup>210</sup> See for example article 14(2 & 3), 25(5, 7, 8 & 10) of ACDEG

<sup>211</sup> PSC/PR/BR. (CDXXXII), p. 3 par (b)

AU instruments against UCG. The phrase ‘for reference’ and the practice of PSC makes violation of relevant constitutional provision a determinant factor to designate a situation UCG or not to take actions to avert or end UCG. This is a good start to end executive coup; but AU is so far silent on incumbent’s action in contradiction of the principles of good governance and standard of constitutionalism (Niger, Mauritania, Burkina Faso, Egypt, Zimbabwe recently). In fact AU’s understanding of constitutionalism as discussed in chapter two leans towards regime protection than human security which is clear with the absence of no country in the Union which is blamed for having a constitution that fails to qualify AU’s standard of constitutionalism. And also there is no member state that falls prey to condemnation or sanction for having a constitution that did not qualify the Union’s standards. The problem here is that there is no mechanism in AU instruments to decide whether the constitution is violated or not and no body is empowered to do so to check the implementation of national constitutions. Is it the domestically empowered body through pre-established legal procedure or PSC? In Niger AU did not react to the actions of the president that goes against the decision of the Constitutional Court that nullified the action of the president for its unconstitutionality. But the AU called on stakeholders to respect the outcome of the Supreme Court’s decision on the constitutionality of the president’s action in Burundi. Is it the Union’s judicial organ? Not so far under AU’s instruments. Is it PSC, the political organ of the Union? Neither AU instruments nor current PSC practice provide clear answers for these questions.

To suspend Egypt, PSC stated that the overthrow of the democratically elected president does not conform to the relevant provisions of the Egyptian Constitution and therefore constitutes UCG within AU instrument.<sup>212</sup> The same line is followed in Niger, Mauritania, and Burkina Faso. In all situations the military used force and suspended the constitution. But for soft and judicial UCG the situation is different. PSC’s action is limited by the guiding principles of AU instruments including the separation of power, non-interference in the internal affairs, sovereignty and integrity of states and principles of constitutionalism itself. For instance Separation of power focuses on separation of government organs for check and balance as guaranteed by the constitution. Its success at regulating government behavior depends on the

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<sup>212</sup> *ibid*

strength of the organs to keep one another in a legitimate scope delimited by the constitution. Where there is stronger executive the principle of separation of power becomes a shield to create a pseudo constitutionalism, defended by the principle of state sovereignty and non-interference in the internal affairs. The text of the constitution without its spirit is used to define standard constitutionalism. Burundi is a good example. The court decided within its legitimate power though its decision defeats the proper application of the constitution, which the opposition considered interpretative constitutional coup while AU did not under its instruments. Burundian government argues that the crisis is legal one, which should be resolved in accordance with the procedures provided by the provisions of the constitution, i.e. a legal conflict should be solved by judicial mechanism following the separation of power and judicial decision on the matter by the Supreme Court. Any action in this circumstance amounts to interference in the internal affairs of which is prohibited by the guiding principle of the Union. Though the final result is a clear UCG situation PSC did not classified it as such. This resulted from existing procedural problems of designating a UCG situation and the understanding of what constitutionalism is. Does having a “National Constitution” or the application of each provisions of the proclamation qualifies Constitutionalism inferred in the instruments? Declassification of the Burundian situation reflects the understanding that constitutionalism in Africa is a mere existence of a National Constitution not its application to regulate the behavior of the state in a way that enshrines democratic culture and the rule of law. The same is in Niger. Then had it looked in to the applicability of the contents of the constitution the conclusion would have been different. AU improved this in recent events in Zimbabwe and Kenya.

Therefore, the designation procedure differs depending on the type of UCG. Where constitution is not attacked, PSC did not react in all situations amounting to UCG to deter governments from their detrimental actions leading to actual UCG situation (Niger, Burkina Faso, Burundi, Egypt, Zimbabwe). This is due to reliance on the text of the constitution not its application or lack of standard requirements against which the incumbent’s action can be evaluated to classify it as a violation of the constitution warranting actions from PSC under its norms against UCG. As far as the PSC does not look into application of constitutional provisions evaluated against established set of standards consistent enforcement of its instruments against

UCG will be limited to only classic UCG while the perpetrators lean towards the other two types of UCGs to circumvent AU prohibitions.

#### 4.2.4. Harmonizing procedures

One of the objectives of AU instruments against UCG is enabling domestic institutions to prevent UCG and also to resolve post election conflicts. ACDEG clearly provides for domestic legal mechanism to be primarily resorted to solve post election conflicts under article 17. The aim is to enable state institutions give decisions that is reliable and credible, rendered following effective separation of power, independence of Judiciary and non-interference in the internal affairs of states. Independent of the Union domestic institution relies on domestic procedures that should be compatible with the Union's mechanisms to achieve this purpose. Harmonizing these procedures reduces conflicts between decisions of domestic bodies given under national constitution and that of AU under its instruments on the same situation (Niger vs. Burundi situation; Burundi vs. The Gambia situation).

In the Gambia, the President after challenging the election result citing some irregularities lodged a petition before Supreme Court to reverse the election result and order for new election. The Supreme Court appointed for final decision on the matter a date beyond the end of the presidents' constitutional tenure. Disregarding this ongoing domestic process AU declared after the end of his tenure it would not recognize him as a legitimate president and use any means necessary including intervention to remove him from power. Before the Supreme Court decision the president is removed from power with the help of ECOWAS intervention. Here, irrespective of the Supreme Court's independence, strength or credibility, AU violates its guiding principles, overall objectives of ACDEG and specifically obligation under article 17 ACDEG, while the president's action, though the claim is illegitimate, is a legitimate one that did not violate AU instruments and the Gambian Constitution. Following this line of argument the decisions of state judicial organ and legality of the claim is irrelevant for AU to designate situation as UCG. In Niger the Constitutional Court decided the action of the president unconstitutional but AU kept silent on the matter. These conflicts with the understanding of the democracy AU intends to engrave in the continent as discussed in Chapter Two of this paper. One of the understandings includes engraving the culture of check and balance through the

principle of separation of power. Contrary to this the Burundi crises is declassified for the reason that the Constitutional Court decided the action of the president is in line with the constitution the country that AU leaned towards relying on the above principle. AU followed court decisions recently in Zimbabwe regarding the constitutionality of the military action to remove president Mugabe from power. This is a good start to harmonize its enforcement decisions with that of domestic bodies and also to strengthen domestic institution to achieve the overall objective of empowering state institutions to prevent UCG.

The decisions given by national courts is used to legitimize some situations; disregarded in other states or turned away from defending domestic actors decisions against the incumbents when expected to pressure them respect the decision of the court which falls within its own long-term objectives of empowering state institutions to prevent or solve conflicts or end or avert UCG situation. This uneven role given to national actors in the designation process of UCG situation weakens AU's influence to curb or end executive/soft or judicial UCG that is prevalent in the continent nowadays. Therefore AU should follow its recent practice of giving considerations for the decisions of domestic institutions and more over to the existing situations on the ground.

#### **4.2.5. Entry point**

Entry point is a point at where the enforcer seize of the situation to remedy it. PSC decides on entry point and appropriate measures to enforce AU instruments. Entry point should neither be premature (Gambia, Burundi) nor late (Mauritania, Niger) rather it should be appropriate time for each circumstance to achieve its objective effectively (Burkina Faso after the coup against the transitional government). Appropriate entry point has the tendency to harmonize procedures discussed under 4.2.4 (Gambia and Burundi). This contributes for the acceptability, credibility and reliability of the Union to stand with its decisions to influence state behaviors.

The current PSC practice on entry point is chaotic i.e. either premature or late than appropriate. Sustainable peace and stability requires different appropriate actions at each levels from incubation to the state of full-blown conflicts or clear UCG. Though it is difficult at current technological, economic and know-how capacity of the Union, Continental Early Warning

System put in place to detect and understand early the causes of conflicts; diagnose the emergence or existence of possible causes of conflicts to help prescribe possible appropriate effective action is good step. AU can appropriately react upon the emergence of the cause of conflict at a stage understandable to a reasonable person. This determines the appropriate effective entry point and effectiveness of the following measures.

The cause for UCG in Niger, Burkina Faso and Mauritania are the incumbent's actions. Amendment initiative to eliminate term limits contrary to its rejection by MPs (Burundi & Mauritania) and by Supreme Court and Parliament in Niger is the cause leading to UCG situation that demands AU reactions. These events are visible for a reasonable man to determine entry point the failure of which affects the effectiveness of AU's objectives of ending UCG. In Niger refusal by the president to accept the decision of the court is enough to decide on entry point which is neither premature nor late. It is timely and appropriate for PSC to be involved to end the cause before it grows to full conflict. Had AU reacted at appropriate entry point the later decisions would have been effective and stronger (Burkina Faso) than when they are taken against the perpetrators of the UCG overthrowing the president (Mauritania, Egypt).

AU decisions on entry point focus is not UCG causes as envisaged under AU policy instruments rather on its actual occurrence that threatens the regime leaving out the rest. AU's current decisions on entry point depict an inclination towards regime protection than human security (Mauritania, Niger, Burkina Faso and Egypt). AU acknowledged that UCG is the culmination of other problems including unconstitutional actions by incumbent that its policies should be enforced to this end of quenching conflicts at their cause not to contain it after the fire burst out of control. AU did not react to any actions of the incumbents that constitute UCG situation under article 23(5) ACDEG (Niger, Burkina Faso, Mauritania, Egypt, Zimbabwe recently). But upon the actual occurrence of UCG deposing the incumbents AU reacted and demanded restoration of constitutional order or restoration of the deposed presidents (Mauritania & Sao Tome and Principe). Hence an actual threat to the recognized regime determines entry point rather than remedying the root cause that probably end up with clearly manifested UCG.

A failure to determine an appropriate entry point makes AU enforcement frail to achieve its overall objectives. Indeed witnessing this manner of implementation how cannot one say,

“AU’s instruments are deception on human security to perpetuate regime security or the leader’s existing status quo.”

#### **4.2.6. Situation - Enforcement Mechanism Incompatibility**

The need for variety of enforcement mechanism is to have effective, coherent and consistent enforcement adaptable to the changing circumstances in a way that benefits the organization’s efficacy and reliability. Enforcement mechanisms should not be used for being in the instruments rather for its appropriateness to remedy the problem they are against. When selecting an enforcement mechanism existing domestic factor and external factor should be considered. Domestic factor is those factors that either legitimize the UCG or delegitimize it from within the country like domestic support (Mauritania & Egypt) or opposition (Burkina Faso). The external factors are those factors that exist outside the country having effect on the ongoing situation of UCG like allies supporting the coup (US support for the military in Egypt), asset of the target leaders, contribution of the target states in operations in other countries (Burundi contributed large number of soldiers for AMISOM which she threatened to withdraw) etc. AU targeted sanctions of travel ban and asset freeze on leaders of Mauritania is not effective for the reasons that the coup has a popular support making firm base for the leaders to legitimize their action (domestic factor); and absence of assets to be frozen outside the country. AU repeated its disregard for domestic factor against Egypt (2013) by failing to value domestic support the coup has, that finally ended with auto-legitimation of the leader and AU to backtrack from its decisions. The situation-enforcement mechanism relationship here shows AU’s limited understanding of the determinacy of these factors in its enforcement process. Considering domestic factor assists the choice of enforcement mechanism that effectively suits the situation. Imposing asset freeze sanction on a leader who does not have a foreign account has no benefit than making a bluff. The same is for travel restriction where the perpetrators have domestic support giving outcome legitimacy for the UCG situation.

Success in Burkina Faso and Niger at preventing auto legitimation shows the effect of situation-enforcement mechanism relationship and the understanding the existing factors. The coup has no domestic support to shield the leaders from outside influence. Hence leaders need recognition legitimacy from international community unlike Mauritania and Egypt. Due to the

existence of strong internal factor delegitimizing the UCG situation the external factor did not saved the UCG leaders from AU influence. When both domestic and external factor is lacked, it is easy to force them submit to AU's demand. Similarly the success in Gambia and failure in Mauritania and Egypt is in line with this understanding that situation enforcement mechanism relationship influences leaders capacity to auto legitimize their leadership. Diplomatic negotiation has failed twice in the Gambia but after it is supported by threat of intervention it is succeeded to avert UCG. Similarly the reliance on article 4(h) CA degraded the degree of influence that AU would have exerted on Burundi to resolve the situation and prevent UCG.

In general AU's low implementation record emanate from incompatibility of a situation and enforcement mechanisms. Effective enforcement depends on the understanding of the existing situation, contributing domestic and external factors, and selection of appropriate enforcement mechanism to be used at appropriate entry point. Misapplied enforcement mechanism by weakening AU position unconsciously favors UCG perpetrators strengthening their domestic and international support (Mauritania, Egypt, Burundi). Therefore selection of enforcement mechanism should be made taking into account the root causes and citizens' demand apart from the actual occurrence of UCG and AU capacity to enforce its decisions.

#### **4.2.7. Backtracking**

Backtracking is a failure to have a stand in conformity with prior decisions or reversing once decision at a later time. In most circumstances AU reversed its decisions particularly requiring the restoration of the deposed president as a prerequisite for return to constitutional order and prohibition of auto legitimation (Egypt, Mauritania, Niger).<sup>213</sup> In almost all UCG situations restoration of the deposed government is the primary demand as a qualification for return to constitutional order. But AU only held on to this in rare circumstances and succeeded only in Burkina Faso & Sao Tome and Principe. In all other UCG situations AU reversed this position (Egypt, Mauritania, Niger). It even failed to consider restoration of the overthrown government in other circumstances as a restoration of constitutional order to lift suspension and

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<sup>213</sup> AU demanded immediate restoration of the deposed president as one of its requirement to lift suspension and not to apply other sanction which the Union later disregarded while readmitting Mauritania even before the presidential election is conducted

readmit (Madagascar).<sup>214</sup> Similarly AU took a back step from upholding the prohibition of auto legitimization (Egypt and Mauritania). This contributes for AU's frail enforcement in all areas of its objectives including respect for human rights, rule of law, democracy and etc. It can be argued that the backtracking record so far is a combination of the above listed problems cumulatively. A failure to choose an appropriate measure for certain situation leads to its non-effectiveness that forces AU to backtrack from its decision by either agreeing to the position of the UCG perpetrators in violation of its own instruments or completely disregard its decisions ((Egypt, Burundi, Mauritania).

#### **4.2.8. Double Standard in enforcement decisions**

Double standard is visible from AU's reaction to UCG situation in states with strong military, economy, large population and contributes more to the budget of the Union than other small and weak states (Mauritania & Egypt vs. Gambia & Burkina Faso). AU's actions are consistent and strong against small and weak states while it is inconsistent and conflicting in relatively economically and militarily stronger states and with strong allies in and outside Africa. For instance Egypt is strong militarily and economically and has large population compared to Gambia. When we compare Egypt on one side and Burkina Faso, Niger and Gambia on the other side leader of situation in Egypt is successful at auto legitimizing the leadership while the leaders in the later states did not. AU's decisions are consistent and effective against the later smaller states while it is inconsistent, ineffective, full of backtrack, generally chaotic and with no influence on Egypt and also Mauritania and Burundi. The failure of MAPROBU in Burundi and success of intervention or threat to use force in Gambia reflect the same. The Gambia has the smallest standing army in Africa as small as 1200 personnel while Burundi contributes 8000 military, twice more than the number of the Gambian standing army, for AMISOM. The Burundian government threatened to withdraw this force from AMISOM, which has catastrophic effect on AU's peacekeeping mission in Somalia to force AU withdraw MAPROBU, a call for intervention under article 4(h) CA.

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<sup>214</sup> See the case of Madagascar in Siphwe Mkhize, Assessing the Efficacy of the AU Sanctions Policies with Regard to Unconstitutional Changes in Government: The Examples of Guinea and Madagascar, Master of Arts Thesis at University of South Africa.

The consistency of AU's enforcement is thence influenced by states relative strength militarily, economically and their strategic benefit for the Union. The economic benefit AU receives from The Gambia and Egypt is incomparable. Egypt is among the top ranking contributors for the budget of the Union while Gambia is among the consistently defaulting member states. Therefore, for AU equally treating Egypt (larger contributor to its budget) and the Gambia for similar situation is unimaginable. In addition Egypt is strategically important for the Western nations to advance their policies and also for AU. Egypt's grudge on AU will weaken the Union from inside by decreasing assistance it gets from Egypt and also this may result in diminishing assistance it gets from strategic partners of Egypt interested to assist AU implement its objectives. This is will not be the case if AU antagonizes Gambia or Niger or Burkina Faso, which is the result of double standard.

## CHAPTER FIVE

### 5. CONCLUSION

In short AU's manner of implementation is chaotic, inconsistent and ineffective from situation to situation, country to country and region to region. Within this understanding one can conclude that though it is a good start that should be encouraged AU faces the following four general challenges in the process of enforcing instruments. To bring consistency and effectiveness to its implementation, AU should focus on the challenges identified in this paper. From discussions on the above eight points of where shortcomings are witnessed, I identified four general challenges facing AU enforcement. These are political or commitment challenges, economic challenges, procedural challenges, and legal challenges.

#### 5.1. Commitment (Political) Challenges

Political commitment towards implementing the objectives of an organization determines its success with which AU is not known much so far.<sup>215</sup> For instance participation of member states, collectively or unilaterally to enforce UN SC sanction on Iraq in 1990s is crucial for its success.<sup>216</sup> The same is for AU and its member states. The prevalence of conflicting decisions affecting AU enforcement is the result frail commitment from the member states. It arises from two perspectives.

##### *5.1.1. General Assemblies Commitment to implement its instruments*

The first is commitment from the Union itself to enforce or coerce the implementation of its objectives. General Assembly, AU supreme decision making organ, takes lions share in this challenge. This low level of commitment is the result of AU Assembly decision-making structure, which is more political<sup>217</sup> and the behaviors of majority of the leaders making decisions. Structurally it is a political organ made up of politicians than experts. These leaders scrutinize and evaluate every decision in light of their domestic exposure and precedent setting

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<sup>215</sup> Paul D. Williams, (cited above at note 193), p. 20-21

<sup>216</sup> David M. Malone, The International Struggle Over Iraq: Politics in the UN Security Council 1980-2005, Oxford University Press (2006), p. 84 & following

<sup>217</sup> see Stacy Ann Elvy, (cited above at note 106)

effect that particular decision has, if adopted. This is the reason for majority to oppose intervention under article 4(h) in Burundi as recommended by the AU Commission to avert UCG. Hence the political nature of the organ and the domestic actions or behavior of leaders in the General Assembly contribute for AU's persevered enforcement particularly on UCG because many of the leaders stayed in office by committing what the democracy instruments of the Union prohibit.<sup>218</sup>

The prevalence of auto legitimations, non-compliance with its requirements emanates from this challenge. The persistent election of autocratic regimes to PSC cast doubt on the depth of the AU's commitment to democratic principles. Some analysis put it, a "preponderance of such [autocratic] countries . . . will have implications for the continental legitimacy of the PSC, particularly when it has to pronounce on issues relating to peace, security, governance and human rights."<sup>219</sup>

Lack/Low level of commitment affects the capacity of the Union to make independent and consistent decision that member states are willingly or forced/coerced to implement collectively or unilaterally. Commitment from ECOWAS against Gambia compared to EAC against Burundi to enforce AU instruments against UCG and their sub-regional democracy instruments shows that effective enforcement depends on political commitment from member states making up the supreme decision making organ including RECs towards the desire to achieve the sought goal. Backtracking, violation of its requirements, unclear procedures for designation and etc. also arise from General Assembly commitment. Why readmit a suspended state in violation of the prohibition of auto legitimation (Egypt and Mauritania). Why select a member in violation of the Union's objectives to the PSC (Burundi) where the AU Commission empowered to run the daily activities of the Union is asking the General Assembly to authorize intervention to enforce its instruments that the country is violating its obligations.<sup>220</sup>

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<sup>218</sup> See Adriane LeBas, (cited above at note 54)

<sup>219</sup> Institute for Security Studies (ISS), "Peace and Security Council Report," Issue 5, December 2009, p.17

<sup>220</sup> Algeria (2004, 2007, 2013 for 3 years and 2016 for two years); Libya (2004, 2014 for 2 years and 2010 for three years,); Egypt (2006, 2012,for 2 years and 2016 for 3 years); Tunisia (2008 for 2 years); Mauritania(2010 for 2 years; Nigeria since 2004; Togo(2002, 2016 for two years); Burkina Faso(2006, 2008, for 2 years); Ivory coast(2010, 2012 for 2 years); Gambia(2012, 2014, for 2 years ); Ghana (2004, 2006 for 2 years ); Benin(2008, 2010 for 2 years); Guinea(2012, 2014 for 2 years); Niger (2014, 2016 for 2 years ); Gabon (2004, 2007 for 3 years); Senegal (2004, 2006 for 2 years); Equatorial Guinea(2017, 2013 for 3 years); Congo Republic(2016 for 3 years); Congo(2004. 2006, 2012 for 2 years ); Chad (2008, 2010, 2014,2016 for 2 years); Cameroon(2004, 2006, 2012 for 2

Hence the level of commitment particularly by the supreme decision making body of the organization determines the degree of effective enforcement of the Union's instruments and is the primary challenge AU should reconsider in the future. This challenge can be mitigated by electing democratic member states regularly to PSC and restructuring the manner of decision making in the Union which is currently consensual, taking the experience of UN into account in which the decision of the SC binds all member states.<sup>221</sup>

### *5.1.2. Member States commitment on domestic implementation*

The second commitment challenge arises from sovereign member states within their legitimate responsibilities on whether to implement or hinder the implementation of the community obligations through the decisions they make domestically. AU instruments provide that UCG could be minimized or averted through engraving values and principles of democratic change of government, rule of law and constitutionalism in states constitutions or basic laws. Implementation of this depends on member states unilateral commitment to incorporate these values and principles in to their domestic laws. Though these leaders vote for the adoption of the democracy instruments in the General Assembly, they hinder its domestic implementation relying on constitutional saving clauses inserted in the instrument, direct refusal clinging on the principle of state sovereignty or state implementation capacity, not ratifying the instruments, by defaulting in their annual contribution to the budget of the Union which economically weakens the Union to enforce its decisions or any other reasons to refuse domestic implementation.

In short lack of political commitment towards implementing the decisions of the Union from member states is the leading challenge for effective and coherent implementation AU

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years); Burundi (2010, 2012,2014, 2016 for 2 years); Ethiopia(2004, 2007 for 3 years and 2014 for 2 years); Kenya(2004, for 2 years, 2010, 2016 for 3 years); Rwanda(2006, 2008, 2010, 2016 for 2 years); Tanzania (2012, 2014 for 2 years); Sudan(2004 for 2 years); Uganda(2006, 2008 for 2 years); Djibouti(2010, 2012 ); South Africa(2004, 2010, 2014, 2016 for 2 years); Angola(2007, 2012 for 2 years); Zimbabwe(2010); Lesotho(2004, 2012 for 2 years); Botswana (2006, 2016 for 2 years); Swaziland(2008); Namibia(2010, 2014 for 2 years); Mozambique(2004, for 2 years, 2013 for 3 years); Malawi(2006,); and Zambia(2008)

<sup>221</sup> Paul D. Williams, "The African Union's Conflict Management Capabilities," Council on Foreign Relations, International Institutions and Global Governance Program Working Paper, October 2011, p. 16; see also Stacy Ann Elvy, (cited above at note 106)

instruments against UCG. This further contributes for the existence procedural, economic or legal challenges the Union face in its implementation.

## 5.2. Procedural Challenges

Procedural challenges focus on the overall procedures followed by the Union to reach a decision. AU's decisions affected by procedural challenges from situation to situation, country to country, factor to factor affecting the overall consistency and effectiveness of its implementation. For example in principle the criteria for the selection of members to PSC should comply with cumulatively provided criteria under article 5 (2) PSC Protocol to be reviewed as provided by article 5(4). This is a good step at bringing the democratic states towards leadership in the Union empowering them to influence and pressure other member states. Contrarily the members of the PSC fail to fulfill most of the criterion for election to the council under article 5(2). While the crisis in Burundi is under discussion and it is the only country against which article 4(h) CA is triggered the same summit selected Burundi to the PSC in 2016.<sup>222</sup> Burundi is among the states labeled "not free" by Freedom House in 2015 report Paul D. Williams questioning the future consequences that the behavior of the currently elected members will have for peace and security in Africa concludes that the current crop of PSC members is the most autocratic yet.<sup>223</sup> The selection of members of the council is more political than merit based as provided under the instruments of the Union.

A consistent and flawless procedure for decision-making contributes for the effective and uniform implementation. The existence of flawed procedure is witnessed in the process of passing MAPROBU over which the General Assembly and AU Commission interred into conflicting decision lastly forcing AU Commission to reconsider and back from its initiation for intervention. When AU Commission is pressuring hard to influence the Burundian government, the Assembly took a "U" turn on MAPROBU by deciding otherwise.

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<sup>222</sup> Assembly /AU/ Dec. 598(XXVI), par. 12 and Assembly /AU/ Dec. 594 (XXVI),

<sup>223</sup> Paul D. Williams, "Autocrats United? Electing the African Union's Peace and Security Council," IPI Global Observatory, April 5, 2016. Available at: <https://theglobalobservatory.org/2016/04/African-union-peace-security-council/>; Other members elected to PSC and labeled not free include Algeria, Chad, Congo, Egypt, Rwanda and Uganda

Having the objectives of expanding the culture of constitutionalism the Union relies on the procedures provided for in the constitution in one country and rejects the same in other. For instance in the designation of UCG situation the decisions of internal actors especially the court is accounted to declassify the situation in Burundi from UCG while it is disregarded in Niger. In Burkina Faso acknowledgement of people's right to revolt peacefully is taken into consideration not to suspend the country. Surprisingly though the same acknowledgement is made towards Egyptian people it is not qualified enough to save Egypt from suspension. By readmitting Egypt and Mauritania, selecting Burundi to PSC, AU auto legitimized the UCG but stick to its instruments requirement prohibiting auto legitimation in Burkina Faso. Decisions on entry point face the same procedural problem. Undemocratic and unconstitutional action of the incumbents are disregarded for the purpose of deciding on entry point to trigger enforcement action to enshrine democratic culture, rule of law and protection of human rights in the continent under its instruments.

So far AU's implementation procedures are chaotic and ambiguous. You can't say what is what to decide on a situation depending on AU instruments because of ambiguous and lack of uniform implementation procedures. The lack of uniform procedure(s) for decision-making contributes for the overall chaotic and low AU enforcement. This further reduces its ability to remedy the existing and future implementation flaws arising from conflicting and ambiguous procedures. Having a uniform enforcement and decision-making procedure assists to single out what the Union's enforcement or implementation hindrance are; whether the hindrances are legal, commitment, economic or procedural one. It also eases the process for remedying or removing these hindrances by setting a precedent enforcement that can be referred at a later time in the process of its enforcement in other countries. By following general, dynamic and uniform enforcement procedure in decision making some of the problems on entry point (premature or late), conflicting decision and noncompliance with its own requirements, backtracking and prevalence of double standard could have been easily avoided thereby strengthening its enforcement and influence on a member states. The reason is that following uniform and dynamic procedures takes into consideration differentiated determining factors for different situations without affecting the effectiveness of mechanism or measure. It also makes easy to refer to past decision as a precedent that further harmonize the enforcement of the Union finally

assisting the development of comprehensive and dynamic enforcement regime for the Union. Procedural challenge reduces values or considerations to be given to every determining factor for similar UCG situation resulting in low deterrence and precedent setting effect of enforcement decisions.

### 5.3. Economic Challenges

Economic strength of an organization influences the capacity of the organization to implement its objectives. For instance AU budget grew from 278,2 million USD in 2013 to 393,4 million USD in 2015 with external financing covering 61.7% of the budget.<sup>224</sup> In 2016 the Assembly of the AU adopted a budget of 416,8 million USD of which only 169,8 million USD is to be contributed by member states while the rest is to be raised from international partners.<sup>225</sup> This gap in finance makes AU dependent on external source of finance to enforce its decisions in the absence of which the decisions passed by the Union will be floated.<sup>226</sup> For instance in 2014 only 23% of the pledged money is received from international partners and only 67% of member states contribution is paid to the AU creating a gap in financial capacity of the Union.<sup>227</sup> The failure to raise the expected money from its member states can either be due to the economic weakness of its member states or due to the lack of political commitment from AU membership.<sup>228</sup> That means AU has to solve its economic challenge before it makes a decision that needs financial backing from the Union. To overcome these economic challenges and finance effective implementation of its decision AU has a range of options.

Reassessing the contribution of a member state and effectively collecting the assessed contribution is one option. AU is the leading regional organization with a large number of the bottom ranking economies in the world. In addition more than 30 of its member states default in payment to the regular budget of the Union.<sup>229</sup> Member states contribution is calculated

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<sup>224</sup> <http://allafrica.com/stories/201701200093.html>

<sup>225</sup> <http://www.saflii.org/au/AUDECISIONS/2015/19.pdf>

<sup>226</sup> Paul D. Williams, "The African Union's Conflict Management Capabilities, Council on Foreign Relations," International Institutions and Global Governance Program Working Paper, October 2011, p. 16

<sup>227</sup> "AU funding still comes from the West", *The Standard*, June 15, 2015,

<sup>228</sup> "The new self-financing Mechanism of the African Union: Can the proposed AU levy be a step towards financial independence?" 25 May 2017, <https://www.tralac.org>

<sup>229</sup> <http://www.au.int/web/en/financingau>

depending on their contribution to GDP of Africa classifying into three tiers of those who represent above 4% pay 60% of the budget, those representing between 1%-4% pay 25% of its budget and 15% of the budget is paid equally by the countries with shares of less than 1%.<sup>230</sup> Following classification six countries (South Africa, Nigeria, Algeria, Angola, Egypt and Libya) contribute 60% of the AU budget starting from 2016.<sup>231</sup> This exposes the AU to the influence of this top contributing countries in its enforcement decision. Which is witnessed in the report of the High Level Panel to Egypt that one of the primary driving consideration of the Panel in its work is the place of Egypt in Africa.<sup>232</sup> This includes its contribution to the budget of the Union. AU readmitted Egypt violating the prohibition in political participation of UCG leaders while it effectively averted auto legitimation in Burkina Faso and Niger among the least contributors to its budget. The next 12 countries (Cameroon, the Republic of the Congo, Ethiopia, Equatorial Guinea, Gabon, Ghana, Kenya, Sudan, Tanzania, Tunisia, Uganda and Zambia)<sup>233</sup> contribute 2.08% of the budget each while the rest 36 countries would each pay 0.4% of the budget of the Union.

The other option is raising its own finance to ease its dependence on international partners for finance. To achieve this AU Assembly at its 27<sup>th</sup> Summit held in Kigali adopted a “Retreat on Financing of the Union” directing all its member states to implement a 0.2% levy on eligible imports for to finance the African Union. This provides the Union with its own budget independent of its member states assessed contributions. One of the aims of the retreat is to reduce dependence on partner funds for implementation of continental development and integration programs. This proposed levy compliments the budget primarily raised from member states contribution.<sup>234</sup> This source is planned to enter into force in 2017 but it is not yet entered into practice.

Due to the presence of few states that are economically strong and politically committed to provide financial support for the implementation of the Union’s decisions voluntary contribution from member states beyond their assessed contribution is unreliable. So far UN is the primary

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<sup>230</sup> “The AU starts to put its money where its mouth is”, ACPST, 12, February 2015,

<sup>231</sup> Mmanaledi Mataboge, “AU’s dependence on cash from the West still rankles”, Mail & Guardian, 12 June 2015

<sup>232</sup> PSC/AHG/4.(CDXVI), par. 69

<sup>233</sup> “The AU starts to put its money where its mouth is”, ACPST, 12 February 2015,

<sup>234</sup> “AU funding still comes from the West,” The Standard, June 15, 2015

source of finance in the implementation of AU decisions. AU seeks the backing of the UN SC through providing financial assistance to implement its decisions (e.g. AMISOM, UNAUMID, and MONUSCO). Other major source of finance includes EU, US, China, UK, other donor states and international organizations. A failure of MAPROBU significantly exposed AU's economic challenge to implement its decisions. AU looked for financial support from UN and other international organization and donor states including EU and US to enforce MAPROBU, which failed to attract the attention of the donors finally ending with backtracking and reversal of MAPROBU.<sup>235</sup>

#### 5.4. Legal Challenges

Legal ambiguity and lacunae provides unwilling states a means to evade or resist implementation of its obligation. The existence of legal challenge contributes more for the prevalence of procedural and commitment challenges by limiting the reaches of the Union through providing a legitimate defenses for non-implementation. These challenges emanates from states basic laws or from the instruments of the Union itself. For instance constitutional saving clauses and UCG definitions make part of AU's legal/content challenge affecting consistency and uniformity of its enforcement. The Burundi situation showed that the existence of legal conflict within a state constitution that can be manipulated to affect UCG is not covered by current UCG definitions. Similarly AU's failure to react to soft UCGs or undemocratic actions of the incumbents in different states is attributable to the existing legal challenges within AU instruments against UCG (Mauritania, Niger and Burkina Faso). AU instruments make manipulation of basic laws of a country to prolong once tenure among the definition of UCG situation (article 23(5) ACDEG) that includes constitutional amendment for the sole purpose of erasing presidential term limiting provisions. At the same time it allows for the amendment of national constitution without providing for criterions to evaluate the purpose for such amendment (article 10 ACDEG). Assuming that state "A" is authoritarian and its president "Mr. B" out of the need for personal glory amended the constitution to eliminate the term limiting provision

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<sup>235</sup> PSC/PR/COMM. (DLXV), par. 13a; see also Williams Paul, 'Special Report: The African Union's Coercive Diplomacy in Burundi,' The Global Observatory, December 2015; Astrid Jamar, Escalating Conflict in Burundi: The Challenges of Overcoming Radicalization, PSRP, Briefing Paper 10, February 2016

how would AU in the presence of article 10 ACDEG challenge the action of the president? There will be no reactions or condemnation. (Rwanda, Uganda, Cameroon that are successful and Niger, Burkina Faso unsuccessful but still no reactions to the actions of the incumbents.<sup>236</sup>

As discussed in Chapter Two AU instruments define UCG from procedural legitimacy perspective i.e. manner of accession to power defocusing manner of exercising governmental powers or outcome legitimacy. This means that if the government perpetuating UCG controls conflict AU has no means available to trigger its actions due to the limits its instruments impose. If it reacts to those situations even where the conflict is out of control AU's decisions are frail as long as the target state is able to defend its actions (Burundi, Egypt). Thence content gap in the definitions and constitutional saving clauses are part of the existing legal challenges that are used to legitimize domestic situations amounting to UCG.

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<sup>236</sup> For successful and non successful bid for constitutional amendment to scrap term limiting provisions, see Adrienne LeBas, "Term Limits and Beyond Africa's Democratic Hurdles", *Current History*, May 2016, pp. 169-174

## BIBLIOGRAPHY

### *Books*

- A.B. Assensoh and Yvette M. Ales-Assensoh, *African Military History and Politics: Coups and Ideological Incursions 1900-Present*, Palgrave 2001,  
African Union's Handbook 2016
- Arnold Zolberg. *Creating Political Order: The Party States of West Africa* (Rand McNallu & Company: Chicago, 1966
- C.E.Miller & M.E. King, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (Geneva: University for Peace in Africa, Geneva 2005, 2<sup>nd</sup> ed.)
- Carl Schmitt, *Constitutional Theory*, (Translated and edited by Jeffrey Seitz), Duke University Press, Durham and London (2008)
- Charles Tilly, *Democracy* 7(2007)
- Chuka Onwumehili, *African Democratization and Military Coups*, PRAEGER 1998,
- David Cortright, George A. Lopez and Linda Gerber-Stellingwerf, *The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990*, pp. 205-226, in Vaughan Lowe, Adam Roberts, Jennifer Welsh, Dominik Zaum (Ed.), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, Oxford University Press, 2008
- David M. Malone, *The International Struggle Over Iraq: Politics in the UN Security Council 1980-2005*, Oxford University Press 2006
- David M. Malone, *The International Struggle Over Iraq: Politics in the UN Security Council 1980-2005*,
- Diana Amneus, *The Coining and Evolution of Responsibility to Protect: the Protection Responsibilities of the State*; in Gentian Zyberi (ed.), *An Institutional Approach to the Responsibility to Protect*, Cambridge University Press (New York), 2013, pp.3-33,
- Gudmundur Alfredsson(ed.), Jonas Grimheden, Bertrand G. Ramcharan and Alred Zayas, *International Human Rights Monitoring Mechanisms*, Essays in Honour of Jakob Th. Moller, 2<sup>nd</sup> Revised Edition, Martinus Nijhoff Publishers (2009),
- Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* Cambridge Studies in International and Comparative Law, (Cambridge University Press, 2011),
- H. H. Han, *International Legislation by the United Nations* (1971),
- Henry G. Schermers and Niels M. Blockker, *International Institutional Law: Unity within diversity*, 4 Ed. Martinus Nijhoff Publishers Boston/Leiden
- Jeremy Matam Farrall, *United Nations and the Rule of Law*, Cambridge University Press (New York 2007),
- John Dewey, *The Public and Its Problems* (1972)
- John Hatchard, Muna Ndulo, and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Common Wealth an Eastern and Southern African Perspective*, Cambridge University Press, New York(2004),
- K.Nhrumah, *Axioms of Kwame Nhrumah* (New York, Nelson 1967)
- Kwame Nkrumah, *Revolutionary Path*, PANAF (London, 1973)
- Norberto Bobbio, *Democracy and Dictatorship: The Nature and Limits of State Power*, (Translated by Peter Kennealy), University of Minnesota Press Minneapolis (1989).

Sabelo Gumedze, *The Peace and Security Council of the African Union: Its Relationship with the United Nations, The African Union and Sub-Regional Mechanisms*, ABO Akademi University Press, 2011

Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press: Norma and London, (1991);

T.Maluma: “Reimagining African Unity: Some Preliminary reflections on the Constitutive Act of the African Union (2002)”, *African Yearbook of International Law*, Vol.9, 2001

Volker Rittberger (Ed.), *Global Governance and the United Nations System*, United Nations University Press, New York (2001),

### *Journals*

Adrienne LeBas, “Term Limits and Beyond Africa’s Democratic Hurdles”, *Current History*, May 2016, pp. 169-174.

Adrienne LeBas, “Term Limits and Beyond Africa’s Democratic Hurdles”, *Current History*, May 2016, pp. 169-174

Alhaji Sarjoh Bah et. al. *The African Peace and Security Architecture: a Handbook*. (Friedrich-Ebert Stiftung 2014)

Augustin Kwasi Fosu, “Political Instability and Economic Growth: Implication of Coup Events in Sub-Saharan Africa”, *American Journal of Economics and Sociology*, Vol. 61, No.1 (January 2002),

Ben Kioko, *The Right of Intervention under the African Union’s Constitutive Act: From Non Interference to non Intervention* *International Review of the Red Cross (IRRC)*, Vol.85, No 852, December 2003, 807-825

Ben Kioko, *The right of intervention under the African Union’s Constitutive Act: From non-interference to Non-intervention*, *International Review of Red Cross (IRRC)*, December 2003, Vol. 85 No. 852, PP 807-825;

Berhanu Nega and Geoff Schnieder(2012)“Things Fall Apart: Dictatorship, Development, and Democracy in Africa”, *Journal of Economic Issues*/46:2, 371-382,

Charles M. Fombad, “Challenges to Constitutionalism and Constitutional Rights in Africa and The Enabling Role of Political Parties: Lessons and Perspective from Southern Africa”, *American Journal of Comparative Law*, Vol. 55,

Charles M. Fombad, “Challenges to Constitutionalism and Constitutional Rights in Africa and The Enabling Role of Political Parties: Lessons and Perspective from Southern Africa”, *American Journal of Comparative Law*, Vol. 55,

Christof Hartmann (2017), *ECOWAS and the Restoration of Democracy in The Gambia*, *Africa Spectrum*, 52, 1, 85-99 available at <[www.africa-spectrum.org](http://www.africa-spectrum.org)>

David A. Baldwin, *The Power of Positive Sanctions*, *Power Politics*,

Dr. Solomon A. Dersso, *The Role and Place of the African Standby Force*, ISS Paper 209, January 2010,

Ek. Quashigha & E. Okafar, *Legitimate Governance in Africa: International and Domestic Legal Perspective*, 1999,

Erika de Wet, Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force, *The European Journal of International Law (EJIL)*, Vol. 26 No. 4 PP. 979-998

Francis Nguendi Ikome, 'Good Coups and Bad Coups: The Limits of the African Union's Injunction on Unconstitutional Changes of Power in Africa', Institute of Global Dialogue Johannesburg South Africa, Occasional Paper No. 55 February 2007,

Fredrick Cowell, "Preventing Coups in Africa: Attempt at the Protection of Human Rights and Constitutions", *The International Journal of Human Rights*, Vol. 15, No. 5, June 2011, pp. 749-764

Girmachew Alemu Aneme, Introduction to the Norms and Institutions of the African Union', Published August 2015 on Global Lex,

Godfrey L.Binaiasa, "Organization of African Unity and Decolonization: Present and Future Trends," *ANNALS, American Academy of Political and Social Science*, 432, (July, 1977),

Issaka K. Souare, The PSC and Unconstitutional Change of Government in Africa: A Critical Assessment, , in Tim Murithi and Hallelujah Lulie (eds.), *The African Union Peace and Security Council: A five Year Appraisal*, ISS Monograph, Number 187, pp. 145-164

Joanna Whiteman and Claire Nielsen, Lessons from Supervisory Mechanisms in International and Regional Law, *Journal of Refugee Studies* Vol. 26, No. 3(2003) available at <http://jrs.oxfordjournals.org>;

K.Sturman and E. Baimu, "Amendment to the African Union's right to Intervene: A shift from human Security to regime security", *African Security Review*, Vol. 12, No. 2, 2003,

L G. Aforika Nweke, "The Organization of African Unity and Intra-African Functionalism", *ANNALS, AAPSS*, 489, January 1987

Makumi Mwangiru, *The Organization of African Unity (OAU) and The Management of Internal Conflict in Africa*, International Studies 33, 1(1996), Sage Publications (New Delhi/Thousand Oaks/London,) SAGE Social Science Collections,

Morne Van der Lind, Emerging Electoral Trends in the Light of Recent African Elections, *African Human Rights Journal*, 2001, P. 127-139

Naomi Chazan, "Planning Democracy in Africa: A Comparative perspective on Nigeria and Ghana", *Policy Sciences* 22: 325-357, 1989, Kluwer Academic Publishers, Netherlands,

Niger: Another Weak Link in the Sahel? International Crisis Group Africa Report NO. 208, 19 September 2013, Translation from French

Oscar Schachter, Carl-August Fleischhauer, Frederic L. Kirgis, Jr. and Mary Ellen O'Connell, "Compliance and Enforcement in the United Nations System", *American Society of International Law*,

Paul D. Williams, "From Non Intervention to Non Indifference: The Origins and Development of the African Unions Security Culture", *African Affairs*, 106/423, 253-279, Oxford University Press (London 2007),

Paul D. Williams, Autocrats United? Electing the African Union's Peace and Security Council', IPI Global Observatory, April 5, 2016. Available at: <https://theglobalobservatory.org/2016/04/African-union-peace-security-council/>;

Paul D. Williams, The African Union's Conflict Management Capabilities, Council on Foreign Relations International Institutions and Global Governance Program, October 2011,

Prof. Pacifique Manirakiza, “Insecurity implications of Unconstitutional change of government in Africa: From Military to Constitutional coups”, *Journal of Military and Strategic Studies*, Vol. 17, Issue 2, (2016), pp. 86-106

Sammy Adelman (1998), “Constitutionalism, Pluralism and Democracy in Africa”, *The Journal of Legal Pluralism and Unofficial Law*, 30:42, 73-88, DOI: 10.1080/07329113.1998.1075651

Samuel P. Huntington, “Democracy’s Third Wave”, *Journal of Democracy* Vol. 2. No. 2 (1991),

Sekai Saungweme, A Critical Look at the Charter on Democracy, Election and Good Governance in Africa, Open Society Institute Africa Governance Monitoring and Advocacy Project, AfriMAP, May 2007

Solomon Ayele Derso, Unconstitutional Change of Government and Unconstitutional Practice in Africa, World Peace Foundation, African Politics, African Peace, Summary Paper From The Program on African Peace Missions, Paper No.2, Report on the Future of Peace Missions in Africa, June 2016.

Stacy Ann Elvy, “Towards a New Democratic Africa: The African Charter of Democracy, Election and Governance”, *Emory International Law Review* 27, NO. 1(2013),

Steven R. Levitsky and Lucan A. Way, “Beyond Patronage: Violent Struggle, Ruling Party Cohesion, and Authoritarian Durability”, *Perspectives on Politics*, Vol. 10, No. 4 (December 2012), pp. 869-889, Published by *American Political Science Association*

Thad Dunning, “Conditioning the Effects of Aid: Cold War Politics, Donor Credibility and Democracy in Arica”, *International Organization*, Vol. 58, No. 2 (Spring 2004), pp. 409-423 available at: <http://www.jstor.org/stable/3877863>

The Effectiveness of United Nations Targeted Sanctions: Finding from the Targeted Sanctions Consortium (TSC), November 2013

Tim Murithi, The African Union’s Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect? IPG/2009

Tony Leon, The State of Liberal Democracy in Africa: Resurgence or Retreat? CATO Institute, Center For Global Liberty and Prosperity Development Policy Analysis, April 26, 2010, No.2,

Victor T. Lee Vine, “The Fall and Rise of Constitutionalism in West Africa”, *The Journal of Modern African Studies*, Vol. 35, No. 2 (1997), pp. 181-206

### *International Human Rights Instruments*

CAT  
CEDAW;  
CRC  
ICCPR;  
ICED  
ICERD;  
ICESCR  
ICMW;  
ICRPD

Optional Protocol to the CRC on the sale of Children, Child Prostitution and Child Pornography;

### *Laws and Decisions*

UN Charter

African Charter on Democracy, Elections and Governance

African Charter on Human and Peoples Rights

AHG/Dec. 141& 142 (XXXV)

AHG/Decl.5 (XXXVI) of July 2000) Lome Declaration (Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government,

AHG/Res. 236(XXXI),

Assembly /AU/ Dec.594 & 598(XXVI),

Assembly Dec.310 (XV)

Assembly/AU/ 6(XV),

Assembly/AU/Dec. 112(VII)(July 2006); Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs),

Assembly/AU/Dec. 269(XIV) – Doc. Assembly/AU/4(XIV)

Assembly/AU/Dec. 584 (XXV)

Assembly/AU/Decl. 1(XXI)

AU Commission Statutes

AU Constitutive Act

CM/Dec\_330-363(LXVI)

CM/Dec\_356(LXVI) SIERA LEONE- (DOC.CM/2004(LXVI)-C-),

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), 31 January-2February 2010, Addis Ababa, Ethiopia

Ex. CL/954(XXVIII);

EX.CL /Dec. 820(XXV)

Ezulwini Framework for the Enhancement of the Implementation of the Measures of the African Union in Situation of Unconstitutional Changes of Government in Africa, Ezulwini, Kingdom of Swaziland (17-19 December 2009);

OAU Assembly of Heads of States and Governments started taking action by the adoption of “The Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Places in the World”(July 1990)

OAU Charter,

OAU Doc: AHG/Res. 16(1) adopted at the First Ordinary Session of the OAU Assembly of Heads of States and Government in Cairo, 1964.

Protocol on Amendments to The Protocol on the Statute of The African Court of Justice and Human Rights, adopted by the 23<sup>rd</sup> Ordinary Session of the Assembly, Malabo, Equatorial Guinea, 27<sup>th</sup> June 2014

Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of the African Union, Durban 9 July 2002,

Rule of Procedure of the Assembly

The Roadmap for the Operationalization of the African Standby Force, EX/AU-RECs/ASF/4(I), (Addis Ababa, March 22-23, 2005),

### *Communiqués*

PSC/AHG/4. (CDXV), Final Report of the African Union High Level Panel for Egypt

PSC/AHG/4. (CDXVI) V-VII

PSC/AHG/4. (CDXVI),

PSC/AHG/COMM.3 (DXLVII),

PSC/Min/BR.2 (CCCLXXXVII)

PSC/MIN/Comm.2 (CLD),

PSC/MIN/Comm.3 (CLXIII),

PSC/PR/ BR.1 (CCXXXII)

PSC/PR/(CLXVIII)

PSC/PR/BR. (CDXXXII),

PSC/PR/COMM (CCCXV),

PSC/PR/COMM (CCLXVI),

PSC/PR/COMM (CDLXVIII),

PSC/PR/COMM (CLVI),

PSC/PR/COMM. (CDLXV),

PSC/PR/Comm. (CLIV)

PSC/PR/COMM. (CLXXXI);

PSC/PR/COMM. (DCLIV)

PSC/PR/COMM. (DCXLIV),

PSC/PR/COMM. (DCXLVII),

PSC/PR/COMM. (DLXV),

PSC/PR/COMM. (DVII);

PSC/PR/COMM. (DXXIII),

PSC/PR/COMM. 2(DXV);

PSC/PR/COMM.(CCLX)

PSC/PR/COMM.(DCLIV),

PSC/PR/COMM.1 (CCXVI)

PSC/PR/COMM.2 (CCXVI),

PSC/PR/COMM.2 (CDXLII),

PSC/PR/Comm.3 (CXCII),

PSC/PR/COMM.3 (DIII);

PSC/PR/COMM/(CCCLXXXIV)

PSC/PR/COMM/3. (DXLIV),

### *UN SC Resolution*

SC Res. 661, 665, 666, and 670 (1990);  
UN SC Resolution 2337(2017),

### *Reports*

Ben Armstrong, *Ne Touche Pas Ma Constitution: Pressures and Presidential Term Limits*, Honors Thesis, Department of Political Science, Northwestern University, May 2011

Karim Forander, *Dealing with Unconstitutional Change of Government: The African Union Way*, Master Thesis, Faculty of Law University of Lund, 2010

Lt. General (Rtd.) Louis Matshenyego Fisher et. al. *Moving Africa Forward*, African Peace and Security Architecture(APSA), 2010 Assessment Study,  
Niger: Another Weak Link in the Sahel? International Crisis Group Africa Report NO. 208, 19 September 2013, Translation from French,

Report of the Chairperson of the Commission on the Partnership Between the African Union and the United Nations on Peace and Security: Towards Greater Strategic and Political Coherence, Peace and Security Council 307<sup>th</sup> Meeting, Addis Ababa, Ethiopia, 9 January 2012

Siphiwe Mkhize, *Assessing the Efficacy of the AU Sanctions Policies with Regard to Unconstitutional Changes in Government: The Examples of Guinea and Madagascar*, Master of Arts Thesis at University of South Africa.

*The Effectiveness of United Nations Targeted Sanctions: Finding from the Targeted Sanctions Consortium (TSC)*, November 2013

### *Thesis*

UNSG, 'In Larger Freedom'

### *Judicial Decisions*

Republic of Burundi Constitutional Council: RCCB 303; in the matter of constitutional interpretation requested by the senators the interpretation of articles 96 and 302, Judgment rendered on 4 May 2015

Cour Constituionnelle du Niger, avis No. 2/CC, 25 May 2009,(translation)

### *News Reports and Websites*

'AU to drop Mauritania after coup', BBC News, Saturday, 9 August 2008, available at: [new.bbc.co.uk/1/hi/world/Africa/7551531.stml](http://new.bbc.co.uk/1/hi/world/Africa/7551531.stml)

'Burundi court backs President Nkurinziza on third term' BBC 5 May 2015, [www.bbc.com/news/world-africa-32588658](http://www.bbc.com/news/world-africa-32588658), (accessed on 28 April, 2017)

'Gambia's Yahya Jammeh rejects result of presidential election' Al Jazeera English, 10 December 2016, [www.aljazeera.com/news/2016/12/gambia-jammeh-rejects-result-presidential-election-161210034606068.html](http://www.aljazeera.com/news/2016/12/gambia-jammeh-rejects-result-presidential-election-161210034606068.html)

'The African Union and the Burundi Crisis: Ambition Versus Reality' International Crisis Group, Briefing No. 122/Africa 28 September 2016. Available at

<https://www.crisisgroup.org/Africa/central-africa/Burundi/African-union-and-burundi-crisis-ambition-versus-reality>

‘Zuma: African Union to Send Monitors to Burundi’, Al Jazeera English, 28 February 2016, available at: <http://www.aljazeera.com/news/2016/zuma-african-union-send-monitors-burundi-160228035159349.html> (accessed 28 April 2017)

“African Union lifts sanction on Mauritania”, Reuters, Wednesday July 1 2009, available at: [mobile.reuters.com/article/idUSTRE56021Z20090701](http://mobile.reuters.com/article/idUSTRE56021Z20090701), (accessed on 10 May 2017)

“Army Ousts Egypt’s President: Morsi Is Taken Into Military Custody”, The New York Times, July 3, 2013, accessed on 23, April 2017; “Egypt’s coup: What we know so far, CNN, Thursday July 4, 2013

“Burkina Faso coup sparks deadly street protests”, BBC News, 17 September 2015, [www.bbc.co.uk/new/world-africa-34276807](http://www.bbc.co.uk/new/world-africa-34276807) (accessed on 14 May 2017); “Burkina Faso’s president back in charge as coup fails”. REUTERS, Wednesday September 23 2015, available at: [mobile.reuters.com/article/idUSKCN0RN0U120150923](http://mobile.reuters.com/article/idUSKCN0RN0U120150923)

“Coup Leader Wins Elections Amid Outcry in Mauritania”, The New York Times, July 19, 2009 available at: <https://mobile.nytimes.com/2009/07/20/world/Africa/20mauritania.html>

“Egypt’s El-Sisi bids military farewell, says he will run for presidency”, Ahram Online, 26 March 2014; P. Kingsley ‘Abdel Fatah al-Sisi won 96.1% of vote in Egypt presidential election, say officials’ [www.theguardian.com/world/2014/jun/03/abdel-fatah-el-sisi-presidential-election-vote-egypt](http://www.theguardian.com/world/2014/jun/03/abdel-fatah-el-sisi-presidential-election-vote-egypt), (on 26, April 2017).

“Egyptian Army Issues 48-hour ultimatum”, Al-Jazeera English, July 1, 2013

“Mauritanian coup leader rejects AU ultimatum”, AFP, September 27, 2008 available at: <http://afp.google.com/article/ALeqM5iAPV5wvH4evDM3CelqAtIDNbs9zQ>, (accessed on 10 May 2017).

“Mauritanian parliament backs military coup”, the guardian, Thursday 14 August 2008, available at: <https://www.theguardian.com/world/2008/aug/14/Mauritania>

D Smith ‘Military Junta seizes power in Niger coup’ <http://www.theguardian.com/world/2010/feb/19/niger-military-junta-coup> (accessed 26 April 2017)

Tanja Bruhl and Volker Rittberger, From international to global governance: Actors, collective decision-making and the United Nations in the world of the 21<sup>st</sup> century,

The government declared MAPROBU as an ‘invasion and occupation force’ if happened and vowed to fight back to defend Burundi while AU, UN and Western officials called the PSC’s decision a mistake and an insult on Burundian Sovereignty

The Monitor ‘ECOWAS suspends Niger for Defying Election Ban’, All Africa 22 October 2009 <http://allafrica.com/stories/200910220193.html> (accessed on 26 April 2017)