ADDIS ABABA UNIVERSITY
SCHOOL OF GRADUATE STUDIES
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RECOGNITION OF GOVERNMENT IN THE REGIONAL ORGANIZATIONS: THE CASE OF AFRICAN UNION

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RECOGNITION OF GOVERNMENT IN THE REGIONAL ORGANIZATIONS: THE CASE OF AFRICAN UNION

I hereby declare that this thesis is my original work and all source materials used in this work have been duly acknowledged.

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Dedicated to my newly born baby

EZRA MARKOS

Abstract

The OAU charter served as a road map for the efforts of liberating African States from colonialism, apartheid and racism. This regional organization is not only deterred by liberating member states, but also promoting democracy and democratic institutions in Africa. To enhance the democratization agenda of the organization, OAU adopted a declaration on the frame work in response to unconstitutional change of government. In accordance to this declaration a government comes to power unconstitutionally would not be recognized. Further, such government would face sanction. The OAU objective of prevailing constitutionalism became stronger while OAU transformed into AU. AU in its respective legal instruments developed more strict rules and procedure that enabled the organization to deter unconstitutional change of government and fostering recognized democratically elected governments in the organization. Furthermore, AU develops a mechanism of collectively condemning a government comes to power unconstitutionally as well as collectively recognizing a government comes to power respecting the legal instruments of the organization and its own constitution.

As a result this study provided due attention to the response of OAU and its successor AU to the recognition of government. The study analyzes these organizations policies with regard to recognition of governments as well as the application of these policies. In considering these issues, the paper examines the response of AU to the coup d'état of Madagascar, Mali, Mauritania and to the NTC of Libya. In doing so the study was conducted based on analyzing the organization's legal instruments, assessing literatures and case analysis. In each cases AU was condemned and denied recognition governments come to power unconstitutionally. Although AU member states strived to prevail constitutional order in the continent through denying recognition a government comes to power unconstitutionally, there are member states which are vitiating this collective response of the organization for the prevalence of rule of law and constitutional order. However, as the findings show that AU did not take any measure on these countries which are against the organization's collective act. The organization also lacks coordination in restoring constitutional order in member states where by unconstitutional change of government happened. Furthermore, some of specific sanctions are not directly targeted the perpetrators of unconstitutional government. This might resulted in adverse effect on the innocent civilians. Finally, this paper suggests some recommendations which the writer thinks to be appropriate and enhance the enforcement of one of the organization's objective of prevailing recognized democratic government in the continent.

Contents

Acronyms

OAU Organization of African Unity

AU African unity

OAS Organization of American States

OECD Organization for Economic Cooperation and Development

WEU Western European Union

NATO North Atlantic Treaty Organization

EU European Union

ECSC European Coal and Steel Community

EEC European Economic Community

EC European Community

SADC South African Development Community

AUPSC African Union Peace and Security Council

AUC African Union Commission

RCC Revolutionary Command Council

TNC Transitional National Council

UNSC United Nations Security Council

ANC African National Congress

UDPM Democratic Union of the Malian People

CTSP Transitional Committee for the Salvation of the People

ADEMA Alliance for Democracy in Mali

MNLA National Movement for the Liberation of Azawad

AQIM Al-Qa'ida in the IslamicMaghreb

CNRDR National Committee for the Restoration of Democracy and State.

ECOWAS Economic Commission of West African States

AFISMA African-led International Support Mission in Mali

MCJD Military Council for Justice and Democracy

CHAPTER ONE

INTRODUCTION

Background

International law is primarily concerned with the rights and duties of states. Thus, it is necessary to have a clear idea of the components of a State.According to the 1933 Montevideo Convention on Rights and Duties of States, a State as a person of international law should possess the following qualifications: a permanent population, a defined territory, government and capacity to inter in to relations with other states. [1]

A State which fulfills the above mentioned criteria recognized as a State. The recognition of a new State is a free act by which one or more States willingness to enter into official relations with a new State or manifest its opinion on the legal status of a new entity or authority or both.

In the case of government, the question of its recognition normally arises only when there is an existed State. When a State recognizes a new government, it usually acknowledges a person or a group of persons as competent to act as the organ of the State and to represent it in its international relations. The only criterion in international law for the recognition of an authority as the government of a State is its exercise of effective control over the State's authority. [2] In contrast, however, a number of regional treaties and charters that bound member States renounce any government acquiring power via unconstitutional means. These agreements include: African Charter on Human and People's Rights; Organization for African Unity declaration on Unconstitutional Change of Government (the Lome Declaration); African Charter on Democracy, Elections and Governance; and the Constitutive Act of the African Union. That means the recognition of government which comes to power through constitutional means or non- recognition of unconstitutional government is a collective act made by the Union.

Such kind of commitment towards democratization and constitutionalism also reflected in the Organization of American States and the Treaty of European Union.

[1]Montevideo Convention on Rights and Duties of States,1933,Art.1.
[2]O.Connel. D.P, *International Law,* Cambridge University press Ltd.,1964, p.148.

This new organizational development of condemning unconstitutional change of government and cognizance of a government acquiring power through constitutionally is one of the mechanisms of the prevalence of good governance and also a way towards the protection of citizens' democratic rights. Although this collective concern towards the democratization development of the continent (African Union), there is unilateral acts of member States which affects the common organizational whim of the unreserved efforts of the Union to alleviate coup d'état and other means of having power through unconstitutional means. This paper therefore tries to analyze cases and provides possible recommendations to challenge those problems which are the antithesis of the collective recognition of the Union.

1.2 Statement of the Problem

One of the deep rooted problems in Africa is coup d'état. The intensification of this and other unconstitutional change of governments are threats to peace and security of the continent and they constitute a very disturbing trend and serious setback to the ongoing process of democratization in the continent. Furthermore, the phenomenon of coup d'état and other related unconstitutional change of government have resulted in further violation of the basic principles of the continent organizational arrangements and of the United Nations.

In order to mitigate or if possible to alleviate the above mentioned problems, the Constitutive Act of African Union and the African Charter on Democracy, Elections and Governance inculcated provisions which unequivocally condemned and rejected any unconstitutional change of government.[3] Furthermore, Rules of Procedure of the Assembly of the Union stipulates the organ and Union officials who are in charge of renouncing unconstitutional change of government on behalf of the Union[4]. That means, the Union's officials renunciation of unconstitutional change of government infers the collective measure of the member States of the Union. However, there are member States which are setting aside this organizational collective jurisdiction and take unilateral act. Thus, this unilateral act of States which jeopardizes the collective jurisdiction of the Union depicts somehow member States disloyalty towards the Union's regional arrangement of collective measure regarding unconstitutional change of government. In line with this

[3] Constitutive Act of African Union adopted in Togo, Lome on July 11,2000 , Art.30 and Art.25(1) of African Charter on Democracy, Elections and Governance adopted in Addis Ababa, Ethiopia, 30 January 2007.
[4] Rules of Procedure of the Assembly of African Union adopted in Durban, South Africa on July 10, 2002, Art37(4)

organizational problem, there is disparity among member States with regard to the punitive measures made by AUPSC against unconstitutional change of government. The other problem that initiated this study is that some of the specific sanctions imposed by the AUPSC targeted against the perpetrators of the unconstitutional change of government may have adverse impact on innocent civilians. In addition, while AUPSC enforcing its objective of combating against illegal regime change, suspending the member state not the perpetrators of the coup d'état, however, this is not the purpose of the sanction. As a result, these are the major research problems that initiated this study. The paper is therefore an endeavor to critically analyze the above mentioned problems with selected cases.

1.3 Objectives of the Study

The inclusion of recognition of government in regional organizations such as in African Union Constitutive Act is a good development. According to the Rules and Procedure of the Assembly of the Union and the Charter on Democracy, Elections and Governance; recognition of constitutionally changed government or condemning unconstitutional change of government is vested up on the Chairperson of the Assembly of the Union and the Chairperson of the Commission. However, there is unilateral recognition of government made by some member States of African Union. On the one hand, member States ratified the African Union Constitutive Act, that is, the Constitutive Act became integral part of the law of the member States where by collective measure of the organization bound member States. On the other hand, there is a practice of unilateral recognition of unconstitutionally changed government, which jeopardizes the organizational arrangement. Thus, the objective of this research is examining the legal justifications as well as the legal effects of unilateral and collective recognition of government in accordance to the regional arrangements of African Union.

In relation to the above mentioned major objective of the study, there are also specific objectives addressed in this research. These include:

- To examine the rationale and legal basis of collective recognition of government and situations calling for recognition of government.
- To evaluate legal effect of unilateral and collective recognition as well as non-recognition of government in regional member States of AU.

- To critically assess immediacy and effectiveness of the measures made by AU in response to unconstitutional change of government.
- To evaluate the pertinent nature of AUPSC sanctions.
- To evaluate member states loyalty towards the Constitutive Act of AU.

1.4 Research Questions

In accordance with the above mentioned statement of the problem that provokes this research, there are certain questions need to be addressed under the issue of recognition of government. Thus, this research will address the following research questions.

What is the implication of collective recognition of constitutional change of government of the AU on its member States?

What is the effect of unilateral acts of the individual States on the unconstitutional change of government?

What situations could be considered as unconstitutional change of government?

What are the requirements of collectively condemning and denying recognition to unconstitutional change of government in the regional arrangements of AU?

AU adopted collective denial of unconstitutional change of government in its respective legal instruments. However, what kind of possible measures it's using to implement its decision?

Is there any punitive measure or remedy on states which are jeopardizing organizational collective measure through unilaterally recognizing unconstitutional government?

Is there any kind of challenges to enforce regional collective measures?

1.5 Significance of the Study

As it is clearly stated in the objective, there are member States of African Union which are unilaterally recognizing unconstitutional government though the Constitutive Act of the organization recommended collective recognition. Thus, this study has legal significance through recommending points which are relevant in the implementation of recognition of constitutional or condemning unconstitutional change of government as well as related points mentioned in the objective of the study.

In general, this research will have the following significance.

It will provoke more research on the subject matter of recognition of government and related issues. It will also used as research material for future researches and as secondary source for students.

It is hoped that, this research enables the regional organization(African Union) provide due regard to its Constitutive Act and the Charter on Democracy, Elections and Governance and then make responsible member States which are recognizing unconstitutional government unilaterally.

1.6Scope of the Study

The study covers only recognition of government in selected regional organizations with particular emphasis on the African Union. This study will not assess recognition of States, belligerents, government in exile and diplomatic recognition as an independent research objective. However, in order to develop the research, the writer of this study will take some concepts from the above mentioned issues which are entirely related to the research topic.

1.7 Research Methodology

In order to achieve the research objective, this study provides due regard on the analysis of the relevant available literatures on the subject. The study specifically relies on examining regional constitutive acts and protocols, general comments, books, journals and academic articles. Furthermore, various internet sites have been consulted for relevant information. This research also analyzes some selected cases.

1.8 Organization of the Study

This research has attempted to explore the recognition of government in the regional organizations with particular emphasis to the case African Union. In doing so the writer has opted to divide the work into five chapters. Chapter one briefs the introductory part of the study. Chapter 2 explores the theoretical and conceptual overview of recognition. This topic assessed the recognition of state with its theoretical arguments and recognition of government. This chapter also inculcates modes of recognition, non recognition of government, withdrawal of recognition and the legal effects of recognition.

Chapter three is devoted to the assessment of the recognition of government in the then OAU now AU, EU, and OAS. In this regard, the Constitutive Act, Protocols and declarations of these regional organizations have been analyzed in line with the subject of the study. Chapter four is all about the analysis of recognition of government in the four selected member states of AU. These are: Madagascar, Mali, Libya and Mauritania.

Finally, chapter five elaborates the conclusion and recommendations. It summarizes the main findings of the research based on the previous chapter analysis and attempts to provide some recommendations points which are pertinent to recognize or to denounce recognition to a government which comes to power constitutionally or through coup d'état respectively.

CHAPTER TWO

CONCEPTUAL AND THEORETICAL OVERVIEW OF RECOGNITION

2.1 The Concept of Recognition

The term recognition means "a formal acknowledgement of declaration by the government of an existing state that it intends to attach certain customary legal consequences to an existing set of facts which in its view, justify it (and other states) in doing so".[5] The concept of recognition in international law described as the acknowledgement of a fact which had been previously uncertain and this acknowledgement may relate to new states, of a new government or a belligerent community.[6]

Recognition in the case of a new state or government could be by an act officially acknowledges the existence of such state or government and indicating a readiness on the part of the recognizing state to enter in to formal relations with it.[7] However, the existence in the fact of a new state or a new government is not depends up on its recognition by other states.[8] In the case of belligerency, the recognition of belligerents by a state implies that a revolt with in another state has attained such a magnitude as to constitute in fact a state of war, entitling the revolutionists or insurgents to the benefits, and imposing up on them the obligations, of the rules of war.[9]In other words, recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.[10] Once recognition has occurred, the pertinent legal consequences will follow, and as such, recognition constitutes participation in the international legal process generally and at the same time it is important within the context of bilateral relations .[11]

On the other hand, Oppenheim explained the meaning of recognition differently. According to him, the term recognition is neither a contractual arrangement nor a political concession, rather it is a declaration on the part of the recognizing state that a foreign community or authority is in

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[5]. Von GlahnG.,*Law Among Nations: An Introduction to Public International Law,* 2nded.,Coller-Macmillan Ltd., Toronto,1990, P.40

[6] . Santos V.A,*Cases and other materials on International Law,* Phonix Press Inc., Philippina, 1971, P.93.

[7]. Ibid.

[8]. Robert M. Maclean,*Public International Law* 17thedn.,HLT Group Ltd., 1995, p.49.

[9]. Ibid.

[10]. ShowN.Malcom, *International Law* 6th ed., Cambridge University Press,2008, P.444

[11].Ibid.

possession of the necessary qualifications of statehood, of governmental capacity or of belligerency.[12]These qualifications are not necessarily enduring of all times, that means, a state may loss its independence; a government may cease to be effective; a belligerent party in a civil war may be defeated, then in all these cases withdrawal of recognition is both permissible and indicated. [13]

Thus, recognition or non recognition may be meant an indication of willingness or unwillingness on the part of the recognizing government to establish or maintain official but not necessarily intimate, relations with the government in question.[14]Especially in cases of prolonged official non-recognition of established government, states frequently speak of their willingness to normalize their relations with the government in question.[15]

The meaning of recognition would have distinct meaning for recognizing state's intention regarding recognition when the state used the term recognition with 'of' and 'as'. It seems that if a sate speaks of the recognition of an authority 'as something' (that is, 'as the government of a particular state') it intends to say that, in its opinion, the authority so recognized qualifies for that particular status.[16] On the other hand, if a state speaks of the recognition 'of something' (that is a group of exiles calling themselves the government of a particular state) it seems that it intends, especially if the 'something' recognized is a de facto government to express only its willingness to enter in to official relations with the 'something'.[17]

On the other perspective, recognition covers a variety of factual situations calling for acknowledgement by foreign states. These are: the appearance of new states, changes of government outside the constitutional forms, territorial changes, especially those achieved by force and involving the extinction of states, and the parties to the civil war.[18]The common factor in all these cases is that certain governmental authorities claim competence over territory and people, and foreign states are faced with the choice of recognition or not recognizing that the

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[12]. OppenheimL.,*International Law: A Treaties* Vol.1. 8th ed.,Tand A Cnstable Ltd.,University of Edinburgh, 1955, P. 149-151.
[13].Ibid.
[14] .TalmonStefan, *Recognition of Government in International Law: with particular reference to governments in exile*, Oxford University Press Inc., New York, 1998,p 23.
[15].Ibid.
[16]. Ibid.
[17]. Ibid.
[18]. O.Connell.D.P, *International Law*,cambridge University Press Inc.,1964, P. 137.

claim is valid.[19] Recognition in this regard is a political action where by the recognizing state indicates a willingness to acknowledge the factual situation and to bring about certain legal consequences of that acknowledgment, and what should be clear in this case is that, acknowledgement is not recognition if it is limited to noting the factual situation, for instance, the United States knows perfectly well that the central people's government rules china, it does not doubt that fact, nor does it pretend to the contrary.[20] Rather, it merely refuses to allow the legal consequences of its knowledge, and international law would seem to permit it to do.

In order to distinguish acknowledgement of facts which has consequences in international law from one which has not, it is useful to distinguish three process, cognition, cognizance and recognition. The taking notice of the facts may be described as cognition, that is, until the facts are noted and until indeed they are facts, there is not proper recognition.[21]Cognizance is the act of somebody other than the executive taking note of the facts and allowing consequences to follow there from, in other words, this is what a judge does when he draws legal conclusions from the existence of an unrecognized as well as from a recognized state or government. [22]Recognition is the act of the executive taking note of the facts and indicating a willingness to allow all the legal consequences of that noting to operate.[23]

In certain scenarios the term recognition may be absent and thus recognition may take the form of an agreement, or declaration of intent, to establish diplomatic relations, or a congratulatory message or attainment of independence.[24] The typical act of recognition has two legal functions. First, the determination of statehood, a question of law: such individual determination may have evidential effect before a tribunal and secondly, the act is a condition of the establishment of formal optional and bilateral relations, including diplomatic relations and conclusion of treaties.[25] The act of recognition itself may take various forms. It may consist of a formal

[19]. August Rayt, *Public InternationLaw:Text, cases and Readings*. Prentice- Hall Inc.,1995,p.101
[20]. Ibid.
[21]. O.Connell.D.P, Supra Note.14.
[22] . Ibid.
[23]. Ibid.
[24] . Brownlielan, *principles of Public International Law* 6th ed.,Oxford University Press Inc., New York 2003, P. 88-89
[25]. Ibid.

pronouncement, an official letter of the newly recognized entity, a statement before a national court or it may be inferred from the opening of full diplomatic relations. [26]

Regarding the normative nature of recognition, Santos clearly arguing that, there are no normative rules for the granting or with holding of recognition, rather to recognize a state or government or belligerent, it should be easy enough to determine whether or not certain facts exists, that is, whether an entity claiming to be a state has the qualifications of a state, whether a government in a state is the actual and effective sovereign or whether the rebellion against the legitimate government has attained the magnitude of an actual war. [27]

Concerning the application of recognition in practice, recognition is accorded or withheld principally for political consideration and with scant reference to the factual situation. [28] Whether when and where recognition is to be accorded is a matter of discretion on the part of the political arm of the government of a state and its decision on the matter cannot be legally questioned. [29] While recognition is a high political act judicial consequences, both in international law and municipal law, flow from the act once it is made. [30] Nevertheless, state practice reveals that recognition is a discretionary act that other states may perform when they choose and in a manner of their own choosing subject only to compliance with the imperative of general international law. [31]

In general speaking, recognition is one of the most difficult topics in international law, because it is a confusing mixture of politics, international law and municipal law. [32] The legal and political elements cannot be disentangled, when granting or with holding recognition, states are influenced more by political than by legal considerations, but their acts do have legal consequences. [33] What is not always realized, however, is that the legal effects of recognition in international law are very different from the legal effect of recognition in municipal

[26]. Dixon Martin, *Text Book on International Law* 6th ed.,Oxford University Press Inc., New York, 2007, P.126
[27]. Santos,Supra Note. 2
[28]. BranimirM.Jankovic':*Public International Law* , Transitional Publishers inc., New York, 1984,p.99.
[29]. Ibid.
[30]. Ibid.
[31]. Show,SupraNote 6.
[32]. ibid.
[33]. Ibid.

law.[34] Another reason why recognition is a difficult subject is because it deals with a wide variety of factual situation; in addition to recognition of states and governments, there can also be recognition of territorial claims, the recognition of belligerency or of insurgents, the recognition of national liberation movements or the recognition of foreign legislative and administrative act.

2.2 Recognition of State

International law was conceived originally as system of rules governing the relations of states among themselves and these nations are the most important and most powerful of the subjects of international law that they have all the capacities and it is with their rights and duties that the greater part of international law is concerned.[35] It is vital, therefore, to know when an entity qualifies as a state. In other words, when is an entity entitled to all of the rights and subject to all of the duties assigned under international law to states.[36] According to the 1933 Montevideo convention on rights and duties of states, the criteria of statehood is clearly stipulated under article1.[37] This provision reads as, "state as a person of international law should possess the following qualifications: (a) Permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other states."[38] Since the objective of this research paper is on the recognition of government, the writer of this paper would not devote much time to brief in detail these elements of the State. Thus, a State comes to existence when the community involved acquires the characteristics associated with the concept of a State mentioned above. Because all those elements (enumerated under article 1 of Montevideo convention) of Statehood involve ascertainable facts, the dating of the beginning of a new State is merely a question of fact not law. The new State exists, regardless of whether recognized by other States, when it has meet the factual requirement of Statehood. With regard to Statehood the Organization of American States Charter under article 9 stipulates as follows:

The political existence of the state is independent of recognition by the other states. Even before recognition the state has right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate up on

[34]. Ibid.
[35].Dixon,Supra Note.22. P113
[36]. Ibid.
[37]. Montevideo Convention on Rights and Duties of States,1933,Art.1.
[38].Ibid

its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other states in accordance with international law.[39]

However, there is a debate as to the effects of recognition on the legal status of the body being recognized. Essentially, this has resolved itself in to two theories: the declaratory theory and the constitutive theory of recognition.

The constitutive theory denies that international personality is conferred by operation of international law.[40] On the contrary, the act of recognition is seen as a necessary precondition to the existence of the capacities of statehood , that means, according to this theory if a sate is not recognized as a sate, it is not a state or if a state is not recognized by the international community, it cannot have international personality.[41] Thus, recognition is said to 'constitute' the state.[42]

The main strength of the constitutive theory is that it highlights the practical point that states are under no obligation to enter in to bilateral relations with any other body or entity unless they are recognized.[43] However, non-recognition did not mean that a sate could ignore general rules of international law in its dealings with other states, nor did it mean that the non-recognized state was a state.[44]

It is clear that the constitutive theory raises insoluble theoretical and practical problems. First, there is no doubt that recognition is a political act, governed only in part by legal principle. For instance, the USA did not recognize the soviet government until 1933, even though it had been effectively with in the state for at least ten years. [45]Second, we must ask ourselves whether it is consistent with the operation of any system of law that legal personality under it should depend on the subjective assessment of third parties.[46] Surely, legal personality must be an objective fact

[39] .Charter of the Organization of American States,1948, Art.9.Avilable at http://wwwtreaties.un.org/doc/Publication/.../volume-119-I-1609-English.pdf, *accessed on*08/15/2012
[40]. Jankovic,supra Note 24.p.97.
[41]. Ibid.
[42]. Kapoor.s.K, *International Law and Human Rights* 17th ed.Vipin Enterprises Ltd., 2009,p. 152
[43]. Ibid.
[44]. Dixon,Supra Note.22 p.128
[45]. Ibid.
[46]. Ibid p.129.

capable of resolution by the application of rule of law. [47] Third, assuming we accept the constitutive theory, in practical terms what degree of recognition is required in order to 'constitute' a state? Must there be unanimity among the international community, or is it enough that there be a majority, substantial minority or just one recognizing state? Again, is membership of an international organization tantamount to collective recognition and if so, which organizations? What if membership of the organization is suspended? Are some states or groups of states (eg. USA, the EU) more 'important' when it comes to recognition? [48] These are practical problems that constitutive theory must answer, yet cannot. [49] Some commentators have attempted to meet those criticisms by supporting that there is a 'duty' to recognize once a state or government has fulfilled the criteria laid down by international law. [50] However, not only is it impossible to find any support for the existence of this 'duty' in state practice, in real terms it is little different from the declaratory theory. [51]

In general, in accordance to the Constitutive theory, international personality can be obtained only through the consent of existing legal persons by the performance of an act constituting recognition. However, this may not be justified as per the definition of State in the Montevideo convention as well as in the Charter of the Organization of American States. Because in accordance to these legal instruments the rights and duties of a new state are based on its own will as a state they cannot be derived from the will of other states.

The second theory is the declaratory theory. According to the declaratory theory, the general legal effects of recognition are limited. When an existing state recognizes a new state, this is said to be nothing more than an acknowledgement of pre-existing legal capacity, that infers, the act of recognition is not decisive of the new entity's claim to state hood, because that status is conferred by operation of international law. [52] The implication of this theory dictates that international legal personality of a state does not depend on its recognition as such by other states. Though this theory elaborates that rights and duties are relative under international law, it does not mean that the unrecognized body has no international personality, rather, if the entity

[47]. Ibid.
[48]. Ibid.
[49].Kapoor, Supra Note .38
[50].Ibid.
[51]. Kapoor, Supra Note .38. p.98.
[52].Ibid.

satisfies the criteria for statehood, especially those concerning actual and effective control, it will be a state irrespective of recognition.[53] Thus, in accordance to the declaratory theory of recognition, the effective body will be subject to, and be able to claim, the general duties and rights accorded to a state or government under international law.

The view of declaratory theory has been endorsed on many occasions by international conventions, arbitral decisions and even by the international court of justice[54]. There does exist a qualification concerning the declaratory theory: since states are free to deny or to grant access to their courts, recognition of a sate is constitutive with respect to those domestic courts, and not every community claiming to be a state has the capacity to appear before permanent international tribunals.[55]

Accordingly O.Connell explains that, declaratory theory contends that the state has capacity in international law as soon as it exists in fact (that is when it is competent in municipal law), this capacity generating spontaneously from the assertion by the community that it is a judicial entity.[56]A body when socially organized is internally legal organized, and hence competent to act in such a way as to engage itself in international responsibility. The result, of course, is to reduce the juridical significance of recognition, and it has even been argued that recognition has no other legal effect than to bring about ordinary diplomatic relations.[57]

The declaratory theory has its own short coming. One difficulty with this theory is, however, offered by the death as distinct from the birth of states. If capacity follows the facts we would expect it to lapse when the factual basis for competent action is destroyed.[58] This, however, is not necessarily the case, for instance, Ethiopia remained a member of the League of Nations for two years after its subjugation by Italy, as a result, Continued recognition in this case kept an entity alive in law that no longer existed in fact, perhaps we must conclude that there is a rule of law permitting a legal entity once created to survive the facts which gave it birth. [59]

[53]. Glahn G, SupraNote.1.p.91
[54].Ibid.
[55].O.Connell, SupraNote.14.p.139.
[56]. Ibid.
[57]. Kapoor, SupraNote.38.p.153.
[58]. O.Connell, SupraNote.I4
[59]. SupraNote.22.p.131

To conclude, declaratory theory adopts the opposite approach of the constitutive theory and accorded a little more with the practical realities. It maintains that recognition is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. In accordance to this theory, a State will be legally constituted by its own efforts and circumstances and will not have to await the procedure of recognition by other states.

Regarding Constitutive and Declaratory theories, a possible question that may aroused is that, what would be the legal effects of these two competing theories? concerning the declaratory theory, the legal effect of recognition is limited, since recognition is a mere declaration or acknowledgment of an existing state of law and fact, legal personality having been conferred previously by operation of the law[60] In the case of constitutive theory, the political act of recognition is a precondition of the existence of legal rights: in its extreme form this is to say that the very personality of a state depends on the political decision of other states.[61] The results is a matter of principle impossible to accept: it is clearly established that states cannot by their independent judgment establish any competence of other states which is established by international law and does not depend on agreement or concession.[62]

The other issue that needs to be addressed under this topic is that the legal effect of recognition of states in the international and domestic laws. In international law a recognizing state may have no choice other than to accept the fact of existence of the recognized state.[63]But national law is a different legal system. Whether the executive, administrative or judicial authorities of the recognizing state pay any regard to the acts of the recognizing state on the national plane may depend entirely on whether it has been formally recognized.[64] In practice, the legal effects or consequences of recognition in national law depend on the laws of each state.

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60. Kapoor ,SupraNote 38.p.151
61. Ibid.
62. Santos, SupraNote.2.P.96.
63. Ibid.
64. Talmon, SupraNote.10.p.24

2.3 Recognition of Government

The recognition of a new government is different from the recognition of a new state. As far as statehood is concerned, the factual situation mentioned under section 2.2, examined interms of the accepted criteria. Different considerations apply in the case of recognition of government. This sub topic addresses these considerations applied in the recognition of government.

The term recognition, used in the sense of recognition of new governments is meant the establishment of normal official relations by the recognizing government with the government recognized or an indication of readiness to do so, in most cases, recognition of government will lead to the establishment of normal official relations, this is not necessarily so, as the establishment of bilateral relations requires the consent of both parties.[65]In view of the fact that recognition is only a unilateral act, it is therefore more precise to speak of an indication of the free act by which one or several states acknowledge that a person or a group of persons are capable of binding the state which they claim to represent, and witness their intention to enter in to relations with them.[66]

Thus, recognizing the new government is necessary for the purpose of defining the relationships with the new regime. It is not, however, necessary for the recognition always to be formal, sometimes States may deal with the new government as if they had formally recognized it, and this is tantamount to recognition.[67] Such was the case when the thirteen states federated to form the United States, and it is the case with in the British Common wealth where the successive changes in status of its members have taken for granted by other states.[68]Whether or not formal recognition is required will depend very much on the facts, whether the change of government is politically acceptable to the recognizing states, whether there are two claimants to authority between whom a choice must be made.[69] The criteria that enabled the government qualified to be recognized includes: the new government must be an effective administering authority; it must also attain power by constitutional means; and that it must behave responsibly towards foreign

[65]. Santos, Supra Note.2.P.96.
[66]. O. Connell, Supra Note.14.p.146.
[67]. Ibid.
[68]. Ibid.
[69]. Oppenheim, Supra Note.65.

countries.[70] All these qualifications will be discussed in the following subsequent sub topics of recognition of government directly or otherwise.

Recognition or non-recognition of a government may thus manifest whether or not in the opinion of the recognizing authority, the government in question exists as such, that is to say, whether or not it fulfills the criteria prescribed by international law for the legal status of government. [71]Recognizing or not recognizing an authority 'as something', that is, in a certain capacity, the recognizing government may indicate the legal status which, in its opinion, the authority in question qualifies or does not qualify, for instance, such cases may arise when competing authorities claim to be the government of the same state, when questions of state hood and governments status linked, when the factual situation with in a state is unclear owing to the civil war, when a government is established by outside intervention, or when an authority claims 'unusual' legal status.[72]However, the granting or refusal of recognition to a government has nothing to do with the recognition of the state itself if a foreign state refuses the recognition of a change in the form of an old state; thelatter does not there by lose its recognition as an interested person, that is, the state is perpetual and survives the form of its government even there is no recognized government the state's life is not affected.[73] In other words, the state does not cease to be an international legal person because its government is overthrown, that is, the recognition or non-recognition of a new administration is irrelevant to the legal character of the country[74]. Furthermore, it must be emphasized that the effect of a revolution resulting in a government which for a time fails to secure any recognition from foreign states, does not destroy the international personality of the state or free it, permanently at any rate, from the existing treaty obligations; though it involves an interruption in that state's legal capacity for international purposes.[75] Accordingly one can see that two separate recognitions are involved and they must not be confused. Recognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state.[76] It is possible; however, for recognition of state and government to

[70]. Talmon, SupraNote.10.p.30
[71]. Ibid.
[72]. O.Connell, SupraNote.14.p.145
[73]. Show,SupraNote 6.p.145
[74]. Oppenheim, SupraNote.8.p.133
[75]. Show,SupraNote 6..p.145
[76]. Ibid.

occur together in certain circumstances, this can take place up on the creation of a new state, for instance, Israel was recognized by the US and the UK by the expedient of having its government recognized de facto.[77] Recognition of the government implies recognition of the state but it does not work the other way. It should be noted that recognition of a government has no relevance to the establishment of new persons in international law, rather it is significant in the realm of diplomatic relations.[78] If a government is unrecognized, there is no exchange of diplomatic envoys and thus problems can arise as to the enforcement of international rights and obligations.[79]

There are certain problems with regard to the recognition of government. The real problems involved in the recognition of government tend to appear when a change in the form of a government takes place either because of a change in type or through an unconstitutional or otherwise irregular transfer of authority from one group to another group within the state in question.[80]What is involved is the authority of a new group or a new person to act as the governing agency of a state and to represent it, to act as its agents, in its international relations. It must be remembered that changes in the form of a government or in its personnel do not affect the continuing existence of the state involved. In any event, transformations of the constitution of a state do not necessarily affects the latter's continuity of legal personality.[81]

Whereas the normal transfer of power from one group or one individual to another in accordance with the constitutional provisions in force in a given country does not require the recognition of the new government by outside states, this infers, there is no "new" government at all, in view of the presumed direct and automatic transfer of authority involved.[82] A Political change of a country's government may be replaced by another party as a result of an election, yet from an international legal point of view the same government continues to function.[83]On the other hand, the question of recognition of a new government arises when serious violations of a constitution are recorded or when the basic form of government is changed in a country, thus,

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77. Madean. SupraNote4.p.55
78. Ibid.
79. Glahn, SupraNote.1p.96
80.Ibid.
81. Ibid p.98
82. Jankovic, SupraNote 24.p.106
83. Ibid.

the "outsiders" then have to pass individual judgments on the competency of the new government to represent its state in its foreign relations.[84] This judgment on the competency of the new government is obviously important for a state can be held legally responsible only for the actions of its government recognized as such by other states.[85] Regarding the judgment of government competence, there are two tests. There are: Objective and subjective tests.

The concept of objective test dictates that, the judgment of a government as to the competence of another, new government, is based on the answers of certain quite objective questions or tests.[86] If the new government exercises de facto control over the administrative machinery of its country; if there is an absence of resistance to the authority of the new government; and if the latter appears to have the backing of a substantial segment of public opinion in its country, then it can be said that the so called objective tests of its competence to act as the representative of the state have been met and that recognition should be extended, provided that political objective to recognition do not bar the later.[87] On the other hand, subjective test applied by some states to a new government in connection with recognition centered on the determination of the new government willingness to carry out the international legal obligations of its state.[88] It might seem that such a test would be superfluous, for any government judged to represent its state might be expected to assume unquestioningly the legal obligation of state, however, practice increasingly favored the application of this test.[89]

Generally speaking, recognition of a new government represents an individual political act on the part of the recognizing government, just as in the case of the recognition of new states.

Recognition of a government must not be necessarily be the object of an express declaration; it may result from dealings which clearly indicate the intention of considering that government as effectively representing the state which it controls and, in particular, it may result from the simple continuation of diplomatic relations.[90] There is certain wrong impression in some literatures that recognition of governments is exclusively concerned with the legal status of

[84].Ibid.
[85]. Glahn, Supra Note 1.
[86]. Ibid.
[87]. Ibid.
[88].Ibid.
[89]. Madean, Supra Note.10.p.4
[90]. Ibid p.23

governments coming to power by coup de'tat, revolution, or any other event involving a break in legal continuity.[91] While it is true that normally no formal statement of recognition is made with respect to constitutional governments, recognition will as a matter of fact be implied by states continuing to deal with the newly elected government. [92] Recognition is not restricted to unconstitutional governments becomes clear from the fact that in certain circumstances states have both expressly recognized and refused to recognize elected governments.[93]The practice of states shows that the term recognition has been employed in a variety of different meanings depending on the factual and legal circumstances.[94] One of the factual circumstances is effective control over the territory of the state in question. The effective control of a new government over the territory of the state is thus an important guideline to the problem of whether to extend recognition or not, providing such control appears well established and likely to continue, however, it was no more than that and in many cases appeared to yield to political consideration.[95]

2.3.1 Modes of Recognition of Government

Regarding recognition of government, there are certain criteria that should be fulfilled to obtain recognition when there is change of government. Such criteria amounted to an acceptance of the realities of the transfer of power and suggested that once a new government fulfills these required criteria, recognition should not be withhold. The following sub topics would explain briefly the modes of recognition of government.

2.3.1.1 Effective Control

The test of effective control was declared by the under-secretary of state for Foreign Affairs of UK in 1970 that the test employed whether or not the new government enjoyed with a reasonable, permanence and effective control of much of the greater part of the territory of the state concerned'.[96]

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[91]. Ibid.
[92] . MalanczukPeter,A*kehurst's Modern Introduction to International Law*, 7th ed.,T.J. International Ltd., Cornwall,1997, p .87.
[93].Talmon, Supra Noe 10.p.4
[94]. Show,SupraNote.6.p.455
[95]. Ibid.
[96].Ibid.

The effective control of a new government over the territory of the state is thus an important guideline to the problem of whether to extend recognition or not, providing such control appears well established and likely to continue, however, it was no more than that and in many cases appeared to yield to political considerations.[97] Thetinoco arbitration constitutes an interesting example of the 'effective' control concept. [98]

Where recognition has been refused because of the illegitimacy or irregularity of origin of the government in question, rather than because of the lack of effectiveness of its control in the country, such non-recognition loses some of its evidential weight.[99] In other words, where the degree of authority asserted by the new administration is uncertain, recognition by other states will be a vital factor, on the contrary, where a new government firmly established, non-recognition will not affect the legal character of the new government.[100] The doctrine of effective control is an indication of the importance of the factual nature of any situation. But in those cases where recognition is refused up on the basis of the improper origins of the new government, it will have less of an impact than if recognition is refused because of the absence of effective control.[101]

Generally, recognition accorded prematurely is a breach of international law since it involves the bolstering up of the revolutionary regime and thus an intervention in the international affairs of the state. Thus, until a rebel organization attains the capacity of effective control of the State, it lacks the qualification to be recognized as either a government or a belligerent, but when it does attain this capacity it may be recognized as either a government or a belligerent.

2.3.1.2 Tobar Doctrine or Doctrine of Legitimacy

Although the effective control doctrine is probably accepted as the most reliable guide to recognition of governments, there have been other theories put forward, the most prominent amongst them being the Tobar doctrine or the so called doctrine of legitimacy. The doctrine of

[97]. Ibid
[98]. Oppenheim, Supra Note 65, .p.152.
[99].Ibid.
[100]. Show, Supra Note.6.p.455
[101]. O. Connell, Supra Note.14.p150.

Dr. Tobar of Ecuodor, advanced in 1907, that governments which had risen to power through unconstitutional means should not be recognized was embodied in a treaty of that year between the five Central American Republics, then the US approved of this policy and it became the WilsonianPolicyof democratic legitimacy when President Wilson on March 11, 1913 announced that the Huerta rebellion in Mexico would not meet with US recognition.[102]During the period from roughly 1913 to about 1929, the government of US did not insist that a new government, in order to be recognized de facto or de jure, had to came in to office by legal and constitutional means and during this period Wilson Doctrine was applied against new government in Mexico (General Huerta), El Salvador, Costa Rica, and Nicaragua.[103] It denied to the people of those states the right to select their own governments by whatever means they choose to apply, it means that the government of the US claimed for itself the right to determine the legality of a foreign government and assuredly this meant concern with a purely internal and sovereign sphere of another state, Commendably, the doctrine was abandoned when the Hoover administration came in to office.[104]

This doctrine suggested that governments which came to power by extra-constitutional means should not be recognized, at least until the change had been accepted by the people, this policy was applied particularly by the united states in relation to Central America and was designed to protect stability in that delicate area adjacent to the Panama Canal.[105]Logically of course, the concept amounts to the promotion of non-recognition in all revolutionary situations and it is, and was, difficult to reconcile with reality and political consideration.[106]The argument of this policy is not directed to the point that unless this qualification is fulfilled there is a duty not to recognize, for this is clearly not the case, but to the point that there can be no duty to recognize unless it is fulfilled.

However the Wilson Policy was never more than a policy; it was designed to promote stability in a revolution-ridden part of the world. Elsewhere and at other times the US has not insisted on constitutionality of origin.[107]This was admitted by Mr. Stimson in 1931 when the policy with

[102].Glahn,SupraNote.1.p.98
[103]. Ibid.
[104]. Show, SupraNote 6.p.457
[105]. Ibid.
[106].O. Connell, SupraNote.14.p.150
[107]. 103.Id.

regard to Central America was said to be exceptional. In 1932 the new Chilean government was recognized when it was in control and not actively resisted.[108] The concept of legitimacy has, however, been equated in American doctrine with democratic expression, and this could be a possible qualification for recognition of revolutionary government.[109]

Generally, in accordance to this policy, where the revolution was supported by the people, it would be recognized, whereas if it was not, there would be no grant of recognition.

2.3.1.3 Automatic Recognition

Automatic recognition of government was put forward by Estrada, the Mexican secretary of foreign relations but this suffers from the same disadvantages as the legitimacy doctrine. It attempts to lay down a clear test for recognition in all instances excluding political consideration and exigencies of state and is thus unrealistic, particularly where there are competing governments.[110] It has also been criticized as minimizing the distinction between recognition and maintenance of diplomatic relations.[111]

The problem, of course, was the recognition of a new government that has come to power in a non-constitutional fashion was taken to imply approval. Allied with the other factors sometimes taken into account in such recognition situations, an unnecessarily complicated process has resulted.

2.3.1.4 Estrada Doctrine

There was some sort of misunderstanding among nations regarding the terms of recognition and non recognition. Because non recognition of foreign governments has often been used as a mark of disapproval, recognition of a foreign government has sometimes been misinterpreted as implying approval, even in cases where no approval was intended, thus, in order to avoid such misinterpretations, some states have adopted the policy of never recognizing governments (although they continue to grant or withhold recognition to foreign states).[112] This policy

[108]. Ibid.
[109]. Akehurst, Supra Note.88
[110]. Show,Supra Note 6, p.458
[111]. Ibid.
[112].Akehurst, SupraNote.88.

originated in Mexico, where it is known as the Estrada Docrine.[113] In 1930, the secretary of Foreign Relations of Mexico declared that: the Mexican government is issuing no declarations in the sense of grants of recognition, since that nation considers that such course is an insulting practice. [114]

This statement reflects the fact that the change of government in a state is legally an internal matter, whether in conformity with the national constitution or not, and does not concern international law or other states.[115] The same policy also has been applied in recent years by several other states, including France, Spain and the US.[116]

At first sight the Estrada Doctrine appears to abolish the entire system of recognition of governments, in practice, however, it probably merely substitutes implied recognition for express recognition; but can be implied from the existence of diplomatic relations or other dealings with a foreign government.[117] In fact implied recognition is a long accepted practice. However, recognition should only be deduced from acts which clearly show an intention to that effect.[118] The establishment of full diplomatic relations is probably the only one unequivocal act from which full recognition can be inferred, but all other forms of contact do not necessarily imply recognition.[119]

Most states which have adopted the Estrada Doctrine in the past have not applied it consistently; sooner or later they succumb to the temptation of announcing recognition of a foreign government, in order to demonstrate their support for it, or in the hope of obtaining its good will.[120]

[113].Ray August, Supra Note.15.p.109
[114]. Ibid.
[115]. Ibid.
[116].Akehurst, Supra Note.88.p.88.
[117]. Ibid.
[118]. Ibid.
[119] .Ibid
[120].Talmon, Supra Note 10.p.48.

2.3.2 De facto and De jure Recognition

It was in the first quarter of the 20th century that the term de facto and de jure recognition experienced a revival.[121] De facto recognition refers to provisional, conditional, implied, incomplete, and or (more easily) revocable recognition, while de jure recognition is final, unconditional, express, full, and or irrevocable recognition.[122]

However, there is controversy regarding the disparity of these terms. Some writers argued that, as far as legal effects are concerned, there is no appreciable difference between the two modes of recognition, at least while the de facto recognition subsists, inaccordance to these writers, the distinction lies merely in the political sphere.[123] Others by tracing the practice of recognition argued that, practice shows states have made express declaration of de facto recognition have granted de jure recognition on certain conditions withdrawn de jure recognition, thus, the replacing of one adjective with another does not contribute much to the clarification of the meaning of the terms 'de facto' and 'de jure' recognition.[124]Other scholars argue that de facto recognition has no meaning of its own, and that it constitutes only the negative to de jure recognition.[125] States, however, have expressly stated that they do not (want to) recognize a certain government or sate either de jure or de facto, for example, the Italian representative on the Fifth Committee of the League of Nations Assembly stated on 6 December 1920 that 'at the moment the Italian government has not recognized the Albanian government either de facto or de jure.'[126]This shows that de facto recognition must have a meaning other than the mere negation of de jure recognition.

The other very strong argument is that, de facto recognition is indistinguishable from de jure recognition in as much as the legislative and other internal measures of the authority recognized defacto are, before the courts of the recognizing state, treated on the same footing as those of a state or government recognized de jure.[127] Similarly, a state or government recognized de facto enjoys jurisdictional immunity in the courts of the recognizing state; however, it is not correct to

[121]. Id.p.7
[122].Kapoor,SupraNote. 38.p.154
[123].Ibid.
[124].Talmon, SupraNote10.p.81
[125]. Ibid.
[126].Oppenheim,SupraNote 8.p.137.
[127].Ibid.

assume that no legal consequences follow from the distinction between de jure and de facto.[128] Thus, at a time when, in 1937, Great Britain recognized de facto the Italian rules over Abyssinia, the legal position underwent a change in this respect after the annexation of Abyssinia had been recognized de jure.[129] According to the practice of some countries, including Great Britain, de facto recognition does not, as a rule, bring about either full diplomatic intercourse or the conferment of diplomatic immunities up on the representatives of the de facto government.[130]

Whatever is the disparity between these terms, in certain occasions it has appeared difficult to apply at once objective and subjective tests to a new revolutionary government. Under such circumstances, it has been the frequent practice of states to grant de facto or de jure recognition to the new government.[131]

This means, in the case of de facto recognition the foreign states in question indicate their willingness to deal with the new government purely on the basis and to the extent of its control of the administration of its country, this enables other states to continue commercial relations and to protect their national and their property in a country torn by civil strife without the need for determining right away weather the new government is entitled to represent its state internationally.[132] Such provisional recognition is fraught with many problems as long as the de facto government is not in complete control of the territory of its state, that is, as long as the legitimate sovereign is still in office, even though limited in the extent of its own territorial jurisdiction.[133] In other words, de facto recognition is a declaration that the body claiming to be the government of an established or a new state actually wields effective authority over the state's people and territory without satisfying other conditions of full, de jure, recognition.[134] Without going in to question of what these 'other conditions' of full, de jure recognition may be, it can be said that this view is not in conformity with state practice which shows that de facto

[128]. Ibid.
[129].Ibid..
[130]. Glahn, Supra Note 1.p.105
[131].Ibid.
[132].Ibid.
[133].Talmon, Supra Note 10.p.48.
[134].Ibid.p.81.

recognition has been accorded not only to governments wielding effective authority over people and territory but also governments in exile and other émigré organizations[135].

This shows that the meaning of de facto recognition is not necessarily a declaration that a body claiming to be the government of a state actually wields effective authority; the Wielding of effective authority may, however, in the practice of individual states, be the condition for de facto recognition, for example, after the second world war the United kingdom regarded effective control as a precondition for recognition as a de facto government.[136]

The characteristic of de facto recognition therefore is not that certain relations are maintained but the general willingness on the part of the recognizing government to maintain official relations.[137] This may be manifested by the fact that states may have a wide range of general willingness to have official relations with a certain government may find expression in all kinds of dealings, from occasional informal meetings between officials to the exchange of permanent representatives, the question whether certain dealings signify de facto recognition exclusively depends upon the intention of the government in question.[138] However, the exchange (sending or receiving) of resident official non-diplomatic representatives, delegates, agents, or commissions (to whom diplomatic privileges will regularly be accorded as a matter of courtesy or on the basis of a special agreement) will, as a rule, constitute de facto recognition.[139]This is confirmed by the fact that states have regarded the exchange of representative as amounting or being tantamount to de facto recognition.[140]

De facto recognition, however, may not only express the recognizing state's general willingness to maintain official relations, but may also or instead indicate that, in the opinion of the recognizing state, the government or so recognized is not (yet) a sovereign authority.[141] De facto recognition may thus generally be employed in (at least) the following two meanings: it may indicate that, in the opinion of the recognizing state, the government so recognized is not a

[135].Ibid.
[136].Jankovic, SupraNote24.p.101.
[137].Ibid.
[138] .The Recognition of De Facto Governments:*The American Journal of International Law*, Vol. 58, No. 1 (Jan., 1964), p.111.Available at http://www.jstor.org/stable/2196612, accessed on 09/12/2012.
[139]. Ibid.
[140]. Ibid.
[141].Jankovic, SupraNote24.p.101.

sovereign authority and/ or it may express the recognizing state's general willingness to maintain relations with it.[142] In addition, in the practice of individual states, it has been used in the meaning of a simple acknowledgment that a government exists and wields effective control over people and territory.[143] Thus, after IWW, the governments of various new states, such as Finland, Latvia and Esthonia, which formerly constituted part of the Russia Empire, were recognized in the first instance as de facto governments pending the final territorial settlement in that part of the world.[144]

On the other aspect, de facto recognition implies that there is some doubt as to the long term viability of the government in question.[145]It also involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by de jure recognition when the doubts are sufficiently over come to extend formal acceptance, for instance, the united kingdom recognized the soviet government de facto in 1921 and de jure in 1924.[146]

The other concept aligned with de facto recognition is de jure recognition. This mode of recognition used in the sense of de jure recognition of government, manifests that, in the opinion of the recognizing state, the government so recognized is the government of a sovereign state, that is, the depositary of state's sovereignty or, in more general terms, a sovereign authority.[147] Recognition de jure usually follows where the recognizing state accepts that the effective control displayed by the government is permanent and firmly rooted and that there are no legal reasons detracting from this, such as constitutional subservience to a foreign power.[148] This view finds support both in the literature and in sate practice.In the case of sovereignty, both de facto and de jure recognition have difference. The distinction implied that, in the eyes of the recognizing state, a government recognized as the government de jure, is one which ought to possess the powers of sovereignty, though at the time it may be deprived of them, where as a government recognized as the government de facto but not recognized as the government de jure, is one

[142]. Ibid.
[143]. Oppenheim, Supra Note 8.p.137.
[144].Show,Supra Note 6.p.460.
[145]. Ibid.
[146]. Connell, Supra Note.14.p.175.
[147].Show, SupraNote 6.p.460.
[148]. O.Connell, Supra Note.14.p.176.

which is really in possession of them, although the possession may be wrong full or precarious.[149]

With regard to the concept of de facto and de jure recognition, there are however, more complex situations in which even states whose policy is to recognize only states, not governments, have found (and will find) it necessary, in order to clarify their attitude on the legal status of an authority, or expedient for political reasons to make a formal announcement of their decision to recognize or not to recognize an authority as the government of certain state. Three different situations may be identified.

First, there is the situation of two or more local defacto authorities each claiming to be the only legitimate government of a (recognized) state,for instance, the state of China with its two authorities in 1994,that is, the government of the republic of China (on Taiwan) and the government of the people's republic of China (in peking), both claiming to be the government of the whole China, is a case in point.[150]Secondly, there is the situation that the government of a state claims to continue to be the government of a part of the state's territory that has de facto seceded, this situation may be illustrated by the case of Cyprus, where the Greek Cypriot government in the south of the island does not accept the de facto secession of the Turkish north, claims to be the government of the whole island of Cyprus, and is recognized as such by the international community with the sole exception of Turkey.[151] Thirdly, there is a situation in which an authority in exile claims to be the government of a state which is under the effective control of a colonial power, a belligerent occupant or its local puppets, or an authority which came to power by coup d'état, or revolution, for instance, in the case of Haitian and Kuwaiti governments in exile many states which recognize only states, not governments, also announced their non-recognition of the defacto authorities in situ and their continued recognition of the exiled government.[152] Canada, which in 1988 adopted the policy of recognizing only states, not governments is a case in point.[153]

[149]. Talmon,Supra Note 10.p7-9
[150].Ibid.
[151].Ibid.
[152].Ibid.
[153]. O. Connell, Supra Note.14p.167

In general, recognizing a government as de facto or de jure in these three different situations, as well as depriving or granting recognition of government determined by intention and good will of the recognizing state, because under international law either de facto recognition or de jure recognition has no binding effect on the recognizing state. This notifies that recognition in any form is discretionary, that is, there is no requirement that a government in undisputed authority shall be recognized as the government de jure or the government de facto.

2.3.3 Express and Implied Recognition

Recognition can be either express or implied. Express recognition takes place by a formal notification or declaration clearly announcing the intention of recognition, such as a note addressed to the state or government which has requested recognition. [154] Implied recognition, on the other hand, takes place through acts which, although not referring expressly to recognition, leave no doubt as to the intention to grant it, therefore, whether a state has impliedly recognized a foreign government the question that has to be addressed is whether on the evidence it has evinced an intention to recognize. [155] It cannot stumble unwittingly in to recognition by making some false step. Sometimes a state formally announces that its conduct is not to be taken as recognition, as when the United Kingdom stated that the documents concerning the partition of Vietnam agreed upon with Russia did not involve UK recognition of North Vietnam. [156] In the absence of some such announcement, implied recognition is to be ascertained by construction of the relevant acts of the government alleged to have accorded recognition, that is, in the absence of an unequivocal intention to the contrary, no recognition is implied. [157]

In certain circumstances, the conduct of informal relations with the officials or agents of a government deemed implied recognition. In order that recognition may be implied from any act short of explicit recognition, the act must be of such unequivocal character as to leave no doubt of the intention of the state performing or participating in it to deal with a government officially as such. [158]However, State practice shows that no recognition is implied from various forms of

[154]. Ibid.
[155].Ibid
[156]. Ibid
[157] . Santos,Supra Note. 2.p.101
[158]. Brownlie, Supra Note 20.p.93.

negotiations, the establishment of unofficial representation, the conclusion of a multilateral treaty to which the unrecognized entity is also a party, admission to an international organization (in respect to those opposing admission), or presence at an international conference in which the unrecognized entity participates. [159]

Accordingly, there are conditions in which it might be possible to declare that in acting in a certain manner, one state has by implication recognized another state or government. Because if this facility of indirect or implied recognition is available, states may make an express declaration to the effect that a particular action involving another party is by no means to be interpreted as comprehending any recognition. [160] This attitude was maintained by Arab countries with regard to Israel. It automatically excluded any possibility of implied recognition but does suggest that without a definite and clear waiver, the result of some international actions may be recognition of a hitherto unrecognized entity in certain circumstances. [161]

The point can best be explained by mentioning the kind of conditions which may give rise to the possibility of recognition where no express or formal statement has been made. A message of congratulations to a new state up on attaining sovereignty will imply recognition of that state, as will the formal establishment of diplomatic relations, but the maintenance of informal and unofficial contacts (such as those between the united states and communist China during the 1960's and early 1070's in warsaw) will not possible that the conclusion of a bilateral treaty between the recognizing and unrecognized state, as distinct from a temporarily agreement, might imply recognition, but the matter is open to doubt since there are a number of such agreements between parties not recognized each other. [162]

Generally, participation in a multilateral conference with an unrecognized state (or an unrecognized government of an established state) does not amount to implied recognition, although it is certainly evidence that the entity in question has achieved some measure of international personality. A vote in favor of the admission of a new state to the UN may amount

[159]. Show,SupraNote 6.p.463-464
[160]. Ibid.
[161]. Ibid.
[162]. Oppenheim, SupraNote.8.p.149

to implied recognition, as was the case with the UK's vote in favor of the admission of the former Yugoslav republic of Mace donia to the United Nations on 8 April 1993.[163]

2.3.4 Conditional Recognition

Recognition in its various aspects, is neither a contractual arrangement nor a political concession, rather it is a declaration of capacity.[164] This being so, it is improper to make it subject to conditions other than the existence, including the continued existence, of the requirements which qualify a community for recognition as an independent state, a government, or a belligerent in a civil war.[165] In fact, the practice of states shows conditions of recognition in the accepted sense, that is, of stipulations the non-fulfillment of which justifies withdrawal of recognition.[166]

The practice of conditional recognition subject to fulfillment of certain conditions and these conditions annexed to grant recognition have been various, including the abolition of slave trade, removal of tariffs, settlement of claims, the good treatments of religious minorities as occurred with regard to the independence of some Balkan countries in the late nineteenth century, or the granting of most- favored- nation status to the recognized government.[167] One well known instance of this approach was the Litvinov agreement on 1983 where by the United States recognized the soviet agreementup on the latter understanding to avoid acts prejudicial to the international security of the USA, and to come to a settlement of various financial claims.[168]

To illustrate more these conditional recognitions with examples, when in 1878, at the Berlin congress, Bulgaria, Montenegro, Serbia and Romania were recognized as independent States; a condition was imposed up on them to the effect that they should not impose religious disabilities up on their subjects.[169] Furthermore, Great Britain recognized Danish sovereignty over Green land on the condition that in the event of Denmark wishing to dispose of the territory she will grant the British Empire the right of pre-emption, in the same year, Germany made its

[163].Ibid.
[164].Ibid.
[165].Ibid.
[166].O. Connell, Supra Note.14.p.148
[167]. Show, Supra Note 6.p. 465-466.
[168]. Oppenheim, Supra Note.8.p.149
[169]. O.Connell, Supra Note.14.p.148

recognition of Latvia conditional on Allied recognition of that countrywith reference to these conditions the supreme court of US said in US versus Pink that 'recognition is not always absolute; it is sometimes conditional; However, although the United States protested to Russia against violation of these undertakings it did not withdrawal recognition.[170]

However, breach of the particular condition does not invalidate the recognition, rather it may give rise to a breach of international law and political repercussions but the law appears not to accept the notion of a conditional recognition as such.[171] The status of any condition will depend up on agreements specifically made by the particular parties, however, it is important to distinguish conditional recognition in this sense from the evolution of criteria for recognition generally, although the two categories may in practice overlap.[172]

2.3.5. Collective Recognition

Collective recognition in most cases made by international organizations, this signifies the importance of the international community in its collective assertion of control over membership and because of this it has not been warmly welcomed, nor can one foresee its general application for some time to come.[173]The idea has been discussed particularly since the foundation of the League of Nation and was re emphasized with the establishments of the UN, however, it rapidly became clear that member states reserved the right to extend recognition to their own executive authorities and did not wish to delegate in to any international institution.[174] The most that could be said is that membership of the United Nations constitutes powerful evidence of statehood not government, but that is not binding up on, that is, other member states are free to refuse to recognize any other member state of the UN.[175]

Collective recognition may take the form of a joint declaration by a group of states, for example, the Allied supreme council after the First World War permitting a new state to become a party to a multilateral treaty of a political character, such as peace treaty.[176] The functioning of

[170].Shaw, SupraNote 6.p. 465-466
[171].Ibid.
[172]. Kapoor ,SupraNote.38.p.163.
[173].Show, SupraNote 6. .p. 465-466
[174].Ibid
[175]. Brownlie, SupraNote.20.p.94.
[176].Ibid.

international organization of the type of the League of Nations and UN provides a variety of occasions for recognition, of one sort or another, of statesnot government. [177]

On March 8, 1950 the secretary General related a memorandum on the subject which treated the problem of admission of a new state and change of delegations of existing members as one question in relations to recognition.[178] The memorandum demonstrated the political character of recognition and rejected the theory of collective recognition by the United Nations, and then it asserted that recognition of either state or government is an individual act and admission to membership or acceptance of representation in the organization is collective acts. [179]

All the above mentioned elaborated about collective recognition of States at the international organizations both in the League of Nations and the United Nations not recognition of government. However, this is a bit different in the regional organization of Africa, because African Union unequivocally declared that it would collectively recognize government comes to power constitutionally and condemns government having power unconstitutionally in its Rules and Procedure of the Assembly of the Union[180]. As a result whenever a government comes to power unconstitutionally it would be deprived recognition and the subsequent measures imposed up on it. Thus the writer of this research believed that the development of AU regarding collective recognition of government needs to be adopted by the United Nations to prevail constitutionalism as well as peace and security through the world.

2.3.6 Diplomatic Recognition

The more formal recognition by diplomatic agent is to be understood as diplomatic recognition. In contrast, de facto and diplomatic recognition do not manifest an attitude on the question of sovereignty but simply indicates a willingness to have a certain mode of relations. [181] De facto recognition of a new state is there by identified with the recognition of its commercial flag, the appointment of consuls, the acceptance of its exequatur, and the sending of diplomatic or

[177].O. Connell, SupraNote.14.p.172.
[178] .Id
[179].Talmon,SupraNote.10.p.54
[180].Rules and Procedures of the Assembly of African Union adopted in Durban, South Africa on July 10, 2002, Rule 37(4)(a).
[181].O.Connell,SupraNote.14.

political agents to it, while diplomatic recognition is identified with regular diplomatic relations evidence in the accrediting ministers or Ambassadors.[182]

Besides the terms 'de facto' and 'de jure' recognition, States have employed the terms 'official recognition', 'formal recognition', 'political recognition, 'full recognition', and full diplomatic recognition and these terms are normally used interchangeably with de jure recognition, for example, on 1 January 1949 the US extended 'full recognition to the government of the republic of Korea: on 25 March 1949, on the occasion of the presentation of his letters of credence to president Truman, the newly appointed Korean Ambassador, Dr, Chang, referred to that recognition in the following terms: 'we remember particularly, with profound gratitude, your very gracious action in according the first de jure recognition to the Republic of Korea on January first of this year.[183] It is important to note that these variants, like de jure recognition, express the recognizing state's willingness to maintain normal official, i.e. diplomatic recognition, the variant that has gained most prominence in modern state practice.[184] In the large majority of cases the variant will express the recognizing state's willingness to enter in to diplomatic relations.[185]

2.3.7 Recognition of Government in Exile

According to the predominant view in legal literature the term 'government in exile does not denote special legal status or an independent subject of international law but indicates the domicile of a 'government', that is, the depository of a state's sovereignty and its representative organ in international relations[186]. This view also finds support in states practice, for instance, the British Lord Chancellor, Viscount Simon, stated on 19 Dec. 1940 that the Allied governments although forced temporarily to live in Exile, are continuing to discharge their functions as the legitimate governments of their countries.[187] It should be noted in this connection that states have never recognized an authority as a 'government in exile' but have recognized authorities in exile as 'government', for example, France in 1940 recognized the

[182]. Ibid.p.109-111
[183]. Ibid.
[184].Ibid.
[185].Talmon,SupraNote.10.p.14-16
[186]. Ibid
[187]. Ibid.

Belgian government at Angers as 'the only legal government of Belgium' and not as the Belgian government in exile. [188]

Authorities in exile not recognized as government, have been allowed to enter into agreements only in their own name or on behalf of their movement, but not on behalf of the state which they purported to represent and thus, as a general rule, it may be stated that only an authority in exile recognized as a government, that is, as a state organ, can validly sign, ratify, or accede to a multilateral, inter-state treaty. [189] That the accession to a multilateral treaty does not create treaty relations between the non-recognized parties and the acceding authorities in exile should not, however, prevent the latter from exercising general right under the treaty, such as the right to propose amendments or to participate in a diplomatic conference uniting all the sates parties to the treaty for the purpose of a changing the text of the treaty. [190] After all, it would be wrong to say that the accession to an open inter-state treaty by a partially recognized authority in exile has no legal effect at all and the accession is to be regarded as not effective only with regard to the non-recognizing parties. [191]Thus, it can be concluded that only an authority in exile recognized as a government can validly conclude a treaty that involves the exercise of state sovereignty on its part.

2.4 Non-Recognition of Government

Non recognition is often assumes that through what at times is an act of moral disapproval, one nation may be able to let loose such disruptive forces in another that the government of the latter cannot long survive or, at times, it assumes that the status conveyed through recognition might place a government so honored in a position of such strength that it would last for a long time to come, nevertheless, the failure of a government to be recognized by foreign governments produces definite legal consequences. [192] With regard to non recognized de facto government, it has been established beyond question that a non recognized government does not possess a right of access to the courts of such other states as denies it recognition i.e., an unrecognized government cannot sure in such courts, however, the view that an unrecognized government does

[188].Ibid.
[189]. Ibid.
[190]. Ibid.
[191]. Ibid.p.125.
[192].Glahn, SupraNote.1.p.109-110

not have access to the courts of non recognizing states in the case of non recognized de jure government is not shared by all writers in international law.[193]

Non-recognition of a government need not necessarily mean that, in the opinion of the recognizing government, the unrecognized government does not exist as a government in the sense of international law, it may mean only that recognizing government is unwilling to enter into normal official, i.e., diplomatic, relations with it, however, non-recognition may only express the recognizing government's unwillingness to enter into normal official (diplomatic) relations, recognition may only express the recognizing government willingness to enter into such relations.[194]

With regard to non recognition government, to what extent non-recognition of a change of government affects the international status of the country concerned is a matter which has attracted some attention in both municipal and international tribunals. It is quite clear that the change itself has no effect on the rights and obligations of the country subjected to it, but it may leave that country without agent competent in the eyes of the non-recognizing sate to give effect to them, for example, treaties continue to apply to the state but may be inoperative during the period of non-recognition.[195] In other words, non-recognition implies a refusal to admit the validity of the change, but it does not necessarily involve a refusal to admit the consequences of it.

The other issue that needs to be addressed concerning non-recognition of government is collective non-recognition. One form of collective non-recognition commonly seen in practice is the resolution or decision of an organ of the League of Nations, and now the UN, based on a determination that an illegal act has occurred.[196] There is no doubt a duty of states parties to a system of collective security or other multilateral convention not to support or condone acts or situations contrary to the treaty concerned. In some contexts such a duty will be carefully spelled out and a duty of non-recognition may be associated with measures recommended orcommanded by an organ of the UN as a form of sanction or enforcement against a wrong doer.

[193].Ibid.
[194].Talmon,SupraNote.1o.p.39.
[195].O. Connell, SupraNote.14.p.179
[196].Brownlie, SupraNote 20.p.95

For instance, the security council resolutions of 1965 and 1966 characterized the Smith regime in Rhodesia as unlawful in terms of the charter of the UN and called upon all states not to recognize the illegal regime.[197]

2.5 Withdrawal of Recognition

Recognition once given may in certain circumstances be withdrawn. This is more easily achieved with respect to de factor recognition, as that is by its nature a continues and temporary assessment of a particular situation which a de facto government losses the effective control it once exercised the reason for recognition disappears and it may be revoked.[198] It is in general a preliminary acceptance of political realities and may be withdrawn in accordance with a change in political factors. De jure recognition on the other hand cannot be withdrawn unless there is a fundamental change affecting the status of the entity recognized, until this change is acknowledged by the recognizing state, de jure recognition will remain with the original entity, for instance, the UK refused to acknowledge the incorporation of the former independent states of Latvia, Lithuania and Estonia in to the USSR and continues to accept the diplomatic agents of the these states as accredited representatives of de jure sovereign.[199]

Generally, if the recognized sate finds that the state recognized de facto is not capable of fulfilling its international obligation or lacks the signs of stability it will not grant de jure recognition to such a state. In other words, we may say that in certain circumstances de facto recognition may be withdrawn, however, de jure recognition once given can never be withdrawn unless there is a fundamental change affecting the status of the entity recognized, because if after granting de jure recognition a state wants to withdraw its recognition then will have no meaning under international law. Under international law, as explained in section 2.2 of this chapter, recognition means that the state recognized has attained statehood. Thus, the simple fact of withdrawal of recognition by a state would not necessarily mean that the state recognized has ceased to be a state.

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[197]. UNSC Resolution 202: Question concerning the Situation in Southern Rhodesia,6 May,1965.P.6.
Available At:www.un.org/documents/sc/res/1965/scres65.htm, *and UNSC* Resolution 221:
9 Apr,1966.p.5.Available At:www.un.org/en/sc/documents/resolutions/1966.shtml, accessed on 09/23/2012.

[198].Show,Supra Note.6.p.467

[199].Maclean,Supra Note.4.p.?

Of course, where a government recognized de jure has been overthrown, a new situation arises and the question of a new government will have to be faced but in such instances withdrawal of recognition of the previous administration is assumed and does not have to be expressly stated, providing always that the former government is not still in existence and carrying on the fight in some way.[200] Withdrawal of recognition of one government without recognizing a successor is a possibility and indeed was the approach adopted by the UK and France, for example, with regard to Cambodian in 1979.[201]

Finally, withdrawal of recognition in other circumstances is not a very general occurrence but in exceptional conditions it remains a possibility, for instance, the United Kingdom recognized the Italian conquest of Ethiopia de facto in 1936 and de jure two year letter, however, it withdraws recognition in 1940, with the intensification of fighting and the dispatch of military aid.[202]

2.6 Legal Effects of Recognition

There is a profound doctrinal controversy regarding the legal effects of recognition. On the one hand proponents of the constitutive theory argue that a state does not exist for the purposes of international law until it is recognized by the intentional community, on the other hand, proponents of the declaratory theory advocate that the existence of state is only a question of fact.[203] Recognition is therefore merely an acknowledgment of that fact and has no independent legal effect.

Though these theoretical controversy of the effect of recognition, recognition of government has legal effects at the domestic and in the international arena. In international law, state may have no choice other than to accept the fact of existence of other state, but national law is a different legal system whether the executive, administrative or judicial authorities of a state pay any regard to the acts of other government on the national plane may depend entirely on whether it

[200].Show, SupraNote.6.p.466
[201]. Ibid.
[202]. Ibid
[203]. Dixon,SupraNote. 22

has been formally recognized, in practice, the legal effects or consequences of recognition in national law depend on the laws of each state. [204]

In the international context, in the majority of cases, it can be accepted that recognition of a state or government is a legal acknowledgement of a factual state of affairs, nevertheless, it should not be assumed that non-recognition of, for example, a state will deprive that entity of rights and duties before international law, excepting of course, those situations where it may be possible to say that recognition is constitute of the legal entity.[205]

In general, the political existence of state is independent of recognition by other states and thus an unrecognized state must be deemed subject to the rules of international law, it cannot consider itself free from restraints as to aggressive behavior nor can its territory be regarded as terra nullius.

Non-recognition with its consequent absence of diplomatic relations may affect the unrecognized state in asserting its right or other states in asserting its duties under international law but will not affect the existence of such rights and duties.[206] The position is, however, different under municipal law. Because recognition is fundamentally a political act, it is reserved to the executive branch of government. This means that the judiciary must as a general principle accept the discretion of the executive and given effect to its decision. [207]The courts can not recognize a state or government, they can only accept and enforce the legal consequences which flow from the executive political decision, although this situation has became more complex with the change in policy from express recognition of governments to acceptance of dealing with such entities.[208]To this extent, recognition is constitutive, because the act of recognition itself create legal result with in the domestic jurisdiction, for instance, in the UK and the US particularly, the courts feel themselves obliged to accept the verdict of the executive branch of government as to whether a particular entity should be regarded as recognized or not.[209] If the administration has

[204]. Ibid.
[205].Ibid.
[206]. Ibid
[207].Ibid
[208].Brownlie, Supra Note. 20.
[209]. Ibid.

recognized a state or government and so informs the judiciary by means of a certificate, the position of that state or government with in the municipal structure is totally transformed.

CHAPTER THREE

Recognition of Government in the Regional Organizations

3.1 Recognition of Government in the Organization of African Union

3.1.1 Historical Background

African leaders, in order to combat against the yoke of colonization in the continent, they determined that they must act collectively. As an expression of their will to act collectively on issues of common interest, the Organization of African Unity (OAU) was established on May 25 1963.[210] Therefore, to build its collective capability and capacity to act as a stakeholder and not an outsider in world affairs and to fully participate in shaping international norms and agenda, collective act of the Union is indeed an important and overarch objective of the Union Governments.

The Organization of African Unity was founded at a time when African leaders were experiencing their first taste of independence and were anxious to consolidate their leadership.[211] Across the continent they saw the danger posed by the divisions of language, culture and religion, economic inequalities and controversies over boundaries arbitrarily drawn by the colonial powers, thus it quickly became clear that a high degree of co-operation was necessary among the fledging African States, if the continent was to survive as a viable economic and political entity.[212] Understandably, there were considerable differences of opinion as to how African co-operation and further its unity could best be attained. These differences of opinion sharply split into three rival blocs – the Casablanca group, the Monrovia group and the Brazzaville Twelve.[213]

The major cause of these disparities is emanated from the statement of Kwame Nkrumah's introduction of the concept of African unity. According to his book of I Speak of Freedom, Nkrumah explained that:

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[210].Charter of Organization of African Union adopted on25 May1963.
[211]. ZdenekCervenka*The Unfinished Quest for Unity: Africa and the OAU,* Julian Friedmann Publishers Ltd 1977.P 2.
[212]. Ibid.
[213]. Ibid.

Divided we are weak, united, Africa could become one of the Greatest forces for good in the world. I believe strongly and sincerely that with the deep-rooted wisdom and dignity, the innate respect for human lives, the intense humanity that is our heritage, the African race, united under one federal government, will emerge not as just another world bloc to flaunt its wealth and strength, but as a Great Power whose greatness is indestructible because it is built not on fear, envy and suspicion, nor won at the expense of others, but founded on hope, trust, friendship and directed to the good of all mankind [214]

Furthermore, Nkrumah in his later work in 1963, Africa Must Unite, he sets forth his theories of African unity as: "Since our inception, we have raised as a cardinal policy, the total emancipation of Africa from colonialism in all its forms, to this, we have added the objection of the political union of African states as the securest safeguard of our hard won freedom and the soundest foundation for our individual, no less than our common, economic, social and cultural advancement."[215]

In this regard it is easy to visualize that Nkrumah's goals were the total political and economic emancipation of Africa and the achievement of a continental union. Unfortunately, when he introduced his concept of African unity to the continent, a division, which was based on the implementation of this concept, was created among the then emerging African intelligentsia groups at the onset and each with its own vision as to the nature and form of unity that was best suited to Africa.[216]The Brazzaville group finally merged with the Casablanca group, leaving the continent with two groups, which became known as the Monrovia and Casablanca groups or co federalists and the federalists' respectively.[217]

Regarding the ideology of the co federalists and the federalists both focused on Nkrumah's ideology of a United States of Africa and the federalists called for a much more radical approach

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[214]. Robert W. Eno:Human Rights, Human Development, and Peace: Inseparable Ingredients in Africa's Quest for Prosperity. University of the Witwatersrand, Johannesburg, South Africa, January 2008.p.87available At: http://wiredspace.wits.ac.za/bitstream/handle/10539/6827/PhD%20Final%20Submissions.?sequence=1// accessed on 04/12/2012.

[215]. Ibid.

[216]. Ibid.

[217]. Ibid.

to African unity, shifting political loyalty from its narrow territorial base to a continental base.[218] On the other hand, the co federalists, who favored a loose association, argued their approach would have little assault on national sovereignty and then this school of thought, to which a great majority of leaders of independent African states belonged, believed a gradual race to unity was the best insurance against premature derailment and also they argued that a solid attitudinal change among African leaders was a precondition for achieving a constitutional agreement that reflected an African loyalty shift away from nation-states to a continental community.[219]

Because of this strong ideological disparity between these groups, the creation of the OAU was delayed. Many believed that these two camps of nationalists' sharp differences would become permanent and thus ending the hopes and dreams of any African unity and also others had speculated as to how such opposing groups would merge to form a united Pan-African body.[220]Yet, in May 1963, in spite of their incessant bickering, these two opposing groups were able to come together to form the Organization of African Unity and then On 25 May 1963, independent African countries meeting in Addis Ababa, Ethiopia decided to sign the charter creating the Organization of African Unity.[221]

The Charter of the organization revealed that those advocating the supremacy of national sovereignty had won the day and then, Kwame Nkrumah's call for continental unity was brushed aside and the African leaders settled for a superficial unity which brought together African Heads of States but not African peoples.[222]This in no way affected the sovereignty of each independent State, and they were left free to pursue policies in which continental priorities were sacrificed to narrow national interests.[223]This clearly envisaged that the organization fell short of meeting the ambitious structure of Ghana's Kwame Nkrumah and the Casablanca group. Nkrumah in

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218. *Journal of Alternative Perspectives in the Social Sciences (2009) Vol 1, No 3p647 Available at* www.francisyawdaah.blogspot.com/2012/.../**africa-must-unite**-or-perish.ht, accessed on,09/12/2012

219. Ibid.
220. Ibid.
221. OAU Charter ,Supra Note 1.
222. ZdenekCervenka, Supra Note.2.
223. Ibid.

particular, regarded the OAU Charter as inadequate as it was not the United States of Africa he looking for.[224]

Though, the desirable unity was not realized in accordance to Kwame Nkrumah and the Casablanca group, African leaders were successful in achieving the organizational role in spearheading the liberation and decolonization of the continent, the struggle against apartheid and racist minority rule in Southern Africa, forging a common socioeconomic agenda, and in affirming a common African identity that they have been adopted in Durban declaration.[225]

The Organization of African Union after it has been served as continental organization for more than three and half decades, it was felt that it has to be reinstated by a new organization, African Union, charged with a new responsibility and objectives and also vested with enhanced powers and functions. The reasons for the transformation of OAU to AU have been justified by the Heads of State and Governments as:"in order to strengthen the continental Organization and to make it more effective so as to keep pace with the political, economic and social developments taking place within and outside the continent as well as cognizant of the challenges that will confront the continent and peoples as well as to cope with those challenges and to effectively address the new social, political and economic realities in Africa and in the world, we are determined to fulfill our peoples' aspirations for greater unity in conformity with the objectives of the OAU Charter and the Treaty establishing the African Economic Community."[226]Furthermore, the Heads of State and Governments believed that the Continental Organization needs to be revitalized in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances; then they have decided to establish an African Union.[227]

Though all these justification for the transformation of OAU to AU, one relevant question needs to be addressed. That is, instead of totally changing the organization, why not amending the

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[224]. Robert W. Eno ,Supra Note.5.

[225]. Assembly of the African Union, First Ordinary Session: Decisions, in Durban, 9 -*10*July 2002. *ASS/AU*/Decl. 1-8 available at: *www.*africa- union.org/...Declarations/durban%202002/... t: PDF,accessed on 07/12/2012

[226].Sirte declaration. Fourth Extraordinary Session of the Assembly of Heads of State and Government 8-9 September 1999. Sirte, Libya. EAHG/Decl. (IV) Rev.1 Available At:www.au2002.gov.za/docs/key_oau/sirte.htm,accessed on 07/12/2012.

[227]. Ibid

relevant provisions of the OAU charter to cope up with the new challenges that faces the organization? In response to this issue, many scholars and commentators have stated over the years that, OAU had a mixed, if not altogether, poor record in respect of its other declared objectives.[228] It failed to achieve much in advancing real socio-economic development of the continent or in deepening the unity and integration of African peoples and its record also in resolving the vicious circles of poverty, conflict and human rights violations was generally dismal.[229] As Mkandawire has noted:

The political unification and economic integration of the continent have thus far failed, at least when judged against the dreams of the key figures of the Pan-African movement, the documents and plans prepared by Pan-African conferences, and the declarations and rhetoric of African leadership. It has failed when judged against the well-articulated, widely shared understanding of the needs of the continent. It has failed when judged against the emotive force of pan-Africanism in the African discourse.[230]

These failures have been compounded by other, largely external, factors. At the beginning of the last decade of the twentieth century, developments in other regions of the world, especially the end of the Cold War, the collapse of the Soviet Union and the relentless advance of globalization and global capitalism had begun to impact upon the African continent in ways that had not been anticipated.[231]For many among the members of the OAU itself, the organization had become moribund and irrelevant, in the face of the changed circumstances of the world, as the Interim Chairperson of the Commission of the AU has explained: "The world had changed, the continent had changed but the organizational vehicle at the regional level remained pretty much the same, with prisms and methods that could not cope with emerging challenges. The commitment to change this situation fostered the birth of the African Union."[232]

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228. *University of Botswana Law Journal* volume 9 June 2009. p.56. Available at: www.pulp.up.ac.za/pdf/2009_12/2009_12.pdf , accessed on 07/17/2012

229. Ibid.

230 Thandika Mkandawire, Rethinking Pan-Africannism, nationalism and the new Régionalisme. Available At: www.forumdesalternatives.org/.../Thandika_Mkandawire-Rethinking. PDF .p.3.,accessed on 22/07/2012

231. Zdenek Cervenka, Supra Note2

232. Amara Essy in an address to the First African Western Hemisphere Diaspora Forum in Washington, DC, 17- 19 December 2002. para. 84, available at http://www.africaunion.org/Special_Programs/CSSDCA/cssdca-fisrtau-forum.pdf accessed on

This commitment to change must be understood within the context of two specific factors. First, the OAU Assembly initiated a process to review the Charter in 1979, taking in to account the need to incorporate changes necessitated by the experiences that the organization had witnessed in the decade and half since its inception, however, the efforts to review the Charter had not moved with the anticipated speed and effectiveness. [233]Because in the seventeen years of its existence of the OAU Charter Review Committee met only a few times and did not adopt any concrete proposals for amendment or reform for consideration by the OAU policy organs. [234]This inertia and an apparent lack of a sense of urgency on the part of the committee had driven some member states to be skeptic about any chance of achieving a meaningful review of the Charter, Secondly, there was the phenomenon of globalization, which gained more currency in the immediate post-Cold War years. [235] This had begun to concentrate the collective minds of OAU member states on the need to reorient the objectives and activities of the OAU to enable it to meet the related challenges of globalization and economic integration in Africa, this new mechanism is the AU. [236]

The Constitutive Act of AU which envisages collective cooperation of member States of the Union in terms of restoring constitutional order and other interventions to prevail democratic governance in the continent was adopted by the Assembly of Heads of State and Government of the OAU meeting in its thirty sixth ordinary session in Lome, Togo, on 11 July 2000 and then the same organ celebrated the establishment of the Union on 2 March 2001 in Sirte, Libya, then entered into force on 26 May 2001, following its ratification by two-thirds of the member states of the OAU.[237]

In general speaking, the adoption of the Constitutive Act represented a critical moment in defending unconstitutional change of government that was the historic problem of Africa. In

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[233].The African Union: Legal and Institutional Framework. *A manual on the pan-African organization* Edited by Abdulqawi A. Yusuf, FatsahOuguergouz. 2012.p.27 Available At: http//www:*books.google.com.et/books?isbn=900422100X*Abdulqawi A. Yusuf, FatsahOuguergouz accessed on 11/08/2012

[234]. Ibid.

[235]. *Botswana Law Journal*, Supra Note 19.

[236]. Ibid.

[237]. Assembly of Heads of State and Government Thirty-Sixth Ordinary Session 10-12 July, 2000Lome, Togo. *AHG/Dec.143 (XXXVI)* .Available At: www.africa-union.org/Special.../cssdca-solemndeclaration.pdf, accessed on07/23/2012

other words, the establishment of the AU represented an aspect of Africa's collective response to an act which contravenes the Constitutive Act of the Union. Furthermore, the enactment of the Union Constitutive Act is regarded as one of the achievement of the fathers of pan-Africans, though not generally achieved the major motto they had been struggled to see the united Africa in terms of politically integrated continent. However, one of this pan-Africans dream as well as the principle of collective response to unconstitutional change of government by African Heads of State and Government declaration on the same subject matter in Lome, Togo[238] can only be achieved on their commitment to actualize this radical principle in their responses to actual disregard and denial of recognition to any unconstitutional change of government which is the antithesis of the Union Act.

3.1.2 Recognition of Government and the Organization of African Union

The Organization of African Unity (OAU) was established in 1963 as a collective arm to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of member states and to fight against neocolonialism in all its forms.[239] This regional organization adopted very crucial purposes, among others; member States are committed to defend their sovereignty and to eradicate all forms of colonialism from the continent.[240] The organization further strengthened these purposes in its principles by addressing that member States are strictly prohibited from intervention in the internal affairs of member States and respect for the sovereignty, territorial integrity and inalienable right to independent existence of each Member State.[241]

Before the establishment of the OAU, most of African countries were under the yolk of colonialism, as a result of this, the charter of OAU in its entirety provided due attention towards sovereignty, non-intervention and condemnation of colonialism, however, with in the continent from the formation of the OAU in 1963 to the end of 1989, there were sixty one successful coups in Africa, and more than half of all African states had at some point been governed by military

[238]. LomeDeclaration on The Framework for an Oau Response to unconstitutional Changes Of Government10-12 July, 2000Lome, Togo.*AHG/Decl.5 (XXXVI)*
[239]. OAU Charter preamble, Supra Note 1
[240]. Ibid. Art. II ©-(D)
[241]. Ibid. Art.III (1)-(2)

regimes that had displaced civilian governments.[242]In this regard the charter of OAU in order to curb these coups and other related unconstitutional change of government has no any effective measures or suspending the government which comes to power through coup d'état or any other unconstitutional means. In other words, the charter did not deny recognition for those governments comes to power unconstitutionally. The only way out that is enshrined under the charter of the OAU is that mere condemnation of political assassination[243]. Then what kind of measures would be taken by the organization after this condemnation of political assassination and other unconstitutional acts is not stipulated in the charter as well as in the procedure OAU charter.

Therefore, it is not cumbersome to generalize that the OAU charter was concerned with the equal sovereignty of member States and non-intervention policy. But there is no collective act of member States suspending or put any punitive measure on the Member State Government comes to power unconstitutionally or there was no organizational set up that recognizes constitutional government. Though the fact is as mentioned above, the writer of this research believed that since the time was the period colonization and the gradual emancipation of some African countries from colonization, it was very early to be more concerned about which member State government comes to power unconstitutionally or through coup d'état than asserting sovereignty and exerting efforts to eradicate colonialism.

Gradually, the member States of OAU developed concern about coup d'état and other unconstitutional change of government in the continent. In 2000 the Heads of State and Governments assembled in Togo, Lome declared the Framework for an OAU Response to Unconstitutional Changes of Government.[244] This declaration in order to enhance the political development and to restore constitutional order accommodates three important issues. First the Lome declaration provides what constitutes unconstitutional change of government. In accordance to this declaration, unconstitutional change of government referred as: military coup d'état against a democratically elected government; intervention by mercenaries to replace a

[242]. EkiYemisiOmorogbe: ***A Club of Incumbents***? The***African Union and Coups d'état*** .p.126, available At www.vanderbilt.edu/jotl/manage/wp-content/.../omorogbe-cr.pdf, accesses on 07/23/2012

[243]. OAU Charter , Supra Note 1, Art.III(5)

[244]. Lome declaration, Supra Note 28.

democratically elected government; replacement of democratically elected government by armed dissident groups and rebel movements; and the refusal by incumbent government to relinquish power to the wining party after free, fair and period election.[245]

This depicted that the OAU heads of state and governments commitment towards democracy and constitutional order. These coup d'état and other forms unconstitutional change of government are among others the major problems that set back the democratization development in the continent of Africa. However, the Lome declaration of unconstitutional change of government did not visualize some important issues in line with coup d'état and unconstitutional change of government. This is when an elected government abusing its power beyond the constitutional limit vested up on it or when the incumbent government committing crimes, for instance, involved in ethnic cleansing, the electorate may involve in gorilla fighting and then ultimately overthrowing the regime through people's revolution. In this regard, the organization might be in a situation of not taking any measure in these serious problems in accordance to this declaration. Under these circumstances, the Lome Declaration on Unconstitutional Change of Government needs to take in to consideration such kind of scenarios in its possible definition through amendment.

Although this lacuna in the definition of the Lome declaration, when an unconstitutional change of government takes place within the scope of the definition mentioned above in the member state, the chairman of the OAU and the secretary general, on behalf of the organization, not only immediately and publicly condemned such a change and urge for the speedy return to constitutional order, but also they will unequivocally warn the perpetrators of unconstitutional change no more be tolerated and recognized by the OAU.[246]This clearly depicted that OAU for the first time in its declaration of unconstitutional change of government denied recognition and provided no status for the government comes to power unconstitutionally as a representative of the state concerned in the regional organization. This is one fundamental step towards the prevalence of constitutional order in the continent.

[245]. Ibid.
[246]. Ibid.

The second step in accordance to the Lome declaration towards unconstitutional change of government after condemning the government comes to power either through coup d'état or any other unconstitutionally means, the government which jeopardizes those principles enumerated under the definition which concerns unconstitutional change of government given six months to restore constitutional order.[247] One of the good aspect of this declaration is that, within these months the perpetrators of the unconstitutional order suspended from participating in the policy organs of the OAU, and further, with in this given period of time, after the secretary general gathering facts and discussing with the perpetrators of unconstitutional change of government and if there is no sign of reinstating constitutional order in the state, limited and targeted sanctions such as, visa denials for the perpetrators of an unconstitutional change, restrictions of government to government contacts, and trade restrictions imposed against the regime that refused to restore constitutional order.[248] For the implementation of these and other sanctions, the heads of state and governments decided that the existing OAU mechanisms, particularly the control organ, at all its three levels will be the instrument to enforce this framework of unconstitutional change of government in Africa.[249]

Lome declaration, as I mentioned so far, is a good development towards the constitutional order in Africa. However, regarding the nature and implementation of the sanction on the perpetrators of unconstitutional change in the concerned state, may have certain impediments that deters the enforcement of this declaration. As it has been mentioned, the ultimate measure of the organization on the government comes to power unconstitutionally is that those sanctions enumerated in the declaration. The issue here is that the named unconstitutional government may not have willingness to cooperate with the organization, though those sanctions are implemented on it. Under this circumstance, the organization needs to have other mechanisms to restore constitutional order in the country, perhaps, it could be military intervention or any other mechanisms need to be inculcated in the declaration in order to enhance the implementation of Lome declaration.

247 .Ibid..
248. Ibid.
249. Ibid.

The other concern of the writer of this research is one of the sanctions, that is, trade restriction. The nature of trade transaction in most cases has direct impact on those business men; it could be investors, merchants or entrepreneurs. Thus, this sanction on trade restriction would have impact on all these segments of the society and then ultimately on the innocent civilians. In other words, the declaration might have loss its objective of prevailing constitutional order in the continent. Because through this particular sanction the perpetrators may not have been directly penalized by their illegitimate act, rather the civilian population became the victim of the declaration as well as the economy of the named state, though the Lome declaration clearly stated that "ordinary citizens of the concerned country do not suffer disproportionately on account of the enforcement of sections."[250]Finally, this declaration is a good development of OAU in combating against unconstitutional change of government and coup d'état as well as denying recognition for such regimes in the continent.

3.1.3 Recognition of Government and African Union

The adoption of the Constitutive Act of the African Union marked a great departure from OAU regarding collective response to unconstitutional change of government and coup d'état in the continent. It is also the manifestation of the commitment African States towards the prevalence of constitutionalism and democratization process in the continent.

The commitment of the Heads of State and Government of Africa envisaged in several provisions on the introductory articles of the African Union's Constitutive Act. For instance, member States of the Union are obliged to promote democratic principles and institutions, popular participation, good governance, human rights and the rule of law[251]. As a matter of fact, to maintain these democratic principles of the Constitutive Act, member States of the Union need to promote constitutionalism and other democratic principles. Unless and otherwise member States are committed towards these principles enshrined in the constitutive Act, there would be jeopardy of these governing principles whereby member States are loyal to it.

Whenever there is unconstitutional order, for instance, unconstitutional change of government in the member States, the union through its supreme organ, unequivocally condemn and reject this

250. Ibid.

251. The constitutive Act of African Union adopted in Lome ,Togo on July11, 2000 Art.3(g),4(m).

unconstitutional change of Government. [252] These constitutionalism principles and the mechanisms to defend them are good implications of African Governments that they have adopted new normative principles reflecting a changed attitude and a new approach among African states to challenge their common problem of absence of constitutional order in the continent.

The constitutive Act of AU has its own mechanism of restoring constitutional order in the continent. Among these mechanisms, Article 30 of the Act stated that: "Governments which came to power through unconstitutional means shall not be allowed to participate in the activities of the Union". [253]In other words, the Act of the Union condemns and rejects unconstitutional changes of government and not recognized those governments seized power unconstitutionally and contrary to their respective constitution. Beyond suspending a member State engaged in unconstitutional changes of government, the Assembly of the Union imposed sanctions on member states who fail to comply with the decisions and policies of the AU. [254] These sanctions include the denial of the right to speak at meetings, to vote, to present candidates to any position or post within the Union or to benefit from any activity or commitments, transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly. [255]These sanctions enumerated under Article 23 of the Constitutive Act are imposed on member States which jeopardize those organizational principles. Maintaining constitutional order and promoting democratic principles are among the core principles of the Union, thus, these sanctions are the pertinent punitive measures against unconstitutional change of Government to sustain constitutional order in the country and to the prevalence of recognized constitutional government in the continent at large.

The determination of AU's against unconstitutional change of government enshrined in the constitutive act, further emphasized by the Assembly Rules and Procedure of the Union. The constitutive act in its article 8 stated that the Assembly shall adopt its own rules of procedure.[256] This procedure of the Assembly, adopted in Durban, South Africa, clearly stated what constitutes

252. Ibid. 4(p),6(2)

253. Ibid.Art.30

254. Ibid.Art.23(2)

255. Ibid, Art23(1)

256. .Ibid. Art. 8

unconstitutional change of government and the meaning of unconstitutional change of government which is explained in the Lome declaration and the new additional meaning of unconstitutional change of government inculcated in the Charter on Democracy, Election and Governance. [257]

Accordingly, whenever an unconstitutional change of government takes place, the chairperson of the Assembly and the chairperson of the commission shall:

immediately, on behalf of the Union, condemn such a change and urge the speedy return to constitutional order; convey a clear and unequivocal warning that such an illegal change shall not be tolerated or recognized by the Union; ensure consistency of action at the bilateral, interstate, sub-regional and international levels; request the PSC to convene in order to discuss the matter; and immediately suspend the Member State from the Union and from participating in the organs of the Union, provided that exclusion from participating in the organs of the Union shall not affect that State's membership of the Union and its obligations towards the Union. [258]

The mere fact of suspending and condemning a coup d'état and other forms of unconstitutional change of government is not adequate. Rather the Assembly shall immediately apply sanctions such as, visa denials on the perpetrators of unconstitutional change; restriction of government to government contacts; trade restrictions; the sanctions provided in Article 23(2) of the Constitutive Act and in these rules; and any additional sanctions as may be recommended by the peace and security council imposed against the regime that took power unconstitutionally and refuses to restore constitutional order. [259]

The Union is not limiting its duties of prevailing constitutional order by imposing sanctions. Instead the Chairperson of the Commission in consultation with the Chair person of the Assembly shall gather facts relevant to the unconstitutional change of government and then establish appropriate contacts with the perpetrators with a view to ascertaining their intentions

[257]. Rules of Procedure of the Assembly of African Union adoptedinDurban,South Africa on July 10,2002.Rule.37(2)(3)
[258]. Ibid, Rule 37(4).
[259]. Ibid, Rule 37(5).

regarding the restoration of constitutional order in the country. [260] The Chairperson of the Commission and the Chair person of the Assembly, to prevail constitutional order seek the contribution of African leaders and personalities in order to get the perpetrators of the unconstitutional change to cooperate with the union, ultimately, these two top officials of the union enlist the cooperation of the Regional Economic Commissions to which the concerned country where by the perpetrators of unconstitutional change of government belongs. [261]

The above lists of sanctions are good mechanisms of restoring constitutional order. However, suspending the member state concerned may not reconcile with this Rule(Rule 37). Because the objective of this Rule is directed against the perpetrators of unconstitutional change of government not the State.

The African Union commitment against coup d'état and unconstitutional change of government and its effort for the prevalence of peace, security and constitutional order in the continent persists by denying recognition a government comes to power unconstitutionally. The Assembly of the Union strongly stressed that, whenever an unconstitutional change of government takes place, the Chairperson of the Assembly and the Chairperson of the Commission immediately, on behalf of the Union, convey a clear and unequivocal warning that such an illegal change shall not be tolerated or recognized by the Union. [262] This collective measure made by the union is one feature that the union's governments commitment towards the prevalence of recognized democratic governments in the continent. However, there are unilateral acts made by member states which are acknowledging or recognizing a regime which comes to power unconstitutionally by setting aside their own organizational set up on recognition of government. Thus, to retard unilateral acts of member states of the union, the Assembly Rules of Procedure needs to inculcate provisions which condemns and put unequivocally punitive measures on member states which unilaterally recognize a regime comes to power unconstitutionally. If this is so, the union's measure will foster the implementation of the organization's decisions and declarations among member states in this respect.

260. Ibid, Rule 37(6)(a)(b).
261. Ibid. Rule 37(6)(d).
262. Ibid. Rule 37(4)(b).

The heads of State and Governments in their eighth ordinary session held in Addis Ababa again concerned about the unconstitutional changes of governments that is one of the essential causes of insecurity, instability and violent conflict in Africa[263]. They were also enthusiastic to enhance the relevant Declarations and Decisions of the OAU/AU including the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world; the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development; the 1999 Algiers Declaration on Unconstitutional Changes of Government; the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa; and the 2003 Protocol Relating to the Establishment of the Peace and Security Council of the African Union[264].Taking in to consideration of these declarations and decisions and above all their commitment towards the prevalence of constitutional order, the heads of State and Governments declared the African Charter on Democracy, Elections and Governance On January 30, 2007.[265]Since the protocol strictly requires the deposit of fifteen instruments of ratification of signatories of the Union, [266] it is not yet enforceable among member States.

But, currently only three States (Ethiopia, Mauritania and Sierra Leone) are ratified and deposited this instrument.[267]Though the majority member States of the Union reluctant to fulfill the requirement of Article 48 of the charter, this instrument has very crucial role in strengthening constitutional order through Promoting and enhancing to the adherence of the principle of the rule of law upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties.

The African Charter on Democracy, Elections and Governance has a peculiar feature than the preceding Constitutive Act and the Declaration on Unconstitutional Change of Government made at Lome. The charter on democracy clearly stipulated additional definition on what

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263 Preamble of the Charter on Democrcy, Election and Governance adopted in Addis Ababa, Ethiopia, on30 January 2007.

264.Ilbid..

265. Ibid.

266. Ibid ,Art.48

267.. AU, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance. Available At:www.africa-union.org/root/AR/index/Charter on Democracy and Governance.rtf accessed on 15/08/2012.

constitutes unconstitutional change of Government which is not found either in the Constitutive Act or in the Lome Declaration. In accordance to this additional definition, "any amendment or revision of the constitution or legal instruments is an infringement on the principles of democratic change of government". [268]The AU charter on democracy is not only peculiar in terms of the definition of unconstitutional change of Government but also the punitive measures on member State Governments which come to power unconstitutionally. In addition to the suspension of the Government concerned, the charter deters the perpetrators of unconstitutional change of government to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State and, in the same vein, these Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.[269]

The charter strong hold on unconstitutional change of Government is not limited by imposing punitive measures on the perpetrators of unconstitutional change of Government, but also on member states which are instigating or supporting unconstitutional change of government in another state and also the charter obliges State parties not to harbor or give sanctuary to perpetrators of unconstitutional changes of government. [270] Furthermore, State parties, beyond reserving the accomplice of this illegal act, they are required to bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition, to extradite those perpetrators of unconstitutional change of Government, State parties are encouraged to conclude bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance. [271]However, if state parties are not loyal to the above mentioned obligations, the Assembly shall impose sanctions on any Member State that supports the perpetrators of unconstitutional change of Government in conformity with Article 23 of the Constitutive Act.[22]The African Charteron Democracy, Elections and Governance has reflected peculiar feature on what constitutes unconstitutional change of government, however, this protocol is not enforceable on revolutions like Libya.

[268]. Ibid. Art.23(5).
[269]. Ibid, Art. 25(4)(5)
[270]. Ibid,Art. 25(6)(8)
[271]. Ibid.Art.25(9)(10)

As it can easily understand from the above analysis of the charter of Democracy chapter eight, the charter strengthened the punitive measures on the perpetrators of unconstitutional change of government. These strong punitive measures of the protocol not only entirely limited on the perpetrators of this illegal act, but also it deterred those State parties who instigate, support and harbor the perpetrators of unconstitutional government. This is the manifestation of AU Strategies in strengthening its legal framework applicable on combating against unconstitutional change of government, though it has serious problem of implementation through the required number of deposited ratified countries.

Accordingly, to prevail constitutional order the charter on democracy gave mandate to the African Union Peace and Security Council to exercise its responsibilities in order to maintain constitutional order when a situation arises in a State Party that may affect its democratic institutional arrangements or the legitimate exercise of power.[272] The Security Council while discharging its responsibility vested up on it by the Democratic Charter, first it has to be sure that diplomatic dialogue have failed with the perpetrators of unconstitutional change of government in order to restore constitutional order and if this is happened, the Council shall suspend the said State Party immediately from the exercise of its right to participate in the activities of the Union in accordance to articles 30 of the Constitutive Act and 7(g) of the peace and security council Protocol.[273] However, the Security Council shall lift sanctions on the said State party's perpetrators of unconstitutional change of government if and only if they restore constitutional order.[274]

Despite the fact that the peace and security is a protocol among the signatory State parties, the PSC practice has envisaged that it has been imposed measures and sanctions against any member state in which a coup occurs, even if the nation has not ratified the Protocol, for instance, the PSC imposed sanctions on Mauritania in 2005 even though it had not ratified the Protocol (Mauritania signed in May 2003 and ratified in July 2008) and also the PSC imposed sanctions on Guinea in 2009 (Guinea signed in July 2002, and has yet to ratify).[275]

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[272]. Ibid.Art.24
[273]. Ibid.Art.25(1)
[274]. Ibid.Art.26
[275]. EkiYemisi Omorogbe, Supra Note 32, P.131.

As a concluding remark, the transformation of OAU to AU brought significant change with regard to prevalence of constitutional order in the continent through condemning and denying recognition a government which comes to power unconstitutionally through adopting the Lome Declaration on Unconstitutional Change of Government, the Constitutive Act, the Rules of Procedure of the Assembly of the Union, the Charter on Democracy, Elections and Governance and the protocol on African Union Peace and Security Council. All these declarations and protocols of the OAU and AU have crucial role in prevailing recognized democratic regimes and stretching constitutionalism in Africa.

3.2 Recognition of Government in the Organization of American States

3.2.1 Historical Background

The ideal of a federation of the Central American States goes back a hundred and twenty-five years to the very beginning of Latin-American independence. As early as 1823 a congress of the five states assembled at Guatemala City and declared the provinces to be free and independent states confederated into a single nation under the name of Federal Republic of Central America, however, unhappily the desire for unity soon weakened in the presence of factional strife, and long before the union was formally terminated in 1838 it had already come to an end in fact.[276] Successive efforts to federate the Central American States mark practically every decade of the nineteenth century, and then in 1907 the delegates of all five republics met in Washington and signed a treaty of peace providing for the creation of the Central American Court of Justice and for the adoption of other measures looking to the stability of their constitutional governments. [277]

On January 19, 1921, four of the Central American States succeeded in signing a pact of union establishing the Federation of Central America, but the pact failed of ratification by Costa Rica, and the following year the three remaining states issued decrees resuming their respective sovereignties. [278] In 1923 the five republics again met in Washington and signed a new General Treaty of Peace and Amity reaffirming the provisions of the treaty of 1907 in respect to the non-recognition of governments coming into power in violation of constitutional provisions,

[276].Thomas p. Anderson, *Politics In Central America*: Green wood publishing Group Inc. 1988, p.3.
[277]. Ibid.
[278]. The Emerging Right to Democratic Governance - PICS 3441 Available At: http//wwwpics3441.upmf-grenoble.fr/.../the_emerging_right_to_democratic_.(PDF], accessed on 08/02/2012

however, no progress was made towards federal union.[279] Finally, with the adoption of the Charter of the Organization of American States and the recognition of regional groups within the universal organization of the United Nations, the opportunity seemed to present itself to take the initial step towards union, if not to attain all at once the long-sought objective.[280]On October 8, 1951, representatives of the five states met at San Salvador and adopted the Charter of San Salvador and it was promptly ratified by the signatory governments and came into force on December 14, 1951, by coincidence a day after the Charter of the Organization of American States became effective.[281]

In accordance to the conference of Washington, the five Latin American nations agreed not to recognize new regimes in Central America which come to power in any of the five Republics through a coup d'état, a revolution against a recognized Government, in the case of a duly conducted constitutional reorganization they(member States of the organization) obligated themselves not to recognize the legal authority of a President or Vice President if he was the leader or one of the leaders of a coup d'état or revolution or related to such a leader or leaders by either blood or marriage or if he had held high military command during the coup d'état or revolution or during the election.[282]Furthermore, these nations agreed not to recognize any new government which arises from the election to power of a citizen expressly and unquestionably disqualified by the Constitution of his country as eligible to election as President, Vice-President, or Chief of State designate.[283] This was initiated a new policy of recognition that required an appraisal of the constitutional validity of a new regime before such a regime would be recognized, and pointed in the direction of multilateral or collective recognition, that is, recognition based upon international consultation.[284]

Meanwhile, for Latin America, the recognition of new governments based on the policy which the United States had followed towards Haiti until 1862, Panama in 1903, and Mexico and other

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279. *American Journal of International Law*, Vol. 48, No. 1, Jan., 1954 p.14 avilable at http://www.jstor.org/stable/i312081, accessed on 08/02/2012
280. Thomasp. Anderson, Supra Note 66.
281. Ibid.
282. Recognition in Contemporary Inter-American Relations : Donald Marquand Dozer Reviewed Work,*Journal of Inter-American Studies*, Vol. 8, No. 2, Apr. 1966, pp. 318, available at .jstor.org/stable/165112 accessed on 08/15/2012
283. Ibid.p.325
284. Ibid.p.335

new governments in Middle America after 1913, had taken on the connotation of moral approval of the new regimes thus recognized.[285]That is, when the United States or for that matter any other American nation, extended recognition to a new regime in the Americas, it was generally assumed that it had assured itself that the new regime not only represented the will of the people of the state substantially declared and determined to fulfill its international obligations, but also that the system and principles of the new government were approved by the recognizing government.[286] This implies that recognition of Governments looks as a moral act or, perhaps better, as a political act, that is, the recognizing government was assumed to have given its blessing to everything associated with the newly recognized regime. The granting or withholding of recognition was interpreted as a method of indicating approval or disapproval of a new government, regardless of its actual strength and its fidelity to its international commitments.

3.2.2 Recognition of Government and the Organization of American States

The Charter of the Organization of American States was signed in Bogota on 30 April 1948 during the Ninth International American Conference and entered into force on 13 December 1951, upon deposited by Colombia of the instrument of ratification.[287]Though the Charter of Bogota stood unchanged for twenty years, there was reform in 1967 through the Protocol of Buenos Aires in which it came into force in 1970 and created new deliberative organs.[288] This first Charter reform is evidence of the concern of Member States with keeping OAS priorities in line with the changing times, obviously, the priorities prevailing in the aftermath of World War II had to be changed and Buenos Aires was an initial step in that direction.[289]

The reform of the Charter of the Organization of American States was not static after the first reform, rather further reforms carried out. The second reform, which is next to the protocol of Buenos Aires, was the protocol of Cartagena de Indies. The special session of the General

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[285]. The Struggle for the Recognition of Haiti as Independent Republics:*The Journal of Negro History* - Vol II—October, 1917—No. 4 p.370,**available at**http://wwwthelouvertureproject.org/index.php?, accessed on 08/20/2012

[286]. Ibid.

[287]. Charter of the Organization of American States.Avilable athttp://wwwtreaties.un.org/doc/Publication/.../volume-119-I-1609-English.**pdf,** accessed on08/15/2012

[288]. Protocol of Amendment to the Charter of the Organization of American States :Protocol of Buenos Aires. Art 52,availableawww.oas.org/juridico/english/sigs/b-_31.html accessed on 08/10/2012

[289]. Ibid. Preamble.

Assembly of the Organization of American States met in Cartagena de Indies in December 1985, at the invitation of the Government of Colombia, and on 5 December the Protocol that bears the name of that historic city was signed and came into force in 1988 and it played a corrective role with regard to the 1967 reform.[290] For instance, the 1967 reform had established the Inter-American Committee on Peaceful Settlement under an elaborate set of rules of procedure.[291] This did not turn out to be an improvement over the old Inter-American Peace Committee that had operated successfully under very flexible rules, so much so that not one case was brought before the new organ.[292] Cartagena sought to correct that situation and article 84 of the Charter states that any party to a dispute in which none of the peaceful procedures provided for in the Charter is underway may resort to the Permanent Council to obtain its good offices.[293]

In May 1992 the OAS Member States through their Foreign Affairs and heads of delegation met in the General Assembly decided to amend the Charter once again and approved the Protocol of Washington at the Organization's headquarters in Washington and came into force in 1997.[294] One of the amendments was the suspension mechanism that is suspending governments of Member States that had resulted from the overthrow by force of legitimately elected ones.[295] In this regard one must bear in mind that this would be the first time that the OAS adopted a suspension mechanism in the Charter. The suspension mechanism which is clearly stipulated under Article 9 of the charter of OAS reads as follows:

A member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups, and any other bodies established. The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of

[290]. Protocol of Cartagena. Available At: www.oas.org/juridico/english/sigs/a-50.html, accessed on08/10/2012
[291]. Protocol of Buenos Aires, Supra Note 78, Art.6
[292]. Guillermo Bel: *The Organization of American States*. Washington, DC, June 2002. Available at www.educoas.org/portal/docs/belt_paper_rev.pdf, accessed on 08/12/2012.
[293]. protocol of Cartagena , Supra Note. 80.Art 84
[294]. Protocol of Amendments to the Charter of the Organization of American States : Protocol of Washington. Available At: www.oas.org/dil/treaties_A-56_Protocol_of_Washington.htm, accessed on 09/12/2012.
[295]. Ibid. Art. 9

representative democracy in the affected Member State have been unsuccessful: the decision to suspend shall be adopted at a special session of the General Assembly by an affirmative vote of two-thirds of the Member States; the suspension shall take effect immediately following its approval by the General Assembly; the suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the reestablishment of representative democracy in the affected Member State; and the General Assembly may lift the suspension by a decision adopted with the approval of two-thirds of the Member States. [296]

As clearly envisaged above, the Protocol of Washington incorporated Article 9 and created a formal mechanism for suspension of a Member State whose democratically constituted government has been overthrown by force. This amended measure of the charter taken by the members of the OAS vividly depicting that member States are committed to prevail democracy and good governance by setting aside any regime comes to power through unconstitutional means. In other words, a member State government declaring power unconstitutionally or jeopardizing the above mentioned core principle of the regional organization in combating against unconstitutional change of government, the government of the said State would not be recognized as the legitimate government, besides it would be suspended from any activities of the organization and imposed all the punitive measures enumerated under article 9.

As may be concluded from this summary of OAS Charter reforms, the Organization has moved more expeditiously than is generally recognized to adapt its structure and mechanisms to the changing priorities of the Member States. Within two decades it has introduced substantial reforms to the Charter of the organization. All of these reforms are currently in place.

The commitment of members of the Organization of American States towards the prevalence of democracy and denying recognition for the unconstitutional change of government also manifested by the resolution 1080 of the OAS General Assembly. The General Assembly of the OAS met in Santiago de Chile in 1991 and unanimously adopted the Santiago Commitment to Democracy and the Renewal of the Inter-American System. [297] Under this Resolution, after recognizing that the region still faced serious political, social, and economic problems that may

[296]. Ibid.

[297]. Resolution adopted at the fifth plenary session, held on June 5, 1991, AG/RES. 1080 - OAS. Available At: www.oas.org/juridico/english/agres1080.htm, accessed on 09/12/2012.

threaten the stability of democratic governments, the General Assembly devised a new mechanism to deal with two types of situations, these are, the sudden or irregular interruption of the democratic political institutional process and the interruption of the legitimate exercise of power by the democratically elected government in any of the OAS Member States. [298]

The mechanism is quite simple. In the event of any occurrences giving rise to either situation, the Secretary General is instructed to call for the immediate convocation of a meeting of the Permanent Council and the Council will examine the situation, and convene an ad hoc meeting of the Ministers of Foreign Affairs or a special session of the General Assembly. [299] The purpose of the ministerial meeting, whether in the ad hoc format or as a special session of the Assembly, is to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law. [300] This is the manifestation of the members of the OAS that whenever unconstitutional change of government happened in the organization, member States through their Ministers of Foreign Affairs collectively give verdict either denying or providing recognition if the said regime, having power unconstitutionally, restore constitutional order in the State.

Furthermore the member States of OAS exerted unreserved effort towards democracy through adopting Inter-American Charter on Democracy. In April 2001 in Quebec City , the presidents and prime ministers of the region, reunited at the third Summit of the Americas, affirmed their shared commitment to democracy and instructed their foreign ministers to prepare an Inter-American Democratic Charter to reinforce OAS instruments already in place for the defense of democracy and constitutionalism, which were: the OAS Charter (1948); the Protocol of Cartagena (1985); General Assembly resolution AG/RES. 1080 (XXI-O/91) adopted in Santiago, Chile, in 1991; and the Protocol of Washington (1997) and then, the Inter-American Democratic Charter was adopted by the member states of the OAS at a special session of the General Assembly held on September 11, 2001, in Lima, Peru. [301] This organizational democratic charter is the affirmation that democracy is and should be the common form of government for all

[298]. Ibid.
[299]. Ibid.
[300]. Ibid.
[301]. Inter-American Democratic Charter. Available at, www.oas.org/charter/docs/resolution1_en_p4.htm accessed on 09/12/2012.

countries of the Americas, and it represents a collective commitment to maintaining and strengthening the democratic system in the region. Article of 1 of the Inter-American Charter on Democracy clearly states that: "The peoples of the Americas have a right to democracy, and their governments have an obligation to promote and defend it."[302]

Member States of OAS with their adoption of the Inter American Democratic Charter, not only confirmed their commitment to democracy but also established precise courses of action to be followed if democratic government were threatened. In effect, Article 20 of the same charter provides that in the event of an alteration of the constitutional regime seriously impairing the democratic order in a member state,any me mber state, or the Secretary General, may convene the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.[303] Besides, if such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special session of the General Assembly to adopt the decision it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of the Democratic Charter.[304]

Furthermore, when the special session of the General Assembly determines that there has been an unconstitutional interruption of the democratic order of a member state and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS by an affirmative vote of two thirds of the member states and any suspension shall take effect immediately.[305] In other words, the unconstitutional acts of the government of the Member State would not have recognition in the OAS unless it restores democratic order.

In general, the analysis of the charter of OAS, Resolution 1080 of the OAS General Assembly and the Inter American Democratic Charter with particular reference to the recognition of government depicted that the Member States of OAS are committed to foster constitutional order

[302]. Ibid.Art.1.
[303]. Ibid.Art.20.
[304]. Ibid
[305]. Ibid.Art.21.

through collectively recognizing the regime that restores constitutional order or denying recognition when a regime comes to power failed to respect organizational legal regimes that require the restoration of constitutional order. This is one of the major strength of Member States of OAS to address their Organizational objective towards the prevalence of democracy. However, if there is unilateral act of recognizing unconstitutional change of government, which jeopardizes the Organizational objective, either the OAS charter or the Inter-American Charter on Democracy did not say anything regarding what kind of remedy or measure the Organization take up on such country. This requires the usual updating of the organizational charter through amendment.

3.3 Recognition of Government in the European Union

3.3.1 Introduction

The efforts toward the unification of Europe since the Second World War have created a confusing mixture of numerous and complex organizations that are difficult to keep track of, for instance, the OECD (Organization for Economic Cooperation and Development), WEU (Western European Union), NATO (North Atlantic Treaty Organization), the Council of Europe and the European Union coexist without any real links between them.[306]The last among these groups, that is, the European organization comprises the European Union has the feature that is completely new in the EU and distinguishes itself from the usual type of international association of states, in that, the Member States have ceded some of their sovereign rights to the EU and have conferred on the Union powers to act independently, in exercising these powers, the EU is able to issue sovereign acts which have the same force as laws in individual states.[307]

The foundation stone of the European Union was laid by the then French Foreign Minister Robert Schuman in his declaration of 9 May 1950, in which he put forward the plan he had worked out with Jean Monnet to bring Europe's coal and steel industries together to form a European Coal and Steel Community.[308] This would constitute a historic initiative for an organized and vital Europe, which was indispensable for civilization and without which the

306. Klaus-Dieter Borchardt:*The ABC of European Union law* , rue Mercier 2985 Luxembourg, 2010. P.9.
307. Ibid.p.11
308. EUROPA - The Schuman Declaration – 9 May 1950. Available at www Europa.eu/about-eu/basic-information/symbols/Europe-day/schuman declaration/index_en.htm, accessed on 09/11/2012.

peace of the world could not be maintained.[309]The Schuman Plan finally became a reality with the conclusion of the founding Treaty of the European Coal and Steel Community (ECSC) by the six founding States (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) on 18 April 1951 in Paris (Treaty of Paris) and its entry into force on 23 July 1952.[310] A further development came some years later with the Treaties of Rome of 25 March 1957, which created the European Economic Community (EEC) and the European Atomic Energy Community; these began their work when the Treaties entered into force on 1 January 1958.[311]

The creation of the European Union by means of the Treaty of European Union(the Maastricht Treaty) in1992 marked a further step along the path to the political unification of Europe.[312]The Treaty was regarded as a new stage in the process of creating an ever closer union among the peoples of Europe and ultimately leading to a European constitutional system.[313] EU is an intergovernmental and supra-national union of 27 European countries, known as member states and this regional organization is a family of democratic European countries, committed to working together to promote democracy, the rule of law, peace, and prosperity and also the Union is an advanced form of multi-sectored integration; its competence extending to the economy, industry, development, politics, citizens' rights and foreign policy of its member states.[314]What sets the European Union apart from more traditional international organizations such as the OAS and the AU is its unique institutional structure, it is built on an institutional system which is the only one of its kind in the world.[315]

In accepting the European Treaties, member states relinquish a measure of sovereignty to independent institution representing national and shared interests, that is, the members of the EU have transferred to it considerable sovereignty more than that of any other non-sovereign regional organization, however, in legal issues, member states remain the masters of the Treaties, which mean that, the Union does not have the power to transfer additional powers from states

[309]. Ibid.
[310].Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951). Available at www.cvce.eu/viewer/-/content/11a21305-941e-49d7-a171-ed5be548cd58/en, accessed on 09/11/2012
[311]. The Treaty of Rome (1957).Available at www.historiasiglo20.org/Europe/traroma.htm, accessed on 09/11/2012
[312]. Klaus-Dieter Borchardt, SupraNote96.p.12.
[313]. Ibid.
[314].Robert W. Eno, Supra Note 5, p.164
[315]. Ibid.p.165.

onto itself without their agreement and, in many areas, member states have given up relatively little national sovereignty, particularly in key areas of national interest such as foreign relations and defense.[316]

With regard to democratization and constitutional order, EU has established strong commitments to defend and promote democracy both within the union and in its relations with nonmember countries and organizations. These commitments are established in two key documents: the Treaty on European Union and the Charter of Fundamental Rights. The Treaty on European Union entered into force in 1993 and was amended in Amsterdam in 1999, with further amendments adopted in Nice, in 2001.[317]In accordance to article 6 of the EU treaty, the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.[318]

Furthermore, Article 49 makes respect for the principles presented in Article 6 a central criterion for EU membership.[319] Article 7 of the EU Treaty establishes a mechanism by which the European Council may determine the existence of a serious and persistent breach of Article 6 and impose penalties.[320]The Treaty of Nice (2001) alters this provision by providing for two separate means of determining whether a breach of Article 6 has occurred: a four-fifths majority vote of the European Council or a unanimous decision of the heads of state.[321]

After it has been determined the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), the Council, acting by a qualified majority, may decide to suspend certain rights deriving from the application of this Treaty to the Member State in

316. Ibid.
317.Amendment to the Treaty on European Union. Available at www eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF, accessed on 09/15/2012.
318. Treaty on European Union: Feb 22, 2000. Article 6(1). Available At: www.europarl.europa.eu/hearings/20000222/libe/art6/default_en.htm, accessed on09/15/2012.
319.Ibid Art.49
320.Ibid. Art.7
321.Treaty of Nice. Amending the Treaty on European Union,Art.7(1)Available At:wwweur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf, accessed on09/15/2012.

question, including the voting rights of the representative of the government of that Member State in the Council.[322]

Though, EU has not envisaged in its treaty about recognition of government, it is clearly stipulated in the above mentioned provisions that the Union's commitment towards democracy. The Union denied recognition of a State as a member of EU if it jeopardizes the principles enshrined under article 6. In other words, EU through punitive measures stated under article 7 of the Union combating against the antitheses of democracy such as unconstitutional change of government.

3.3.2 Recognition of Government and the European Union

The issue of recognition of Government at the international arena also became the concern of the European Union. However, there is no common recognition policy among the members of the Community, different nation States developed their own criteria of recognition policy, for instance, recognition in the opinion of the Netherlands government is an act of factual and formal establishment that a particular government actually exercises on a reasonably permanent basis over a major part of the territory and population of a State.[323]It is, therefore, a judgment of a factual situation which does not inculcate any other element of constitutional acquisition of power.

Though, the majority of member states of the Union appeared to have sufficiently similar policies like the above mentioned British old policy of recognition of government adhered by Netherlands, the French government set aside this old policy. The French policy is not to recognize government coming to power through unconstitutional means and it seems to adopt the Estrada principle, section2.3.1.4of this paper, that to do so would be to act in breach of the standard of non-intervention, that is, it is internal affair of the state concerned.[324] It is an attitude closely copied by the Belgian government.[325]The French Foreign Ministry finds it necessary to insist that the maintenance of diplomatic relations after an unconstitutional seizure of power does

[322]. Ibid Art. 7(2)(3).
[323]. *The International and Comparative Law Quarterly*, Vol. 30, No. 3 (Jul., 1981), pp. 568. Available at http://www.jstor.org/stable/759287, accessed on 09/15/2012.
[324]. O'Connell D.P, *International Law,* Vol. I, 2nd ed., 1970. p. 134.
[325]. Ibid.

not imply any judgment upon the policies of the new authority, especially, it does not connote approval, and, what is more, the maintenance of diplomatic relations cannot be held to imply recognition.[326]

Because of the disparities in the policy of government recognition among member States of Union, EU may not take collective measure on unconstitutional change of government. However, the European Community needs to have a policy which allows collective recognition of new governments or condemning a government which comes to power unconstitutionally or through coup d'état like that of the charter of AU on Democracy, Election and Governance.

Even if European Community do not have a set of rules and procedures as a means of deterring unconstitutional change of Government in the Union, the EC Foreign Ministers met in Brussels and issued a Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union On 16 December 1991. [327]In accordance to this declaration, the new candidate nation State to be recognized required to:

respect for the provisions of the Charter of the United Nations and commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights; guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the ECSC; respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes. Finally, the Community and its member States asserted that they will not recognize entities which are the result of aggression.[328]

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[326]. Ibid.

[327]. Recognition of States - *The European Journal of International Law*. Declaration on the `Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16December 1991) . Available at www 207.57.19.226/journal/Vol4/No1/art6.html, accessed on09/15/2012.

[328]. Ibid.

The Guidelines described the candidates for recognition as those new states which have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations and then the Guidelines concluded with the warning that the EC countries will not recognize entities which are the result of aggression. However, the guidelines did not further explain the features of entities which come to power aggressively or unconstitutionally. Thus, this might lead member States of the Union towards controversies on the issue of recognition of State. The other issue reflected in the Declaration is that the guidelines make the process of recognition more difficult because the EC countries purport to retain the normal standards of international practice and also adding a series of new requirements. These requirements make the Declaration rigid to foster the recognition of new member States of the Union.

Following this Declaration was a Declaration on Yugoslavia. The European Community and its Member States discussed the situation in Yugoslavia in the light of their Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union, and then they adopted a common position with regard to the recognition of Yugoslav Republics and concluded that they recognized Yugoslavia in accordance to the above mentioned declaration. [329] These two documents, Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia, were significant to influence international reactions on the issue of recognition of the newly emerging states. At the time these Declarations were issued, the EC countries had welcomed the return of the three Baltic states into the community of nations but had not extended recognition to any new States in Eastern Europe. [330]

Generally, the European Community adopted a Declaration on the recognition of States which does not take in to consideration the mechanisms of recognition of government in the Union. The European Community member States do not have a protocol that governs unconstitutional change of government in the Union and a way out of addressing this problems, it could be

[329]. *International Legal Materials.*Vol.31,No.6(Nov.1992),p.1485. Available at www.tamilnet.com/img/publish/2011/10/earnedsovereignty3.pdf, accessed on 09/22/2012.
[330]. *The European Journal of International Law:*Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991). Available at www 207.57.19.226/journal/Vol4/No1/art7.html, accessed on 09/22/2012.

through sanction or any other organizational mechanisms. The writer of this research recommends that the Union instead of stating that "the Community and its member States will not recognize entities which are the result of aggression," it needs to have detailed rules and procedure that envisage the meaning and the elements that regarded as unconstitutional change of Government as well as its possible remedies and punitive measures to prevail democratic order in the Union.

CHAPTER FOUR

RECOGNITION OF GOVERNMENT IN THE AFRICAN UNION

The previous chapters dealt the conceptual aspect of recognition and the nature of recognition in different regional organizations. This chapter analyses the measures taken by the AU with respect to recognition of government from different perspectives. It looks at the AU response to the coup d'état of Madagascar, the revolution of Libya, the coups of Mali and the coup of Mauritania.

4.1 THE CASE OF MADAGASCAR

4.1.1 POLITICAL TURMOIL OF MADAGASCAR

Madagascar is the world's fourth largest island located in the Indian Ocean approximately 280 miles off the Mozambique coast.[331] Before the island was under the colony of France in 1896, it was largely centralized under the Merina monarchy of the central highlands, and the attempt by the French to govern indirectly through the Merinahad failed, so in 1896 the French colonial authorities resorted to the model of direct rule and the Merinaadministrative personnel were recruited and came to be relied upon throughout the country, however, this resulted in a marked divide in privilege between the Merinaand the seventeen other ethnic groups, nominally grouped together as coastal people and the impact of this social divide continues to be felt today.[332] On 28 September 1958 after a successful referendum held to determine whether it should become a self-governing republic, a presidential election was held under French auspices on 27 April 1959 in which PhilibertTsiranana and his Social Democratic Party of Madagascar (PSD) emerged victorious.[333] On 26 June 1960, Madagascar gained full sovereignty from France with President Tsirinana at the helm.[334]

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[331]. Lauren Ploch: Madagascar's Political Crisis, June 18, 2012, P.6. Available at http://www.crs.gov, accessed on 08/03/2012.
[332]. Richard R. Marcus: Political Change in Madagascar, ISS Paper 89. August 2004. Avilable at www.iss.co.za/pubs/papers/89/Paper89.htm, accessed on 08/07/2012.
[333]. Ibid.
[334]. Ibid.

After Madagascar gained independence, assassinations, military coups and disputed elections featured prominently.[335] Didier Ratsiraka took power in a military coup in 1975 and ruled until 2001, with a short break when he was ousted in the early 1990s.[336] While both Marc Ravalomanana and Ratsiraka claiming victory after presidential elections in December 2001, Ravalomanana sworn into office in May of the same year, but Ratsiraka continued to reject the election results, and then the two sides marshaled their supporters and engaged in limited armed confrontations, and this resulted in the devastation of Communications, roads, and bridges by Ratsiraka's followers and leaving the capital with no access to the sea or to basic supplies.[337] After this controversial election term elapsed, the next election in accordance to Article 45 of the Madagascar Constitution has to be conducted in December 2006[338] and in this election campaign Ravalomanana was one of several presidential candidates, including a retired army general, Andrianafidisoa, also known as Fidy, disqualified from the presidential race for failing to pay the required deposit of 25 million Madagascar ariary (about US$11,400).[339]

Ravalomanana became re-elected president in this election among those presidential candidates with almost 55% of the vote,Soon after the declaration of Ravalomanana victory an alleged coup d'état attempt occurred on 18 November 2006 when Fidydeclared military rule.[340] Fidy had previously supported the incumbent President MarcRavalomanana in his successful claim to the presidency in the wake of the disputed 2001presidential election and probably expected Ravalomanana to support his presidential bid.[341]

While violence erupted when Fidy declared military rule, President Ravalomanana was returningfrom France during the incident and his plane was diverted from Antananarivo to

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[335]. Madagascar: Government Principal Officials, CIA World Factbook (May 2012)U.S. Dept. of State Country Background Notes (May 2012)Available atwww.blnz.com/.../Madagascar_power_grab_coup_detat_8631.html,accessed on 08/22/2012

[336].Ibid.

[337]. Lauren Ploch ,Supra Note.1

[338]. Madagascar Constitution Adopted on 19, Aug 1992.Article 45.

[339]. CIA World Factbook ,Supra Note.*5*

[340]. Professorial Lecture31 August 2010, Nelson Mandela Drive Campus ,Mthatha, Eastern Cape.Available at www.mrfcj.org/NelsonMandela-Lecture accessed on 08/12/2012.

[341]. Ibid.

Mahajangainstead, the following day the government issued a wanted poster for Fidy and a week later he was arrested and sentenced to four years in prison on 2 February 2007.[342]

Then after the Ravalomanana government held election in late 2007 and early 2008 to elect legislative, provincial, and regional representatives and in April 2007 referendum, President Ravalomanana received 70% approval for a series of constitutional changes, including a controversial proposal to give the President greater power during a state of emergency as well as a proposal to abolish the provinces and allow municipal and local governments more authority.[343]

Letter, in 2009 there began a power tussle between Marc Ravalomanana and AndryRajoelina, former mayor of the capital, Antananarivo.[344] Rajoelina, who had been elected mayor of Antananarivo in December 2007, had beaten thoroughly Ravalomanana'sfavoured candidate.[345] The two power antagonists accused each other, for instance, Rajoelina accused Ravalomanana of selling Malagasy land to foreigners, thus the tension results in the political crisis of 2009, among the causes of 2009-2012 Political Crisis of Madagascar was that Ravalomanana government closed Viva TV, a television station owned by Mayor Rajoelina, after it aired an interview with former President Ratsiraka, the government asserted that the speech threatened to disturb public order and security, while critics viewed the move as a sign of increasing intolerance by the Ravalomanana government of opposition friendly media and as an effort to curtail Rajoelina's influence.[346]

After the closure, Rajoelina issued an ultimatum, demanding, in the interest of press freedom and democracy, that the governmentshould allow the reopening of Viva TV and other stations by January 13 and in mid January 2009, Rajoelina initiated what grew into a wave of public anti-government Demonstrations in Antananarivo and this protest also spurred by dissatisfaction over economic conditions, allegations of government corruption, accusations of state restrictions of freedom of expression, and of unilateral political dominance swelled in size over subsequent

[342]. Ibid.
[343].CIA World Factbook , Supra Note.5
[344]. Nelson Mandela, Supra Note.10
[345].CIA World Factbook ,Supra Note 5.
[346]. Lauren Ploch ,Supra Note 1.

days and, on top of this, Rajoelina called for further antigovernment strikes, which duly ensued, closing down much of the capital and in late January, the protests turned to violence.[347].Rajoelina mobilized his supporters to take to the streets of Antananarivo to demand Ravalomanana's ousting on the grounds of his alleged autocratic style of government, two months later, in March 2009, the 34-year old Rajoelina, said he had a mandate to lead a transitional government and that President Ravalomanana no longer had the mandate to run the country and then, under the ordered of Mr. Rajoelina, the army seized the presidential palace with the intention to hasten the president's departure.[348]

Ravalomanana took refuge in another palace in the city centre, protected by hundreds of hisSupporters and then went on to ask formilitary support from the UN and southern African states, however, after losing support of themilitary, the support of his ministers deserted him one by one.[349] Under pressure from the army, the civilian opposition as well as the intensepressure from Rajoelina, President Ravalomanana resigned and transferred power to the military directorate headed by Vice-Admiral HyppoliteRamaroson, then the military directorate transferred presidential authority to AndryRajoelina at age thirty-four, however, Rajoelina was six years too young to be President under the Malagasy Constitution.[350]But the constitution was amended in November, 2011 which lowers the minimum age limit for presidential candidates that would allow him to do so, as a result of this, AndryRajoelina, the then-34-year-old sworn and becoming the youngest president in Africa,however, in the event of a resignation of a president, the Constitution of Madagascar required an election to be held for a new President and in the interim period, presidential powers should have resided in the President of the Senate.[351]

Ultimately, elements of the military demanded Rajoelina's resignation early in his tenure and continue to oppose the transitional authority and in April 2010, the minister of the armed forces

[347]. Ibid.
[348].Ibid.
[349]. Ibid.
[350]. Madagascar Constitution, Supra Note 8, Art. 46
[351]. Ibid. art.47,52

was fired amid of a possible coup and also security forces loyal to Rajoelina and his supporters suppressed another coup attempt in November 2010.[352]

The recent developments in Madagascar depicted that, Andree Rajoelina, the president of Madagascar's unelected transitional government, agreed to meet with Marc Ravalomanana, the country's former most recently elected president, on June 14, 2012.[353] The agreement comes in the wake of renewed pressure on the two men to meet to resolve disputes over a number of issues, both parties signed the roadmap agreement in September 2011, the agreement inculcates, the establishment of a transitional national union government; an electoral framework leading to the establishment of a democratically chosen government; a range of prescriptive political confidence building measures and national reconciliation efforts aimed at facilitating a neutral, broadly participatory transitional process.[354] However, the political environment of Madagascar remains volatile; it is characterized by regular, relatively low level political disputes including accusations of High Transitional Authority (HAT) of the Rajoelina party ; ill treatment of Ravalomanana-linked political figures; restrictions on and, in some cases, violent suppression of large public political gatherings; selected restrictions on journalists, nevertheless, substantial progress has been made in the implementation of key provisions of the roadmap.[355]

4.1.2 AFRICAN UNION RESPONSE TO THE COUP OF 2009

Section 3.1 of chapter three briefly explainedthat the then Organization of African Union currently African Union unequivocally condemned and enacted subsequent declaration and protocolsto curb unconstitutional change of government in the continent. The constitutive Act and those declaration and protocols are jeopardized by the incumbent government of Madagascar. Since Madagascar is the Member State of African Union, it is governed by these respective laws.As a result the AU suspend Madagascar's membership, not the perpetrators of the coup d'état on 20 March 2009.[356]Though it is not our concern under this topic, the European

[352]. Lauren Ploch, Supra Note 1.
[353]. Ibid.
[354].Ibid
[355]Ibid, p.7
[356]. A.U.P.S.C. *Communiqué* of the 181st Meeting, para.3, Doc. No.PSC/PR/COMM(CLXXXI) (20 March 2009)

Union and other international organizations refused to recognize the new government that assumed power by force. [357]

The AUPSC after it has been expressed its deep concern over the political stalemate in the country and the growing tension in the capital and in other parts of Madagascar, affirmed its total rejection of any change or attempt of unconstitutional change of Government as contained in the relevant texts of the AU, in particular the Algiers Decision of July 1999, the Lomé Declaration of July 2000, the Constitutive Act of the AU and the Protocol Relating to the Establishment of the Peace and Security Council. [358] Further the Council call upon the Malagasy parties to exercise utmost restraint and refrain from any action likely to complicate the search for a solution, challenge the republican institutions and their functioning, and seriously jeopardize civil peace and stability in the country. [359]

On March 17, 2009, the AUPSC noted the resignation of President Marc Ravalomanana, under pressure from the civilian opposition and the army and demanded the Malagasy parties comply scrupulously with the provisions of the Constitution of Madagascar on interim arrangements in the event of resignation. [360] Accordingly, the Council declared that the transfer of power to the military directorate was made in violation of the relevant provisions of the Malagasy Constitution, and that the subsequent decisions to confer the Office of the President of the Republic to Mr. AndryRajoelina constitute an unconstitutional change of Government, as a result the Council strongly condemned this unconstitutional change of Government, which marks another serious setback in the ongoing democratization processes on the continent and reinforces the concern over the resurgence of the scourge of coup d'états in Africa.[361] In accordance with its power, the Council suspended Madagascar from participating in the activities of the AU until the restoration of constitutional order and threatened to impose all the measures provided under the Algiers Decision of July 1999, the Lomé Declaration of July 2000, the Constitutive Act of the AU and the Protocol Relating to the Establishment of the Peace and Security Council,

[357]. Professorial Lecture, Supra Note 10.
[358]. A.U.P.S.C. *Communiqué,* Supra Note 26, para. 4,5
[359]. Ibid.
[360]. A.U. P.S.C. *Communiqué* of the 180th Meeting, para.3, Doc. No. PSC/PR/COMM.(CLXXX) (Mar. 17, 2009),
[361]. A.U.P.S.C. Communiqué, Supra Note 26.

including sanctions, on the perpetrators of the unconstitutional change and on all those who contribute to the maintenance of the illegal status quo, if constitutional order is not restored [362]

On the other hand, on the political situation in Madagascar, the Extraordinary Summit of SADC condemned in the strongest terms the unconstitutional actions that have led to the illegal ousting of the democratically elected Government of Madagascar and called for an immediate restoration of constitutional order in the country, further the Summit also decided not to recognize Mr. Rajoelina as President of Madagascar as his appointment did not only violate the Constitution of Madagascar and democratic principles, but also violated the core principles and values of the SADC Treaty, the African Union Constitutive Act and the United Nations Charter. [363] As a result the heads of state and government of SADC suspended Madagascar from all Community's institutions and organs until the return of the Country to constitutional normalcy with immediate effect and also they urged the former Mayor of Antananarivo, Mr. AndryRajoelina to vacate the office of the President as a matter of urgency paving way for unconditional reinstatement of President Ravalomanana. [364] The Extraordinary Summit underscored that, in the event of noncompliance with the above decisions, SADC shall, in collaboration with the African Union and United Nations, consider other options to restore constitutional normalcy. [365]

In late April, the AU, SADC, the Organization international de la Francophonie (OIF) and the United Nations assembled to discuss ways to resolve the political crisis that has lasted for 6 months in Madagascar. [366] Under the auspices of AUPSC mediation talks were held between the four political groupings led by Ravalomanana, Rajoelina, and two former Presidents of Madagascar, Didier Ratsiraka and Albert Zafy. These deliberation led to the signing of the Maputo Agreements of August 8–9, 2009, and the Addis Ababa Additional Act of November 6, 2009. [367] During this historic summit of leaders, the four political groups have agreed on a framework for a transition neutral, inclusive, peaceful and consensual as well as the

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[362]. Ibid, para,5.
[363]. *communiqué extraordinary summit of SADC heads of state,March2009,.Available At:*www.sadc.int/.../SADC_Extraordinary_Summit-_March_2009.pdf para.14-17, accessed on 09/20/2012
[364]Ibid.
[365]Ibid.
[366]. *Communiqué* of the Joint Mediation Team for Madagascar,Sunday 9 August 2009.Available at www.consulmada- th.org/.../CommuniquA_c_of_the_Joint_Mediatio,accessed on 09/23/2012.
[367] .A.U. P.S.C. Communiqué of the208th Meeting, para.3, Doc. No.PSC/PR/Comm.(CCVIII).(Nov. 9, 2009).

establishment of a Government of National Unity headed by a consensus Prime Minister, three Deputy Prime Ministers and twenty eight Ministers, and also they agreed on power sharing during a transition to constitutional order by November 2010, during which period elections would be held, and members of the transition government would be barred from participating in these elections [368]

Following an impasse between the political groupings, Rajoelina withdrew from the talks and remained defiant in spite of international pressure, and then he announced that he would instead unilaterally organize elections in March 2010.[369]In response to the Rajoelina's violation of the agreement, the AUPSC in February 2010 threatened to impose targeted sanctions on the de facto authorities, borne out of the unconstitutional change, do not comply with the full and timelyimplementation of Maputo Agreements and the Addis Ababa Additional Act.[370] After Rajoelina set aside the sanction threat by the AUPSC, on March 17, 2010, the council imposed sanctions namely travel ban, freezing of funds and other financial assets and economic resources, as well as diplomatic isolation, against Mr. AndryNirinaRajoelina and his officials.[371]

Though Mr. AndryRajoelina renounced candidacy for the forthcoming presidential election, AUPSC after appreciating this progress to end the crisis in Madagascar and considered the updated election calendar of Presidential election on 24 July 2013, the council Stressed that, despite the progress made, some provisions of the Roadmap are still not implemented or are partially implemented, particularly Article 20 and consequently, decided to maintain the suspension of the participation of Madagascar in the activities of the AU and the sanctions imposed against Madagascar, while reiterating its will to lift these measures as soon as possible.[372] On the other hand, the decision of SADC on the Rajoelina regime is not yet changed, that is , SADC denied to recognize the de facto authorities of Rajoelina because

368. Joint Mediation Team, Supra Note 36.
369. Lauren Ploch, Supra Note 1,p.13

370. A.U. P.S.C. *Communiqué* of the216th Meeting, para.8, Doc. No. PSC/PR/COMM.1(CCXVI) (Feb. 19,2010).

371. A.U. P.S.C. Statement of the 220th Meeting, Doc. No.PSC/PR/BR(CCXX) (Mar. 17, 2010).
372. Ibid.

this regime does not only violate the constitution of Madagascar, but also international principles, like the SADC, AU and United Nations protocols. [373]

These strong measures of the AU and SADC are a good implication of these organizations commitment towards the denial of recognition to unconstitutional change of government in the continent, however, this commitment jeopardized by a member State. In January 2012 while the African National Congress of the Republic of South Africa celebrating its 100th birthday invited Mr. Rajeolina to attend it. [374] This represented a clear violation of the decision by the African Union in 2009 to impose a travel ban on Mr.Rajeolina. This unilateral violation of the Union's collective measure to curb unconstitutional order in Madagascar and to prevail recognized governments in the continent needs to have certain measure imposed by the concerned organ of the Union. However, AU did not take any measure until the conclusion of this research. In this regard unless otherwise AU take measures in such kinds of violations, the enforcement of its decisions and declarations would be futile.

4.2 Recognition of Government and the Libya Case

4.2.1 Overview of Libyan Revolution

In order to understand the complexities of the recent crisis in Libya, there is a need to explore into the country's past, especially with regard to state-society relations as well as the evolution and nature of the Gaddafi regime. Because of its position on the Mediterranean Sea, Libya has been exposed at different periods of its history to cultural interactions with Ancient Greece, the Roman Empire, the Muslim world and preindustrial Europe. [375] European colonization can be considered as the most significant factor contributing to the shaping of contemporary Libya, and at the time of the scramble for Africa among the European powers, as precipitated by the Berlin

[373].Madagascar power grab denounced as coup d'etat , available at www.blnz.com/.../Madagascar_power_grab_coup_detat_8631.html, accessed on 09/26/2012.
[374]. Lauren Ploch , Supra Note,P.6.
[375]. Sadiki Koko and Martha Osula:Assessing the African Union'sResponse to the LibyanCrisis. p4. Available at www Osula..mercury.ethz.ch/serviceengine/Files/ISN/142821/.../ch_1.pdf, accessed on09/26/2012.

Conference of 1884–1885, Libya fell under the control of Italy and then Italians managed their newly acquired territory as a united entity known as Italian North Africa (1912–1927).[376]

In 1927, the country was split into two autonomous regions or colonies, namely Italian Cyrenaica in the west and Italian Tripolitania in the east, seven years later; Libya was reconfigured administratively to encompass the three regions of Cyrenaica, Tripolitania and Fezzan (in the south), although these three regions formed integral parts of one united territory, the uneven spread of an already small population and the distances separating the three regional capitals of Benghazi (Cyrenaica), Tripoli (Tripolitania) and Sebha (Fezzan), coupled with the administrative inadequacies inherent to virtually all colonial regimes in Africa at the time, contributed to hampering the emergence of a cohesive and integrated Libyan society. [377] Inter-regional differences were further entrenched after Italy lost control of Libya in 1943 within the context of World War II as Britain took control of Cyrenaica and Tripolitania while Fezzan fell under French domination.[378]

Against this background of regional and distinct identities, Libya gained independence in December 1951 as a united kingdom under King Idris I, previously the Emir of Cyrenaica.[379]

Until the discovery of oil in 1959, Libya remained one of the world's poorest countries and afterward, the accumulation of wealth from oil provoked enmity from the society against the King, especially Tripolitania and Fezzan, because power and wealth remained concentrated in the hands of the Sansui monarchy and its tribal allies in Cyrenaica. [380] The King had good relationship with Western powers at a time of the rise of Nasserism, Nasserism is an Arab nationalist political ideology based on the thinking of the former Egyptian President Gamal Abdel Nasser, as a political ideology, Nasserism is an Arab nationalist and pan-Arab ideology, combined with a vaguely defined socialism, often distinguished from Eastern bloc or Western socialist thought by the label 'Arab socialism' and this ideology called for unity among Egyptians, Arabs and even all people of the Third World in their struggle against domination by

[376].Ibid.
[377]. Ibid.
[378]. Ibid.
[379]. Arnold, Guy (2005) *Africa: A Modern History*. London: Atlantic Books, p. 185 Available At: books.google.com/books/about/Africa.html?id=kFVyAAAAMAAJ,accessed on 09/28/2012
[380]. Ibid.

the developed world, mainly the West. [381] In his early political life, Gaddafi portrayed himself as a fervent disciple of Nasser in Egypt and Arab nationalism in the Middle East also contributed to alienating the regime further from civil society. [382]

Taking advantage of the general social discontent arising from the unfair power and resource distribution, a small group of left inclined four army officers, disgruntled by corruption in high places and led by 27-year old Gaddafi, deposed King Idris I on 1 September 1969 and set Libya on the path of a national revolution. [383] Soon after leading a group of young Libyan military officers against King Idris I in a bloodless coup d'état, Gaddafi became the de facto leader of the country on the same year and after the king had fled the country, the Libyan Revolutionary Command Council (RCC) headed by Gaddafi abolished the monarchy and the old constitution, then proclaimed the new Libyan Arab Republic, with the motto "freedom, socialism, and unity". [384]

The assessment of Gaddafi's 42-year rule over Libya depicted two features. On the one hand the regime achieved significant triumph in the socio-economic sphere in rising the nation from one of the poorest and least developed countries in the world to a high human development index country, ranking 53rd on a list of 169 countries, the highest for an African country. [385] On the other hand, even if the regime was successful in the socio-economic aspect, Gaddafi's governance well known by the absence of any development of a state bureaucracy or any form of institutionalized governmental structure and also there is neither a constitution in the modern sense nor are there any political parties. [386] In Libya, government was no more than what Gaddafi made of it, that infers, Libyans have had no meaningful role in politics and they were marginalized from any political participation by the one man rule of Gaddafi regime. [387]

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[381]. Nasserism, available at: www.saylor.org/site/wp-content/uploads/2011/06/Nasserism.pdf, p.1, accessed on 09/29/2012.
[382]. Ibid.
[383]. Sadiki Koko , Supra Note.45
[384].Libya History.Available At: http://globaledge.msu.edu/countries/libya/history, accessed on 10/05/2012.
[385]. United Nations Development Programme (2010) Human Development report 2010. The real wealth of nations: pathways to human development. New York: UNDP. Available At: http:// hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf, accessed on10/05/2012.
[386]. Institute for Security Studies (ISS*), Peace and Security Council Report no. 21*, Addis Ababa, April 2011, p. 3.
[387]. Ibid.

The political marginalization of Libyan people and the formation of a personality cult around Gaddafi as the 'enlightened Brother Leader and Guide of the Jamahiriya revolution' resulted in the regime's heavy handed overwhelming of political governance on the large portions of the Libyan citizenry (especially among democracy and human rights activists) antagonist to the regime and also placed Libya among the world's pariah states. [388]

Gaddafi's sense of ownership over Libya and its people was well demonstrated in his regime's response to the popular uprisings at their initial stage around the city of Benghazi. [389] Widespread grievances arising from four decades of political marginalization and oppression contributed to placing Libya in the path of the Arab Revolution as it swept through North Africa and the Middle East from Tunisia. [390]

The Arab Spring protests that enabled the Tunisian and the Egyptian people to evict Presidents Ben Ali and Hosni Mubarak respectively in public demonstrations spread and provoked the Libyan people to fight against the brutal Gaddafi regime. [391] In the case of Libya, the protests began on 15 February 2o11 in the eastern city of Benghazi where people staged a protest against the government for arresting a human rights campaigner. [392] The protesters established a Transitional National Council (TNC), headed by former Justice Minister Mustafa Mohamed Abud Al Jeleil, to spearhead the struggle against the Qaddafi government and their struggle achieved significant successes, establishing a firm hold over the cities of Benghazi and Tobruk and declaring they had taken control of most of the country's other major cities. [393] On 21 August, after the rebels launched an offensive attack to take Tripoli from Qaddafi's forces, they made rapid progress and by the end of the week had overrun much of the capitalalthough sporadic fighting continued in parts of the city, however, Qadhafi's forces retook much of the

[388].Sadiki Koko , Supra Note.45.p.5
[389]. Ibid.
[390]. Ibid.
[391]. Alex J. Bellamy And Paul D. Williams: The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect, available at http:// Sonlinelibrary.wiley.com › ... › International Affairs › Vol 87 Issue 4,accessed on 10/15/2012.
[392]. Peace and Security Council, SupraNote.55.
[393]. Alex J. Bellamy, Supra Note.61

country after a number of atrocities were committed by the government with the threat of further bloodshed.[394]

On 21 March 2011 a multinational coalition led by NATO forces intervened with the aim to protect civilians against attacks by the government's forces.[395]Gaddafi was ousted from power in the wake of the fall of Tripoli to the rebel forces on 20 August 2011, although pockets of resistance held by forces loyal to Gaddafi's government held out for another two months, especially in Gaddafi's hometown of Sirte, which he declared the new capital of Libya on 1 September 2011. [396] The fall of the last remaining cities under pro Gaddafi control and Sirte's capture on 20 October 2011, followed by the subsequent killing of Gaddafi, marked the end of the Libyan Arab Jamahiriya. [397]

4.2.2 AU Response to the Transitional National Council of Libya

In February 2011, African Union Peace and Security Council at its 261St meeting discussed on the situation in Libya and expressed deep concern with the situation in the country and strongly condemned the indiscriminate and excessive use of force as well as lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law, which continues to contribute to the loss of human life and the destruction of property.[398] Council also stressed the need for the people of Libya to exert unreserved effort in avoiding any further loss of life, furthermore, AUPSC decided to dispatch urgently a fact finding mission to Libya to assess the situation on the ground. [399] But, before March 17 resolution 1973 establishing a no-fly zone over Libya was passed, African Union was not only relegated to the background, it failed to provide a firm and practical programmed intervention on the uprising against Muammar Gaddafi, that is, AU was absent at a time when it had to take the lead.[400]Thus, the failure of the

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394. Ibid.
395. *Peace* and Security Council Report, SupraNote.56
396. Ibid.
397. Ibid.
398. A.U. P.S.C. *Communiqué* of the 261th Meeting,para. 2, Doc. No.PSC/COMM(CCLXI) (Feb. 23, 2011)

399. Ibid, Para 6.
400. The Use of Force in Libya: The AU Caught Off Guard. Available at www.currentanalyst.com/.../154-the-use-of-force-in-libya-the-au-cau, accessedon 10/15/2012.

AUPSC to act without delay in the crisis became the basis upon which it came to be marginalized by the United Nations Security Council. [401]

The UNSC was concerned about the escalated nature of the violence, the heavy civilian casualties and the crisis in the Libyan Arab Jamahiriya became a threat to international peace and security; as a result of this grave upshot of Libyan crisis, UNSC passed resolution 1973 authorizing the use of force to protect the civilian people. [402]

Though AUPSC rejected foreign military intervention in Libya based on suspicions of double standards in the application of responsibility to protect and hidden agendas pursued by the West, the three African countries- South Africa, Gabon and Nigeria non-permanent members representing AU in the UNSC, voted for UN Security Council Resolution 1973 which authorized the international enforcement of a no-fly zone over Libya.[403] This was necessary for the formal legitimacy of the intervention: had two of the three African members chosen to abstain, resolution 1973 would not have been adopted because it would have fallen short of the required nine affirmative votes. [404]

Regarding the variance of the AUPSC and the three African representative States in the UNSC, AU contends that by voting for UNSC Resolution 1973 it sided with the Libyan people although it did not support the NATO interpretation or manipulation of Resolution 1973 to justify the much more widespread bombing of Libyan military facilities.[405] However, the argument is that AU's member states support to the resolution and voting for use of force to the UNSC was a grave mistake of permitting UNSC to use of force against a member state,as a result of this disparity within the same organization and its failure to take sufficient measures to stop Gaddafi

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[401]. Ibid.

[402]. preamble of the UN security council resolution 1973 (2011) on Libya, available at www.academia.edu/.../The_Libya_Humanitarian_Intervention_Is_it,accessed on10/15/2012

[403].Jan Bachmann &LinnéaGelot:Mediating Ownership, Sovereignty and State Stabilization – The African Union and theResponsibility to Protect.Available atwww.saylor.org/site/wp-content/uploads/2011/06/html.10/15/2012.

[404]. Ibid.

[405]. OziasTungwarara: The Arab Spring and the AU Response. 19 September 2011. p.2.Available at www.afrimap.org/english/.../AfriMAP_NAfrica_Tungwarara_EN.pdf , accessed on 10/17/2012.

from killing his own people, AU invited NATO into the fray.[406] Thisdiverging views among African players insofar as the Gaddafi regime was concerned depicted lack of coherence within the African group, including within the Ad Hoc Committee itself.[407] In this context, although the three African countries serving as representatives of AU in the UNSC at the time may have supported Resolution 1973 for different reasons, their actions illustrated a lack of strategic coordination between the AU Commission and these countries insofar as protecting the AU's already crafted roadmap to alleviate the crisis in Libya.

The problem of coordination of the AUPSC and the three African States in the UNSC also envisaged among members of African Union. There were three positions emerged regarding UNSC Resolution 1973 on Libya. The first position advanced by inter alia Uganda, South Africa and to an extent Kenya, accepted UN Resolution 1973 in principle but was critical of the way the NATO countries were conducting their operations in Libya, to these countries, NATO's operations went beyond the contours of Resolution 1973 and in effect were part of regime change doctrine.[408] The second position advanced by the likes of Rwanda, supported the NATO attacks on Libya and in particular President Kagame, have argued that "the Libyan situation had degenerated beyond what the AU could handle", the third position, advanced by the likes of Zimbabwe, Algeria and Nigeria opposed NATO's operation in Libya and viewed it as Western countries using the UN to get rid of the Qaddafi regime, President Mugabe has accused NATO of being a "terrorist organization" fighting to kill Qaddafi.[409] These disparities among member states of African Union clearly depicts that there is no coordination of member states of the Union on the common objective of their regional organization. Thus, the constitutive Act which has the motive of integrating and unifying States in their common agenda vitiated by such kind of division among member states to act on member states crisis like Libya collectively through their spokes person of AUC.

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406. Ibid.
407. Ibid.
408. Kasaija Phillip Apuuli:The Principle of 'African solutions to African Problems' under the spotlight: The African Union (AU) and the Libya Crisis. p.7. available at: www.afrimap.org/english/images/.../AfriMAP_NAfrica_Kasaija_EN, accessed on 10/19/2012.
409. Ibid.

Though AU was failed to respond immediately, it was very concerned on the crisis of Libya. As a result AUPSC established a roadmap through which the Libya crisis could be resolved, including calling for: urgent African action for the cessation of all hostilities; cooperation with the competent Libyan authorities to facilitate the timely delivery of humanitarian assistance to the needy populations; protection of foreign nationals, including African migrants living in Libya and dialogue between the Libyan parties and the establishment of an inclusive transition period, with the view to adopting and implementing the political reforms necessary for the elimination of the causes of the current crises, with due consideration for the legitimate aspirations of the Libyan people for democracy, political reform, justice, peace and security, as well as socioeconomic development. [410] However, AU in its roadmap did not say anything on the future of Qaddafi in and after the negotiation of the political solution to the crisis. Then after proposing the roadmap of dispute resolution, the PSC established an AU ad hoc High Level Committee on Libya comprising five Heads of State and Government, as well as the Chairperson of the Commission, Jean Ping to follow-up on the implementation of the Roadmap.[411]

In order to address this peacemaking initiative envisaged in the roadmap to the Libyan crisis, AU encountered serious problems to materialize it. First, the deliberate decision by Western powers involved in the NATO offensive – namely France, the United States and the United Kingdom – to ignore, undermine and sideline the AU is the most significant cause of the failure of the AU's roadmap.[412] It is clear that NATO began moving ships to the Libyan coast at least a week before the UN Security Council had passed Resolution 1973, a clear indication that military intervention was their preferred course of action insofar as dealing with the Libyan regime was concerned, the reason for this choice on their part derives from their historical stance against the Gaddafi regime, the geo-strategic importance of Libya and their need to control the country's strategic resources, and the second reason for the failure of the AU's roadmap is that the contribution of Libya to the AU budget was very significant. Libya is one of the five major contributors of the

[410]. A.U. P.S.C. *Communiqué* of the 265th Meeting, para.7, Doc. No. *PSC/PR/COMM.2 (CCLXV)* (Mar.10, 2011)
[411]. Ozias Tungwarara,Supra Note 75.
[412]. Sadiki Koko, Supra Note.45.p.9

AU budget, namely Algeria, Egypt, Libya, Nigeria and South Africa that all of them contributed equally, amounting to 75% of AU's budget.[413]

Thus, the toppling of the Colonel Qaddafi's regime results in the AU budget being decreased by around US $40 million, in other words, engaging war with Libya would have meant the AU decreasing its own budget by one fifth and what was unique with Libya was that Colonel Qaddafi was also contributing for several countries which were not able to make funds avail for their contribution, as a result of all these accumulation, Libya's contribution amounted to nearly one third of AU's budget.[414] This change of regime leave AU in doubt about whether the new regime in Libya would be as generous as Colonel Qaddafi was, thus, the influence of Colonel Qaddafi has been cited as the main reason for AU unable to respond more decisively to the Libyan revolution. The third challenge that encountered AU to enforce the roadmap was on the side of the two main protagonists, the Qaddafi government and the TNC.[415] On the side of Libyan Government (Colonel Muammar Qaddafi), accepted the AU Roadmap including the specific issue of the ceasefire and deployment of an effective and credible monitoring mechanism, whereas on the other side, though the PSC Council stressed that there should be no preconditions for the commencement of the negotiations, political precondition set by the TNC as a prerequisite for the urgent launching of discussions on the modalities for a ceasefire. [416]

According to TNC, Qaddafi and his government had lost all legitimacy to govern the country and thus could not therefore be interlocutors in finding a solution to the crisis, thus, the departure of Gaddafi and members of his family as a prerequisite to the peace process, as a result, the TNC was simply rejecting the very rationale underpinning the AU's initiative, namely inclusiveness, but in reality the TNC never trusted either Gaddafi or the AU, perceiving the latter as biased

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413. Ibid.
414. After Gaddafi, who will fund the AU? Available At: www dailymaverick.co.za/.../2011-09-29-after-gaddafi-who-will-fund-the-AU, accessed on 10/19/2012.
415. A.U. P.S.C. *Communiqué* of the *275th* Meeting, para. 6, Doc. No. PSC/MIN/COMM.2 (CCLXXV AU), (Apr. 26, 2011)
416. ISS, *Peace and Security Council Protocol no. 22*, p. 11. Available at: www.issafrica.org/uploads/May11_2011.pdf, accessed on 10/22/2012.

towards the former. [417] Yet one cannot ignore the fact that the TNC's rejection of the AU's initiative was actually consistent with its alliance with the NATO powers.

AUPSC after all these internal and external challenges, adopted decision on the situation in Libya. In accordance to the decision held on 26 August 2011, at its 291st meeting at the level of the Heads of State and Governmentas well as its High Level Ad Hoc Committee meeting in Pretoria on 14 September 2011, the PSC refused to immediately recognize the NTC and instead made its recognition conditional upon the establishment of an all inclusive transitional government in Libya. [418]

The High Level Ad Hoc Committee under the leadership of South African President, Jacob Zuma, emphasized that PSC's initial position of an all-inclusive Libyan government is linked to the admission of the NTC into the AU. [419] Based on Article 30 of the Constitutive Act of the AU which prohibits governments which come to power through unconstitutional means from participating in the activities of the organization, the PSC reaffirmed its stand that all the stakeholders in Libya come together and negotiate a peaceful process that will lead to democracy and to accelerate the process leading to the formation of an all inclusive transitional Government that would be welcome to occupy the seat of Libya. [420] The implication of PSC decision is that all belligerents who claim power includingelements of the Qaddafi regime has to be part of the new transition government, though this is rejected by the TNC in its political precondition to negotiate.

Even if AU through its PSC denied recognition to the NTC, it would not have been helped and supported by African states because of division of opinion and lack of political will.Whilst the ad hoc Committee and PSC deliberated on the need for the formation of an all-inclusive transitional mechanism to lead Libya in the interim as a new Constitution is drafted to provide for elections, the governments of Ethiopia and Nigeria recognized the TNC as the authority in charge of Libya. [421] Nigeria's move annoyed South Africa that the Secretary General of the African

[417]. OziasTungwarara, Supra Note.75.
[418]. A.U.P.S.C. *Communiqué* of the291thMeeting,para. 3, Doc. No.PSC/AHG/COMM.(CCXCI),(Aug. 26, 2011) and the meeting of High Level Ad Hoc Committee in Pretoria on 14 September 2011.
[419]. Ibid, High Level Ad Hoc Committee
[420]. A.U.P.S.C. *Communiqué,* Supra Note 88, para. 5.
[421]. Tesfa-AlemTekle, 'African union snubs new revolutionary masters', 26 August 2011.

National Congress (ANC), GwedeMantashe criticized the country by declaring that it was "jumping the gun in recognizing the rebels as representatives of Libya," however, in reply President Good luck Jonathan affirmed that his government stood by the recognition of the NTC and that Nigeria's foreign policy "would not be dictated to her by the government, party or opinion of another country."[422] Rwanda has also broken ranks with the 10 AU position by reiterating its unequivocal support to the TNC.[423]

Furthermore,Senegal's President Wade established relations with the Libyan TNC in May when he visited them at their base in Benghazi and called for Qaddafi's departure, he was not the first to recognize the rebels; Gambia had already taken the lead followed byMauritania.[424] Mauritania's president, who serves as chair of the AU's ad hoc committee, announced that Qaddafi's departure had become necessary, a sign that even the AU had become exasperated the Libyan crisis, however, his views were not consistent with the AU's public posture, but provide indication that even for Africa's continental body, finding an African solution has been made more difficult by Qaddafi's hardened position.[425]Generally, there are eleven AU members that have recognized the TNC, there is another forty one states that have declined to recognize it, thus further deepening the divisions within the organization in the Libya crisis.[426]

On 20 September 2011, in New York, the Chairperson of the African Union indicated that the AU recognized the NTC as the representative of the Libyan people as they form an inclusive transitional government.[427] Subsequently, the PSC, recalls the assurances formally provided to the AU by the leadership of the National Transitional Council (NTC) of Libya, stressing its strategic commitment to the African continent; its commitment to give priority to national unity and to bring together all Libyan stakeholders without any exception to rebuild the country; and

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Available athttp://allafrica./stories/201108270009.html, accessed on 10/22/2012.

[422]. AhamefulaOgbu, 'Jonathan-No going back on recognition of new government in Libya', 26 August 2011.Available at http://allafrica./stories/201108260797.html, accessed on 10/22/2012.

[423]. Rwanda urges AU to back NTC 27, August 2011. Available at http://allafrica..stories/201108270005.html,accessed on10/26/2012.

[424]. *Comfort Ero:*The Political Changes in North Africa and the Middle East and the Implications for Sub-SaharanAfrica1p.8. Available at: www.afrimap.org/english/images/.../AfriMAP_NAfrica_Ero_EN.pdf, accessed on 10/26/2012.

[425]. Ibid.

[426]. Kasaija Phillip, Supra Note.78.

[427]. Letter From The Chairperson Issue 1, November 2011, p.3. The African Union and the Libyan Crisis: Putting the Records Straight. Available at: www.nepad.org/.../Letter%20From%20the%20AUC%20Chairperson, accessed on 10/26/2012.

its commitment to protect all foreign workers within Libya including the African migrant workers, the PSC after taking into account the uniqueness of the situation in Libya, authorized the current authorities to occupy the seat of Libya at the AU.[428] It also decided to establish an AU Liaison Office in Tripoli, to assist in the efforts aimed at stabilizing the situation in the country, promoting national reconciliation and facilitating the transition process.[429]

However,the decision of the AU's PSC to recognize the NTC before the formation of any government in post Gaddafi Libya, raises questions on the very working ethics of the AU as an institution. Maru in his article maintains that not only did the recognition threaten the AU's normative framework governing unconstitutional changes of government but that, more importantly, such recognition amounted to an official endorsement of the AU's own marginalization by the deliberate acts of the international actors that actively supported the NTC.[430]

African Union recognition of National Transitional Council of Libya provokes, as Maru stated above, squabble on the AU'S normative framework on the recognition of government.The Declaration on the Framework for an OAU response to unconstitutional changes of government adopted by the OAU in 2000 in Lome (Togo) defines unconstitutional change of government and in Its preamble stressed the OAU's determination to curb the resurgence of coup d'états in Africa.[431] However, Lome Declaration did not specify what amounted to a democratically elected government as well as a regime displaced by a civil war. So what is the legal ground of the AUPSC denying and then permitting recognition to the NTC of Libya? The recognition of the NTC by the AU was not consistent with the organization's legal positions and jurisprudence with regard to unconstitutional changes of governments on the continent, and further it contradicted not only the logic adopted by the AU since the beginning of the Libyan uprisings in February 2011 but also the positions put forward by the PSC as well as the High Level Ad Hoc

[428]. A.U.P.S.C. *Communiqué* of the *297th* Meeting,para. 3,4 , Doc. No.PSC/PR/COMM/2.(CCXCVII), ,(Oct. 20, 2011)

[429]. Ibid. Para.5 and Joint Press Release by the Government of Libya and the African Union Commission Tripoli, Libya on 17 January 2012.

[430].Maru, M.T. (2011) How the AU should have recognized the NTC.*ISS Today*, 2 September 2011. Available at http://www.issafrica.org/iss_today.php?ID=1348 accessed on 08/03/2012.

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

Committee.[432] It set a very dangerous precedent for the organization in the future, taking into consideration that the continued prevalence of imperfect democracies on the African continent constitutes a recipe for forceful changes of government in many African countries.[433]

The other argument is that, there is no tension between the Libyan event and the AU normative frameworks. On the contrary, the spirits of the AU normative frameworks support public demands to assert the general will of the people.[434] In Libya public protests enjoyed great popular support, there were massive violations of people's substantive rights, and absence of constitutional mechanisms of redress, however, the Lome Declaration is not applicable when the incumbent government itself jeopardizes basic human rights and promotes unconstitutional governance in a country.[435]

If public protests enjoy massive popular support and meet what one may call 'the credibility test', then they remain within the rights of people to revolution, the credibility test needs to fulfil three conditions: if there are violations of substantive rights, violation of trust of the people, and absence of constitutional mechanisms of redress, as assessed by the population directly affected and by the international community, when these conditions are prevalent in a country, the people have the right to change the government constitutionally if possible and extra-constitutionally-through revolution - if necessary, for this very reason, the AU needs to work with Libya to ensure democratic constitutionalism that does not endanger the right of majority to rule and the right of minority to be protected from abuses of the majority[436]

Applied to the current Libyan case, it is clear that the Gaddafi regime fulfils the above three conditions that warrant a revolution in need of change of government. Nonetheless, due to the armed nature of the Libyan uprising , that is, the employment of mercenaries on both Gaddafi's and NTC's side, the change of government in Libya constitutes unconstitutional change of government, because in accordance to the OAU Convention For The Elimination Of Mercenaries in Africa, mercenary is a grave threat which the activities of mercenaries present to

[432]. Sadiki K oko, Supra Note. 45. p.9
[433]. Ibid.
[434]. Jan Bachmann, Supra Note. 73.
[435]. Ibid.
[436]. Maru, M.T., SupraNote.100

the independence, sovereignty, territorial integrity, legitimate exercise of the right of African People and harmonious development of Member States of the Organization of African Unity.[437] When such circumstance to change of government occurs and both sides of the armed war have violated normative frameworks of the AU, as policy organ the AU should weigh the balance of unconstitutionality and has to choose the least unconstitutional exercise of power by employing credibility test.[438]

Gaddafi has been in power for 40 years without some form of constitution and popular legitimacy and the regime also characterizes the best example of unconstitutional emplacement of oneself in power, thus for the AU, the NTC has a better chance of compliance to the AU normative frameworks, and for now, the PSC has to bestow official de facto recognition to NTC with some preconditions to fast track to a fully-fledged de jure recognition.[439] However, as it has been explained above, African Union has given recognition to the NTC without fulfilling preconditions set by the AUPSC.

Those weaknesses of timely response of AU and the lacuna on the Lome Declaration of Unconstitutional change of Government depict the limitations of the AU's architecture for promoting democracy. The normative framework of AU on Unconstitutional change of Government does not provide adequate response to popular uprisings. What this tells us that the AU principle enshrined on Lome Declaration was meant to apply only to challenges to democratically elected governments. The uprising against Gaddafi was more clearly one against authoritarian rule and also against a leader that had never held so much as a charade of elections since he seized power in 1969, disqualifying his regime from even the broadest definition of a democratically elected government challenged by unconstitutional change.[440]

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[437].Preamble of Oau Convention for the Elimination of Mercenarism in Africa,1977, CM/817 (XXIX)).Avilable at:www.africa-union.org/...%20Conventions.../Convention on Mercen, accessed on 08/03/2012.

[438]. Maru, M.T. ,Supra Note.100

[439].Ibid.

[440]. Kathryn SturmanThe African Union and the Arab Spring: An exception to new principles or return to oldrules?No. 108 – MAY 2012. p.3Available at: www.ispionline.it/it/documents/Analysis_108_2012.pdf, accessed on 09/22/2012.

In general, following the popular uprisings for democracy in Libya, AU in its normative framework of Unconstitutional change of Government needs to inculcate unequivocally that public protests and revolutions against the incumbent government seized power unconstitutionally, without election or through coup d'état shouldnotberegardedas an unconstitutional change of government. Furthermore, the Union needs to develop guidelines for the member States on how to steer popular uprisings towards the restoration or establishment of constitutional democracy, including provision for transitional government, a timeframe for elections and the consolidation of democratic institutions that enhances democracy and developing the custom of having power through free, fair and periodic election.

The other concluding remark that has to be stressed is that, the AU's member States variance in opinion of the Libyan uprising. As it has been clearly envisaged in the Rules of Procedure of the Assembly of the Union Rules37 (4)(a) and 37(6)(b) condemning, recognizing and suspending recognition of government is the jurisdiction of the Chair Person of the Assembly and Chair Person of the Commission of the Union. However, eleven member States of the Union by setting aside these provisions of the Assembly Procedure recognized the NTC. The Union did not take any measure on these countries. Because either the Constitutive Act or the Rules of Procedure of the Assembly of the Union have no provisions which address this problem that vitiates the Union's collective response. Thus, the writer of this research recommends that there should be due regard for this antithesis measure of the concerned member States on the Union's collective action through adopting new protocol or amending the existing legal instruments.

4.3 The Case of Mali

This topic is devoted for the analysis of the coup d'état of Mali and its response from the International, regional and Sub-regional organizations.

4.3.1 Background of Mali Crises

Mali is a West African state inhabited by fourteen and a half million people fell under French colonial rule in 1892, and in 1893 the French appointed a civilian governor of the territory they called French Sudan and in 1958 the renamed Sudanese Republic obtained complete internal

autonomy and joined the French Community.[441] In early 1959, the Sudanese Republic and Senegal formed the Federation of Mali, then after the withdrawal of Senegal from the federation, the former Sudanese Republic became the Republic of Mali and gained independence from France on 20 June 1960.[442]

Since independence Mali has experienced three political regimes, each markedby the specific context in which it acceded to power. The regimeimmediately following independence, the regime of Modibo Keita, was based on a de facto single party socialist-leaning dictatorship; this regime remained in power until 19 November 1968, when it was overthrown by a military coup by Lieutenant MoussaTraor.[443]

The subsequent Military National Liberation Committee adopted an authoritarian policy that claimed to be liberal, as compared to the previous regime, overthrew in a coup d'état Keita's government under the leadership of Lieutenant MoussaTraoré in 1968 and established Mali's second one-party system. [444]The regime adopted far-reaching administrative reforms, among these were reforms relating to regional and local administration as well as the fundamental principles governing the organisation and functioning of public services, further the MoussaTraoré administration adopted a new constitution of the second republicin 1974 that created a one-party state and was designed to move Mali towards civilian rule, however, the military leaders remained in power.[445] In September 1976, after a new political party was established, the Democratic Union of the Malian People (UDPM) , concluded presidential and legislative elections in June 1979, then declared that Gen. MoussaTraoré won the election, but his efforts at consolidating the single-party government were challenged in 1980 by student-led anti-government demonstrations, which were brutally put down by three coup attempts.[446]

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[441].west african network for peace building warn policy brief MALI:Managing the Damage of a Complex Context. July,3 2012. p.2. Available at: www.mercury.ethz.ch/serviceengine/Files/.../pb_mali_june_2012.pdf, accessed on 09/23/2012.

[442].Kofiannan international peace keeping training centrepolicy brief 1/May 2012. Available at: www.pdfebookshub.com/Civilian.html, accessed on09/23/2012.

[443]. Cahiers d'étudesafricaines 172 (2003) Varia Rosa De Jorio Narratives of the Nation and Democracy in Mali A View from Modibo Keita's Memorial. p. 830.Availble at www. Etudesafricaines.revues.org/pdf/1467. , accessed on09/23/2012.

[444].Ibid.

[445]. Sadiki K oko, Supra Note. 45. p.9

[446]. Ibid.

The recurrent one party dictatorial regime provoked the Malians calling for multiparty democracy and echoing movements that emerged across Africa at the end of the Cold War.[447] In response to the growing demands for multiparty democracy, the Traoré regime did allow some limited political liberalization, including the establishment of an independent press and independent political associations, but insisted that Mali was not ready for democracy, furthermore, in National Assembly elections in June 1988, multiple UDPM candidates were permitted to contest each seat, and the regime organized nationwide conferences to consider how to implement democracy within the one-party framework, however, the regime refused to usher in a fully fledged democratic system, this resulted in the emergence of the 1990 cohesive opposition movements including the National Democratic Initiative Committeeand the Alliance for Democracy in Mali (ADEMA).[448]

The increasingly turbulent political situation was complicated by the rise of ethnic violence in the north in mid-1990, ostensibly fearing a Tuareg secessionist movement in the north, the Traoré regime imposed a state of emergency and harshly repressed Tuareg unrest, despite the signing of a peace accord in January 1991, unrest and periodic armed clashes continued.[449]

Due to Traoré's refusal to open the country to multiparty and free elections, wide sections of the population such as students, union representatives, and women began to organize a series of strikes in the spring of 1991and on March 26, 1991, after four days of intense anti-government rioting, a group of 17 military officers, led by former President AmadouToumaniTouré, overthrew theregime of the MoussaTraoré's second republic in a military coup and arrested him.[450]

Soon after the coup, the coup makers suspended the constitution and during the fourteen-month period of interim rule that followed, Touré and his transitional Committee for the Salvation of the People (CTSP) took a number of important steps toward developing a democratic state, such as the organization of a national conference to discuss and organize the transition to democracy,

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[447]. Ibid.
[448].Rosa De Jorio , Supra Note. 113.
[449].Managing the DamageSupra Note. 111.
[450]..Alan Bryden: Challenges of Security Sector Governance in West Africa Geneva Centre for the Democratic Control of Armed Force (DCAF) LIT. p . 186 Available at: www.dcaf.ch/content/download/.../bm_WestAfrica_bryden_en.pdf. , accessed on 10/02/2012.

and the coordination of the first multiparty elections (1992); then CTSP appointed a civilian led government and national conference held in August 1991 produced a draft constitution (approved in a referendum January 12, 1992), a charter for political parties, an electoral code and Political parties were allowed to form freely as well.[451] Between January and April 1992, a president, National Assembly, and municipal councils were elected andMali's first democratic elections signaled the victory of ADEMA and the election of ADEMA's candidate Alpha OumarKonaré inaugurated as the president of Mali's Third Republic On June 8, 1992.[452]

In 1997, attempts to renew national institutions through democratic elections ran into administrative difficulties, resulting in a court-ordered annulment of the legislative elections held in April 1997, nonetheless, the exercise demonstrated the overwhelming strength of President Konaré's ADEMA party, causing some other historic parties to boycott subsequent elections.[453] President Konaré completed his second and final term in June 2002 and he stepped down after his constitutionally mandated limit of two terms and did not run in the 2002 elections.[454]

Following President Konaré's final term of presidency, AmadouToumaniTouré (popularly known as ATT) reemerged again as a civilian. ATT, running as an independent and leveraging his reputation as Mali's "soldier of democracy," won the presidency in a runoff against the candidate of ADEMA, which had been divided by infighting and suffered from the creation of a spin-off party, the Rally for Mali.[455] The 2002 election was a milestone, marking Mali's first successful transition from one democratically elected president to another, despite the persistence of electoral irregularities and low voter turnout, AmadouToumaniTouré elected Mali's new presidentthat were marred with fraud allegations.[456] This first democratic transition between civilian leaders in Mali politics depicted Mali's growing reputation of democratic rule.

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451. Rosa De Jorio , Supra Note. 113. p.831

452. Peter J. Schraeder:*Nordic Journal of African Studies (2011)* Traditional Conflict Medicine?Lessons for Putting Mali andOtherAfricanCountries on the Road to Peace.Loyola University, United States of America.Available at: www.njas.helsinki.fi/pdf-files/vol20num2/schraeder.pdf, accessed on 10/07/2012.

453. Ibid.

454. Rosa De Jorio , Supra Note. 113.

455. Ibid.

456. Athina W. Tesfa-Yohannes,Independent State of Azawad: Africa's Newest Country?(2012). Available at:

Though this flourishing Mali's democratization process,Mali has been faced with the worst crisis that has questioned both the integrity of its territory as well as the 20 years of political stability. This is because in 2011 regional fears of a new Tuareg insurgency aroused in Mali and Niger with the flight of thousands of Tuaregs from Libya following Qadhafi's fall. [457] Tuareg combatants, some of whom had fought in Qadhafi's military or looted military stocks during Libya's conflict carried heavy weaponry back into Mali, in the same year, they joined with other former rebels to form a new force, the National Movement for the Liberation of Azawad (MNLA), which claimed to be fighting for a pan-ethnic independent state in the north.[458] The term Azawad traditionally referred to the vast plain north of the Niger between Timbuktu and the town of Bourem northwest of Gao, but gradually expanded to mean the entirety of northern Mali by assorted rebel outfits fighting there in the first half of the 1990s and letter on, Tuareg elders penned aletter to Paris petitioning French administrators for an independent Tuareg state from what was then a constituent part of French Sudan.[459]

Tuareg insurgency began in 1990 when these separatists attacked government buildings around the region of Gao, then the Malian Army's reprisals led to a protracted armed conflict.[460] The conflict relented and died down after Alpha Konaré formed a new government and made reparation in 1992, and also Mali created a new self-governing region, the Kidal Region, and provided for greater Tuareg integration into Malian society and in 1995, moderates on both sides negotiated a peace settlement and this agreement ended the First Tuareg Rebellion and promised the repatriation of Tuareg communities forced into resettlement camps in the south of the country and opportunities for Malian Tuaregs to join the central government in Bamako. [461]

Even though these long lasting peace processes, the dispute between Tuareg and the Malian government not yet resolved. Rather On 17 January 2012, Tuareg rebels of the National Movement for the Liberation of Azawad launched an offensive against the Malian army to

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www.bilgesam.org/en/index.php?option=com_content&view, accessed on 10/12/2012.

[457].Alexis Arieff,Crisis In Mali:Congressional Research Service7-5700. Available at: www.crs.govR42664Crisis InMaliCongressional Research Service., accessed on 10/12/2012.

[458]. Ibid.

[459].Derek Henry Flood: Between Islamization and Secession: The Contest for Northern , 2012 : Available at: www.ctc.usma.edu/.../between-islamization-and-secession-the-contest, accessed on 10/23/2012.

[460]. K o f i a n n a n , Supra Note.112.

[461]. Ibid.

secure independence of the north, these armed groups committed serious infringements of international humanitarianlaw by executing the soldiers they caught in combat, then to retaliate, the Malian army responded by bombingindiscriminately the civilian population.[462]

The major cause of this crisis in northern Mali is formed from a decades old separatist sentiment of the KelTamasheq (the anonym used by Tuaregs and other Tamasheq-language speakers) that stems from economic inequality, neglectful development of the north by southern elites and perceptions of ethnic differences, while external factors in the conflict such as Libyan arms and the influx of notorious Algerian jihadist actors have brought the conflict much international attention, it is also important to note that highly localized economic and ecological factors helped the fighting come to fruition[463].

Furthermore, northern Mali has been weakened by several factors over the years, in particular: the development of all kinds of trafficking (drugs, trade of transnationalmigrants, weapons, vehicles, cigarettes); and the presence of Al-Qa'ida in the IslamicMaghreb (AQIM) who transformed certain areas of the region into a safe haven where thesegroups hold hostages.[464] The abandonment of this region has bred frustration among the populations in the North and has continued to feed desires of rebellion and autonomy, even independence amongst some Tuareg movements.[465] The Tuareg population living in Mali, represents approximately one-third of the population were motivated toward rebellion because of unfulfilled promises by the government in Bamako to provide the derelict North with necessary investment. [466]

In January 2012, a new rebellion was launched under the leadership of two armed groups made up, in particular, of the heavily armed Tuareg fighters and AnsarEddin, a week later, whilst this new military power was contested both nationally and internationally, the armed groups seized the whole of Northern Mali in just a few days, and currently Northern Mali is entirely controlled

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462. Tesfa-Yohannes, Supra Note 126.

463. Rosa De Jorio , Supra Note. 113

464. The Tuareg Revolt and the Mali Coup.Available at http://www.foreignaffairshouse.gov/ or http://www.gpo.gov/fdsys/, accessed on 10/11/2012

465. Ibid.

466. PISM/ the Polish Institute of International Affairs, Mali's Political Crisis and Its International Implications. Availableat: www.mercury.ethz.ch/.../Bulletin+PISM+No+53+(386)+May+22+2012, accessed on 10/22/2012.

by armed groups, some of which seek to impose, through use of force, new behaviors based upon their fundamentalist interpretation of Islam.[467]

The objective of the Islamists is to apply Islamic law in the states of the region, where as the Tuareg represent a movement that clings to a national, not religious, identity, strongly impregnate with the values of democracy and secularization, consistent with a patriarchal society that practices a moderate Islam, as a result of this motive, Places of Christian worship have been destroyed, pushing Christian populations to leave the region and some people have been accused of failing to comply with this way of life and have been punished, sometimes resulting in their death.[468]

The Tuareg fighters released the photographs of the corpses of Malian soldiers' which showed their hands tied behind their backs, this Provoked anger among their families and resulted in protest in Bamako on the 1 and 2 February 2012, and to retaliate this act,demonstrators looted and destroyed houses and properties belonging to Tuaregs and other ethnic groups targeted because of their lighter skin color, including Arabs and Mauritanians living in the capital, without the Malian security forces intervening to defend these people.[469]Whilst the rebellion continued to gain ground in the North, On March 21, 2012, just a month before the election, mutinying Malian soldiers displeased with the management of the Tuareg rebellion, attacked several locations in the capital of Bamako, including the Presidential Palace, state television, and military barracks, then the soldiers led by, Captain AmadouHayaSanogo formed the National Committee for the Restoration of Democracy and State(CNRDR), and declared the following day that they had overthrown the government of President AmadouToumaniTouré's.[470]

[467]. Rosa De Jorio , Supra Note. 113.

[468] .Forum for Another Mali (FORAM):MALIThe story of a planned re-colonization.Available at: www.frantzfanonfoundation-fondationfrantzfanon.com/.../Forum-for-Anot, accessed on 10/27/2012.

[469].Xcroc:Analysis Of The Coup In Mali. Available at: www.AFRICOMcrossedcrocodiles.wordpress.com/2012/.../28/analysis-of-the-coup-in, accessed on 11/01/2012.

[470].Andrew McGregor: Implications of the Military Coup in Bamako, March 23, 2012. Available at. http://www.foreignaffairs.house.gov/ or http://www.gpo.gov/fdsys/, accessed on11/01/2012.

This marked a major setback for Mali's encouraging democratic process, in which the Malian president was due to step down following presidential elections that were supposed to take place on 29 April 2012.The deposed Malian president AmadouToumaniTouré (who ironically rose to power in Mali's 1991 coup d'état) has taken up residence in Senegal, in exile since his resignation in mid-April 2012. [471] Following the coup, the coup makers suspended the Constitution, arrested several political leaders and imposed a curfew and on 27 March the CNRDR's attempt to institute a new constitution failed, eventually leading to the restoration of the 1992 Constitution.[472]

Thus, the country's political leadership became uncertain and disputed since a military coup overthrew a democratically elected government in the capital, Bamako. Contrary to the proclaimed objective of creating momentum against the Tuaregrebellion, the coup created a golden opportunity for the MNLA to achieve its military objectives with very little effort.[473]The coup removed a legitimate, albeit ineffective, political leadership and failed to deliver any meaningful political leadership that could effectively replace the previous administration and also the coup divided Mali's military establishment into two camps, Tuareg and Islamist rebel groups taking control of the North, and the joint junta-new civilian government struggling to unify the country.[474] Thus, after enjoying twenty years of constitutional democracy, Mali clearly fell under the control of a group of middle-ranking soldiers.

Clutching the opportunity of the disorganization generated by the coup, the armed groups of the MNLA and AnsarEddin seized the three main cities in the North of Mali (Kidal, Gao, and Timbuktu) at the end of March, as a result of this security vacuum, Salafist groups outflanked the Tuareg, imposed a hard-line interpretation of sharia and provoked international outrage by desecrating historic mosques and tombs of importance to Sufis.[475] On April 5, 2012, after the capture of the town of Duwenza, the National Movement for Liberation of Azawad, or the MNLA, said that it had accomplished its goals and called off its offensive, the following day, it

[471]. Rosa De Jorio SupraNote113.
[472].PSC Report ProgrammeInstitute for Security Studies, Addis Ababa.p.7. Available at: www.operationspaix.net/.../19_en~v~Rapport_sur_le_CPS_-_No__4, accessed on 11/05/2012.
[473]. Ibid.
[474]. Mali: Five Months of Crisis Armed Rebellion and Military Coup Amnsty International, Amnesty International Publications 2012. P.8.
[475]. Kofiannan, SupraNote.112

proclaimed independence of their homeland, Azawad, comprising the territories of all parts of Northern Mali (which covers an estimated 2/3 of Mali) they had seized from the Bamako government.[476]

Though African Union immediately condemned the declaration of the independence Azawad,it had no impact on the ground because soon after the declaration of the independence of Azawad, Ansar Dine rapidly sidelined the MNLA, taking control of several northern towns and imposing hard-line Islamic law, however, their conflicting goals- the MNLA's aspiration is the establishment of an independent Azawad state while AnsarDinehas stated that their objective is to introduce sharialaw throughout Mali- led to abandonment of a planned merger.[477]

Though, these fighting groups scrambling northern Mali as a result of security vacuum, the military junta increasingly isolated on the diplomatic front was compelledto sign, on 6 April 2012, a framework agreement under the aegis of ECOWAS.[478]Thisagreement provides for the return to constitutional order and establishes a transition period headed by a civilian government pending a presidential election, however, this agreementalso gives the head of the junta, Captain Sanogo, an important role in certain key aspects ofthis process, in particular in the appointment of members to key posts in the transitionalgovernment, which is contrary to the charter of Democracy, Election and Governance of African Union.[479]Despite the appointment of an interim Head of State and Prime Minister, mid-April 2012,the new government remains largely under the influence of the military putsches and the lattercarried out a wave of arrests of political leaders, beginning 18 April 2012, and have rejectedthe transitional period of twelve months as agreed by the ECOWAS Heads of State.[480] Though all of these people have been released following the framework agreementsigned 6 April 2012, under the aegis of ECOWAS, some of them, including ModiboSidibe,former Prime Minister, re-arrested as of 16 April 2012.[481]

476. Tuareg Revolt, SupraNote.134
477. Ibid.
478. The Polish Institute, SupraNote.136
479. African Charter on Democracy, Elections and Governance adopted on30 January 2007,Addis Ababa, Ethiopia..Art.25(4)
480. The Polish Institute, SupraNote.136
481. Ibid.

In mid April the junta agreed with ECOWAS negotiators that they would step down from power in return for the end of sanctions, giving power to transitional government led by parliament speaker DioncoundaTraoré,then after, both Touré and coup leader AmadouSanogo formally resigned and ceded power to an interim civilian government, which in turn, formed a new government of national unity in August.[482]

The nation of Mali currently divided into two parts: Southern Mali and Azawad, however, one cannot really assert that there is a functioning united government in any of the two territories as there is tight competition for control among rebel groups in Azawad and among coup leaders and politicians in the South of a once democratically sovereign Mali.[483] Thus, currently Mali finds itself disintegrated between north and south with different motives that put at risk its sovereignty. The downfall of Mali could have a negative impact on the future of Mali as well as the entire Sahel region of Africa.

4.3.2 International, Regional and Sub - Regional Organizations Response to Mali Coup Detat

4.3.2.1 UN Response to Mali Coup Detat

The Mali coup d'état, which overthrow a democratically elected government, elicited condemnation from the international community. Specifically, in separate statements and communiqués, the UN, AU and ECOWAS called for the immediate restoration of constitutional rule and reminded the National Committee for Rectification of Democracy and Restoration of the State(CNRDRE) of its responsibility for the life, safety and security of the President and members of his government, the population, as well as the respect for institutions.[484]

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[482]. The Coup In Mali, SupraNote.139

[483].Think Security Africa: Conflict Northern Mali20/04/2012 Spotlight on the conflict in Northern MaliConflict in Northern Mali. p.3. Available at www.thinksecurityafrica.org/.../Spotlight-on-the- conflict- in- ,accessedon 11/20/2012.

[484].A.U. P.S.C. *Communiqué* of the 315th Meeting, Doc. PSC/PR/COMM(CCCXV) (23 March 2012.); ECOWAS Communiqué N°: 074/2012 'ECOWAS Reaction to the Coup D'état in Mali, 22 March 2012. Available atwww.ecowas.int ; and United Nations S/2012/510 Security Council Distr.General 29 June 2012 .Report of the Secretary-General on the activities of the United Nations Office for West Africa.Available at: www.securitycouncilreport.org/.../UNOWA%20S2012%20510.pdf.p.6, accessed on 11/11/2012.

As the security threats in the Sahel continue to emerge and manifest in different and multiple forms, there is urgent need for collaborative engagements between and among the above mentioned and other international, regional, sub-regional and other stakeholders of the crisis. As the guarantor and harbinger of world peace, the UN has the primary responsibility to address emerging threats in the Sahel specifically in Mali. Both Article 52(1) of the UN charter and Article 17(1) of the Protocol Relating to the establishment of the Peace and Security Council of the African Union stress on collaboration in the pursuit of global peace and security.[485] On its part, Article 3(d) of the 1999 ECOWAS protocol for Conflict Prevention, Management, Resolution, Peacekeeping and Security expressly proclaims the organization's commitment to strengthen cooperation in the areas of conflict prevention, early warning, the control of cross border crime, international terrorism and proliferation of small arms and anti-personnel mines.[486]

These legal frameworks provide the basis for collaborative engagements between ECOWAS and AU on the one hand, and between the two and UN on the other hand, to address both old and emerging security threats that have the tendency to undermine peace and security in the Sahel and particularly in Mali. But more important is the ECOWAS collaboration with the AU as these organizations have the spatial control over the broader Sahelian region. Restoring democracy to Mali will be the first of many steps to bring a semblance of stability to the Sahel region as well as to the continent at large.

Taking in to account the above mentioned international ,regional and sub regional responsibility to prevail peace and security and combatng against unconstitutional change of government, thefollowing topic will analyse the role played by the UN, AU and ECOWAS in restoring constitutional order in Mali.

Regarding UN on the crisis in Mali, it has beenissued a statement on 22 March 2012 that the UN Security Council (UNSC) condemned the forcible seizure of power from a democratically elected government and demanded the immediate restoration of constitutional rule and the democratically elected government in Mali and on 4 April 2012, the UNSC issued a presidential

[485]. United Nations charter, 1945, Art.52(1) and the AU Protocol on the establishment of the Peace and Security Council adopted in Durban, South Africa on July 9, 2002Art. 17 (1).

[486]. ECOWAS Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 1999.Article 3(d)

statement strongly condemning the situation in Mali, furthermore, the UNSC strongly condemned the continued seizure of Malian territory by rebels in the north and on 18 April, the Secretary-General of the UN, Ban Ki-Moon, expressed concern over arrests of high-ranking public officials in Mali and called for the immediate release of all those arrested, he also called on the junta to refrain from any further actions that might undermine the effective restoration of constitutional rule in the country.[487]

The ECOWAS Commission officially requested United Nations assistance to support ECOWAS planning efforts to deploy the Standby Force on 31 May 2012, on the same vein,On 7 June, ECOWAS made a formal request to the UN Security Council to authorize the deployment of a stabilization force of 3,300 personnel to recover northern Mali in the event that negotiations with armed groups failed.[488] Delaying its response, the UN Security Council in its resolution2056 of 5 July 2012, asked for details ofclarification about the objectives, means and modalities of the envisaged deployment and other possible measures for the crisis of Mali.[489] Despite numerous planning meetings, ECOWAS has not yet succeeded in preparing a strategic concept for the resolution of the crisis in Mali that is satisfactory to the UN[490]

On 12 October, the United Nations Security Council unanimously, under Chapter VII of the UN Charter, passed a Resolution 2071, presented by France just like Resolution 2056, approving an African-led force to assist the army of Mali in combating the Islamist militants, the resolution gave 45 days for detailed and actionable recommendations for militaryintervention which would be drafted by ECOWAS and the African Union and also therecommendation has to inculcate the means and modalities of the envisaged deployment, in particular the concept of operations, force generation capabilities, strength and financial costs, further the Resolution also asks the UN Secretary General immediately to provide military and security planners to assist joint ECOWAS and African Union planning efforts.[491]

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[487].*UN Security Council Presidential Statement on Mali.*Availableat.www:usun.state.gov › the Briefing Room › Statements › 2012 › April.accessedonon 11/11/2012.
[488]. S. Rosa De Jorio, upraNote.121
[489]. Security Council resolution 2056 (2012) on the situation of Mali. Available at:www.unhcr.org/refworld/category,LEGAL,,,MLI,505089412,0.html accessed on11/11/2012.
[490]. S. Rosa De Jorio, SupraNote.121
[491]. Security Council Resolution 2071 (2012). Available At:

But, the response of ECOWAS was thinly veiled comment which lacks detail response to the UN's concern on Malian crisis, however, the problems ECOWAS faced in submitting a convincing plan to the UN Security Council are perhaps not solely due to its weakness in terms of planning and the complex nature of the task, but also to the lack of coordination and collaboration with its partners, particularly the AU.[492] .

Though all these rivalry and misunderstanding among the international, regional and sub regional organizations, UN Security Council has to coordinate the regional organizations that enables to discharge its responsibility in accordance to Chapter VII of the UN Charter. Because the crisis in Mali is not only the problem of the Sahel region and the continent of Africa at large, but also the major threat of the peace and security of the whole world.

4.3.2.2 AU and ECOWAS Response to Mali Coup Detat

The prevalence of anarchism in Mali became great concern to African Union. Because of this threat to the peace and security of the continent, On 23 March2012, the African Union Peace and Security Council strongly condemned the unconstitutional takeover of power by the army in Mali and it stressed that this coup d'état, coming just before the presidential election scheduled for 29 April 2012, constituted a serious setback for Mali and for the democratic processes taking place on the continent, then the council decided pursuant to the relevant AU instruments, to suspend, with immediate effect, the participation of Mali in all the activities of the African Union until the effective restoration of constitutional order.[493]

However, the situation in Mali depicted somehow gradual change and the AUPSC welcomed the encouraging developments in Mali relating to the restoration of constitutional order, in particular the signing, on 6 April 2012, of the Framework Agreement on the Implementation of the Solemn Commitment of 1 April 2012, furthermore, the Council welcomed the inauguration of the acting

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www.un.org/News/Press/docs/2012/sc10789.doc.htm, accessed on 11/23/2012.

[492]. ECOWAS Peace and Security Report Mali: making peace while preparing for war. Available At: www.issafrica.org › ... › Ecowas Peace And Security Report, accessed on 11/26/2012.

[493].A.U. P.S.C. *Communiqué* Supra Note 154, para9.

President, Mr. DioncoundaTraoré, and called upon all the actors concerned to implement scrupulously the other provisions of the Framework Agreement.[494].

At its 319th meeting the PSC after it has been reconsidered the situation in Mali, rejected the declaration of independence made by the National Movement for the Liberation of Azawad by the (MNLA), which is null and void, and the Council further stressed that the occupation of any part of the Malian territory by armed criminal and terrorist groups is a threat to international peace and security, besides the Council strongly condemned the taking of hostages by terrorist groups, in particular the abduction of diplomats of the Consulate of Algeria in Gao, Mali.[495] The Council also concerned about the recent arrests of political and military personalities, it recalled the imperative for the scrupulous respect for civil liberties and strongly condemned all attempts to intimidate and harass political and other personalities and then the Council demanded that the "National Council for the Recovery of Democracy and the Restoration of the State" (CNRDRE) to refrain from any interference and any role in the political life of the country, given the need for strict compliance with the prerogatives of civil institutions inherent in the constitutional order.[496]

The denunciation of African Union and its call for the restoration of constitutional order could not deter the crisis in Mali, rather instability and theTuarege rebellion breakout in Mali.[497]The AU Commission issued a communiqué on 18 January 2012, in this regard the communiqué condemned the Tuarege rebel attacks and the unjustified use of violence and expressed its support for the efforts of the Malian government, similarly, on 21 March 2012, the Commission issued a press release condemning 'the reprehensible acts of elements of the Malian army'. [498]

Acting on its mandate under the PSC Protocol, the Council after it has been rejected all delaying tactics of the perpetrators of the coup d'état, imposed sanctions including travel ban and asset freeze, against the leader and members of the junta, as well as against all individuals and entities

[494].A.U. P.S.C. Press Statement of the 317th Meeting, Doc. No. PSC/PR/BR/3.(CCCXVII), (Apr. 12,2012)
[495]. Ibid.
[496]. A.U. P.S.C. *Communiqué* of the 319thMeeting,para 5, Doc. PSC/MIN/ COMM./2.(CCCXIX)),(Apr. 24, 2012)
[497]. Peace and Security Council Report. Available At: www.operationspaix.net/DATA/RAPPORTCPS/1_en~v~Rapport_sur_le_CPS_-_No__34.pdf, accessed on 11/22/2012.
[498]. Ibid.

contributing, in one way or another, to the maintenance of the unconstitutional status quo and impeding AU and ECOWAS efforts.[499] Continuing with the longstanding policy of the AU against undermining the territorial integrity of African states, the Council declared null and of no value all the consequences that the armed rebel groups sought to bring about from the forcible occupation of a part of the territory of Mali, furthermore, the Council requested the Commission, in close collaboration with the ECOWAS Commission, to establish the list of the individuals and entities concerned, for immediate transmission to all AU Member States and partners.[500]

AUPSC, further accused the members of the junta personally and made them collectively responsible for the actions that they have taken, as well as for the security and safety of all political personalities, including the legitimate President, AmadouToumaniTouré, and other opponents to the coup d'état arrested since the unconstitutional change of 22 March 2012, in accordance with Article 25(5) of the African Charter on Democracy, Elections and Governance.[501] The AUPSC make liable the perpetrators of unconstitutional change of government to prosecution and finally, the Council demanded the restoration, without further delay, of constitutional order and the resumption of the normal functioning of the republican institutions on the basis of the relevant provisions of the Malian Constitution.[502]

All these efforts of the AUPSC would not able to deter the turmoil in Mali. Rather the crisis in Mali highly aggravated and arrested several Malian political and military high level personalities.[503]

The Chairperson of the Commission of the African Union (AU), Jean Ping, who continues to follow closely the developments in Mali, deeply concerned about this arbitrary arrest and strongly condemned the illegitimate detention of these personalities in flagrant violation of their most basic rights, he demands the immediate release of the detained personalities and respect for their physical integrity and dignity and also the Chairperson of the Commission considers that

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[499]. A.U. P.S.C. *Communiqué* of the 316thMeeting,para 4, Doc. PSC/PR/COMM.(CCCXVI),(Apr. 3, 2012)
[500]. Ibid, para 6.
[501]. Ibid.
[502]. Ibid, para 7,8.
[503]. Press Release the African Union Calls for the Immediate Release of the Malian Personalities Arbitrarily Detained Addis Ababa, 18 April 2012.Available at: www.ps.au.int/en/sites/default/.../com%20auc%20mali%2018-04-2012.pdf, accessed on 11/22/2012.

these acts, at this critical juncture in the history of Mali, contribute to the maintenance of an atmosphere detrimental to the process for the effective return to constitutional order.[504] On the basis of the spirit and letter of the Framework Agreement of 6 April 2012, as well as to the search of the consensus necessary for the success of the efforts aimed at enabling Mali to meet the serious challenges facing the country, in particular the reestablishment of State authority on its entire territory.[505]

On the other hand, ECOWAS after it has made references to the provisions of the African Charter on Democracy, Elections and Governance and the ECOWAS Supplementary Protocol on Democracy and Good Governance, which rejects any unconstitutional change of government, including seizure of power by force, Unequivocally stated that it would not tolerate any attempt to take power by unconstitutional means in Mali, as a result, ECOWAS strongly condemned the misguided actions of the mutineers and warns that it will not condone any recourse to violence as a means of seeking redress.[506]

The instability resulting from the outbreak of the armed rebellion in northern Mali early in January 2012 and the subsequent military coup d'état against former President Touré on 22 March 2012 were the primary focuses of the efforts of ECOWAS. On 29 March, ECOWAS leaders, in the course of an emergency session, decided to suspend Mali's membership in the Community and to impose sanctions against the military junta should it fail to restore constitutional order by 2 April.[507] The President of Burkina Faso, BlaiseCompaoré, was appointed as ECOWAS mediator for the crisis in Mali and the ECOWAS Commission was requested to place the ECOWAS Standby Force on alert.[508]

Following the failure by CNRDRE to comply with the demand of ECOWAS for the restoration of constitutional order, the Community decided to enforce the sanctions regime agreed upon on 29 March and urged the junta to fully relinquish power to legitimate authorities in conformity

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[504]. Ibid.
[505].Ibid.
[506]. ECOWAS Final *Communiqué* on Mali. Available At: www.ecowas.int/publications/en/communique_final/session_extra/comfinal26042012.pdf, accessed on 11/26/2012.
[507]. Ibid.
[508]. Ibid.

with the 1992 Constitution.[509] The sanctions inculcate: suspension of Mali's membership of ECOWAS, travel ban on members of the CNRDRE and their associates, the recall of ECOWAS Ambassadors from Mali, and the closure of the borders with ECOWAS Member States.[510]

Following these serious sanctions and the mediation efforts of ECOWAS, CNRDRE agreed to sign a framework agreement on 6 April, which led to the resignation of former President Touré and the designation of the Speaker of the National Assembly, DioncoundaTraoré, as interim President for a 40-day period in accordance with the Constitution.[511]The framework agreement also provides that the transitional organs are in charge of conducting the transition, last for 12 months, until the organization of the Presidential election- should be held by the end of April 2013- based on a duly revised voter registration list that is accepted by all and it also contains provisions to enable elections to be held in good conditions throughout the country.[512] The signing of the 6 April framework agreement prompted the immediate lifting of ECOWAS sanctions and on 12 April, Mr. Traoré was sworn in as interim President; on 17 April, CheickModiboDiarra was designated Prime Minister; and on 25 April, a new Cabinet was formed.[513]

Despite these positive developments towards the restoration of constitutional order, the Framework Agreement signed between the ECOWAS appointed mediator, BlaiseCompaore, the president of Burkina Faso and CNRDRE left out local political actors who hitherto have been the bedrock of democracy over the last two decades and also, the failure to clearly define the role and place of the military junta during the transition served to complicate the security situation, giving the CNRDRE the power to undermine the interim political arrangement, for instance, Capt. AmadouSanogo, leader of the junta, who has been recognized by ECOWAS as a former Head of State, continuously exploited the media space, posing a threat to the political process and this consequently prompted ECOWAS to threaten reinstatement of targeted sanctions.[514]

509. Ibid.
510. Ibid.
511. ECOWAS Report. Supra Note 162.
512. Ibid.
513. Ibid.
514. Ibid.

Though ECOWAS threat of sanctions, the junta's interference continues to be felt in the transitional administration led by the speaker of the National Assembly, DioncoundaTraore, which contravenes Article 1(e) of the ECOWAS Protocol on Democracy and Good Governance that bars serving members of the armed forces from engaging in politics, thus, the junta's interference frustrated ECOWAS' mediation efforts, perhaps the seeming breakdown of ECOWAS' effort to broker a peace deal through mediation prompted it to reconsider military action to curb the insurrections in the north and restore constitutional order.[515] In the meantime, the military junta continued to interfere in the transition process through arbitrarily arresting several prominent Malians on a few occasions, for instance, two ex-presidential candidates, SoumaïlaCissé and ex-Prime Minister ModiboSidibe, along with several high ranking military officers, including the former Minister of Defence.[516]

Against this background, on 26 April the Heads of State of ECOWAS decided to extend the duration of the transitional period and the term of the transitional authorities by 12 months, during which presidential elections were expected to be organized and extend the mandate of the transitional organs, and the Conference also demanded the return of members of CNRDRE to the barracks to concentrate on their core duties of defending the territory of Mali and the leaders of the sub region also instructed the Commission to commence, with immediate effect, the deployment of the ECOWAS Standby Force in Mali with the mandate to assist Mali in regaining its unity and territorial integrity.[517]

On 28 April, during a press conference, the CNRDRE firmly rejected the declaration of ECOWAS, which they perceived as a betrayal, though the dialogue was scheduled to continue in Ouagadougou, Burkina Faso, between the junta and the mediation of ECOWAS, on 30 April, fighting erupted in Bamako in what appears to have been an attempted counter coup by a military faction supporting ATT.[518]

Following the rejection by CNRDRE of the 26 April ECOWAS decisions, as well as clashes in Bamako among security forces, the ECOWAS Heads of State reconvened at an extraordinary

[515]. ECOWAS Final *Communique,*Supra Note 176.
[516]. Tuareg Revolt, SupraNote134
[517]. ECOWAS Final *Communique,*Supra Note 176
[518]. Tuareg Revolt ,SupraNote134

summit held in Dakar on 3 May. At this summit, the ECOWAS Commission was requested to prepare for the deployment of the ECOWAS Standby Force, which should be carried out only upon the formal request of the Malian authorities, and to define, in consultation with the Malian authorities the modalities of military cooperation between the ECOWAS Standby Force and the Malian army, however, this proposal found no support amongst the Malian junta, whose members questioned the neutrality of ECOWAS authorized mediators from Burkina Faso and the Ivory Coast who were involved in negotiations between the CNRDRE and President Touré. [519]

In mid-September, the deployment of an ECOWAS mission for the re conquest of the north seemed unlikely as the Malian military declared that they would only allow a smaller regional force, 600 to 800 troops, to support an exclusively Malian-led intervention, despite the less than enthusiastic response from Malian state actors, ECOWAS leaders have been attempting to cobble together a force comprised of 3,270 proposed troops from Niger, Nigeria, and Senegal that could aid Malian regular forces in retaking the lost northern regions. [520] The Malian government, though reluctant to accept this proposed troops by ECOWAS, sent a formal request for help to ECOWAS as well as the UN Secretary General Ban Kimoon, but ruled out deployment of foreign military troops to recover the north, nonetheless, on 23 September, the Malian government and ECOWAS finally came to an agreement on mission terms after the failure of talks with Islamist groups. [521] The agreement reportedly entails the deployment of ECOWAS troops along the Malian army and the establishment of ECOWAS headquarters in Bamako, however, Uncertainty remains as to whether an ECOWAS mission will be approved by the UN Security Council within the upcoming few weeks. [522]

In light of the continued opposition of CNRDRE to the ECOWAS decisions, an extraordinary meeting of the ECOWAS Mediation and Security Council was held at the ministerial level in Abidjan on 19 May and demanded CNRDRE to comply with all ECOWAS decisions and respect the 12-month transitional process and transitional authorities, however, shortly after the Council

[519]. Polish Institute, SupraNote.136.
[520]. Rosa De Jorio, SupraNote.121
[521]. Analysis Of The Coup, SupraNote.139
[522].Ibid.

meeting, Mali's President Traoré was attacked by pro-junta protesters in his office on 21 May, a development indicating the continued fragility of the transition process. [523]

ECOWAS's effort to resolve the political impasse in the southern Mali and brokering an agreement between the interim government and Malian-led armed groups in the north faced numerous problems such as, Mali's interim leaders issued mixed messages with regard to their attitude toward an ECOWAS or other foreign deployment and the rejection of military intervention by the junta; a delayed confronting armed groups in the north, including terrorist actors, could enable them to consolidate or expand their hold, potentially into neighboring states; and ECOWAS's effectiveness has been further undermined by a lack of consensus among its member states on the appropriate course of action in Mali, for instance, Senegal's newly elected President, MackySall ,suddenly withdrew from the proposed coalitionof ECOWAS peace keeping force in reaction to Mali crisis after he has been threatened with reprisal attacks by MUJAO. [524]

Furthermore, many Malians appear to object to outside interference in their domestic affairs and perceive ECOWAS as having acted unilaterally to install Interim President Traoré, who is closely associated with the unpopular former ruling elite. [525]

The other issue with regard to the Malian crisis is the unilateral act made by member states of African Union. Though the above mentioned collective decisions made by AU and ECOWAS to redress constitutional order in Mali in accordance to the African Union Constitutive Act, AUPSC Protocol and the Rules and Procedure of the African Union Assembly as well as ECOWAS's Supplementary Protocol on Democracy and Good Governance, there is violation of these legal instruments of the Union made by a member state. In accordance to these legal instruments, condemning or denying recognition is the jurisdiction of the Chairperson of the Assembly and the Chairperson of the Commission on behalf of the Union. Furthermore, the Union has the authority to intervene in member state by virtue of article4 (h) of the Constitutive Act. However,

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[523]. United Nations S/2012/510 Security Council Distr: General 29 June 2012 Original: English 12-38594 (E) 030712 *1238594* Report of the Secretary-General on the activities of the United Nations Office for West Africa.Available at: www.securitycouncilreport.org/.../UNOWA%20S2012%20510.pdf, accessed on 11/27/2012.

[524].Rosa De Jorio, SupraNote.113.

[525]. Alan Bryden, SupraNote.120.

the Egyptian President Mohamed Morsi says he is opposed to any military intervention in Mali and has called for a diplomatic solution to the crisis in the West African country, the president made this remarks at a meeting with African Union (AU) Commission Chairperson NkosazanaDlamini-Zuma in Cairo.[526] In this regard, is there any possible measure made by the Union on the Egyptian President's unilateral reaction against the Union's legal regime? As far as the researcher is concerned, he has no any accessed information in this regard.

On the same issue of unilateral act , the Nigerian President Goodluck Jonathan condemned in strong terms that Malian rebel soldiers have ousted the country's democratically elected government of President AmadouToumaniToure, calling it "an apparent setback to the consolidation of democracy in Mali in particular and the African continent in general."[527] President Jonathan warned the coup plotters to allow the ongoing democratic process in the country to run its full course and not to do anything that would truncate the electoral process especially the presidential election slated for next month, and he also emphasizing that the Nigerian Government would never recognize any unconstitutional regime, the President urged that all governments in the Economic Community of West African States (ECOWAS), the African Union (AU) and the United Nations (UN) to roundly condemn andnot to recognise the obvious coup d'état in Bamako and further demand an immediate reinstatement of the government of President Toure and the continuation of the current electoral process.[528]Though the president condemns and denies recognition unilaterally, there is no jeopardy of any legal framework of AU. Rather his act was inconformity with thecommuniqués and statements made by the Union.

Currently, highly aggravated situation prevailed in Mali. On 9 January 2013, armed terrorist and criminal groups in northern Mali launched attacks against Malian government positions and this was a stark reminder of the dangers faced by the Malian state and the region as a whole in the continued activities of armed, terrorist and criminal groups in this region.[529]

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[526]. Morsi opposed to AU military intervention in Mali November 2012. Available at: http//www.com/middle-east/103079-morsi- opposed-to-au-military, accessed on 11/28/2012.
[527].Jonathan:Mali coup a setback to democracy . Available at: www.nigeriavillagesquare.com/mali-coup-a-setback-to-democra, accessed on 11/28/2012.
[528]. Ibid.
[529]. A.U.P.S.C. *Comminique* of the 353 Meeting,para 4, Doc No.PSC/AGH/COMM/2.(CCCLIII),(June 25, 2013)

The AUPSCstrongly condemned this renewed violence by armed groups and called on AU Member States, in line with the relevant decisions of the AUPSC and of the UN Security Council resolutions, to extend the necessary logistical, financial and capacity-building support to the Malian Defence and Security Forces.[530] In order to deter the armed terrorist and criminal groups in northern Mali, the deployment of the African-led International Support Mission in Mali (AFISMA) operation was approved by the AU PSC on 13 November 2012 and subsequently mandated resolution 2085 (2012) of the UN Security Council.[531]

Finally, after the AUPSC appreciated France, United Nations, the European Union and the international community that have stood with Mali at this trying moment, the council recalled the AUPSC, ECOWAS, and UN Security Council resolutions calling on Member States and various organizations to contribute actively towards the mobilization of adequate support for the Malian Defense and Security Forces and AFISMA.[532]

4.4 The Case of Mauritania

4.4.1 Overview of Mauritania's History Coup D'états

The Islamic Republic of Mauritania became a sovereign state on 28 November 1960, under the leadership of the young lawyer MoctarOuldDaddah, who enjoyed the support of the French colonial power against his internal political adversaries and the expansionist ambitions of neighboring Morocco.[533] Mauritania joined the OAU, which then caused Morocco to resign (Morocco did not recognize Mauritania until 1969) and at the Sub regional level, although Mauritania is geographically a part of West Africa, it is no longer a member of the regional bodies, namely ECOWAS, which was pulled out in December 2000. [534]

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530. Ibid, para 5.
531. Ibid.
532. Ibid, paragraphs 7,8,and 9.
533. BoubacarN'Diaye:Chapter 7 Mauritania. Available *at:* www.dcaf.ch/content/.../Chapter_7_EN-N_DIAYE_Mauritanie.pdf. *p.152,accessed on 11/28/2012.*
534. AyodeleAkenroye, ECOWAS and the Recent Coups in West Africa: Which Way Forward?. Available at:www.theglobalobservatory.org/.../278-ecowas-and-the-recent-coups, accessed on *11/28/2012*.

Mauritania has 3.2 million inhabitants of the Moslem faith and is made up of three ethno-cultural groups.[535] The first, the 'Negro-Mauritanians', is made up essentially of four sedentary ethnic groups (the Halpulaar, the Soninke, the Wolof and the Bambara), who live mainly in the South and in the West, in urban areas, which represent about one third of the total population regularly attempt to have their (non-Arab) cultural identity recognized and demand a more equitable share in political and economic power, from which they are almost totally excluded.[536]

The second group, the Arab-Berber nomads (also known as Beydane, Bithaanor 'white Moors') who dominate all institutions and exercise almost total monopoly over political and economic power live mainly in the North, centre and East of the country, these groups identify themselves mainly with the Arab world and insist on the Arab and Islamic nature of the country.[537] Over the years, this monopoly has enabled them to present Mauritania to the outside world as an exclusively Arab country; furthermore, they advocate a "Greater Morocco" policy.[538]

The third group, the Haratineand the Abeed, probably the largest, is made up of descendants of black African slaves and they identify themselves culturally and psychologically with their former Beydane masters with whom they share a language (Hassaniya, a dialect of Arabic) and the Arab-Islamic culture, as well as their tribal organization.[539] A notable recent development has been the emergence of Haratineson the political and social scene, despite the internal divisions that weaken them, their demand for a greater share of political and economic power has nevertheless remained fruitless, however, these divisions and the questions of coexistence that they raise, as well as the responses envisaged by different regimes continue to seriously affect the political evolution of the country, including with relation to all aspects of security sector management.[540]

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[535]. MAURITANIA, available at: www.infoplease.com › World › Countries › Mauritania, accessed on*11/28/2012*.

[536]. Mitchell Mackay, The Return of the Military Coup to West Africa: Available at:wiredspace.wits.ac.za/.../MA%20Research%20Report%20.p.18, accessed on*11/28/2012*.

[537]. Ibid.

[538]. Ibid.

[539]. BoubacarN'Diaye, SupraNote.203.

[540]. Ibid.

Starting from 1966, ethnic rivalries between the Arab- Berber and the Negro-African components of the population began to emerge.[541] The opposition, which had initially been harshly suppressed in response to the strike of miners in Zouérate in 1968, was finally appease when the Daddah's regime began to implement some of the reforms it had been demanding, such as the creation of a national currency, revoking the economic and cultural cooperation agreements with France, and nationalizing the iron mining company, Miferma, however, this single-party regime believed that Mauritania is unready for western style multi-party democracy, thus Daddah was reelected in uncontested elections in 1966, 1971 and 1976.[542]

Though this recurrently monopolized power by the regime of Daddah, he was overthrown and replaced by Colonel MaaouyaOuldSid'AhmedTaya on 12 December 1984, army chief of staff and a former prime minister and he remained in power for more than twenty years until he was overthrown on 3 August 2005 by a junta, the Military Council for Justice and Democracy(MCJD).[543] At the end of the 1980s Colonel MaaouyaOuldSid'AhmedTaya was compelled to begin a certain number of political reforms and on 12 July 1991 Col. MaaouiyaOuld Sid Ahmed Taya, who had been in power since December 1984, attempted to move towards democracy with the adoption new constitution instituting a multi-party system through referendum, then he won the elections that were organized the following year, however, it was generally considered to be fraudulent, and which was followed by days of bloodshed.[544]

The subsequent parliamentary elections, which were boycotted by the opposition, the president's Democratic and Social Republican Party (PRDS) won the majorit seats, with the remaining seats going to its allies and also on 3 April the PRDS, unsurprisingly, also won the senatorial elections, moreover, the president was again re-elected in 1997 under the same circumstances and with more than 90% of the vote, in presidential elections that were boycotted by the main opposition leaders.[545]

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[541]. Ibid.
[542]. Ibid.
[543]. StéphaniePézard and Anne-Kathrin Glatz:Arms in and around MauritaniaNational and Regional Security Implications,Geneva Switzerland(2010) p.7.available at, www.smallarmssurvey.org/.../docs/B.../SAS-OP24-Mauritania-EN.pdf, accessed on 12/02/2012.
[544]. Ibid.
[545].Ibid.

Furthermore, between 1992 and 2002 an acceptable civil status register and electoral infrastructure had been set up and this has enabled it to become a country that appears politically stable and that seems to be progressing economically, however, abortive coup attempt made in June 2003 led by a former army commander who had returned to civilian life, ex-Commander Salah OuldHanena, and served as a reminder that the relations between the army, society and politics have not yet become sufficiently stable and healthy.[546] The attempted coup of June 2003, led by officers who were mainly from the OuladNacertribe, highlights two main facts: the first is that a civilian, albeit a former soldier, can attempt a coup d'état and still obtain obedience from the army; the second is that the perpetrators of the coup, some of whom were arrested a year later, claimed to represent an embryo of brewing rebellion against the existing regime and in August 2004 another plot by the same group was foiled and some of its leaders and the man alleged to be the brain behind both coup attempts, Commander Hanena, were arrested in Nouakchott, though in the wake of these events many mid ranking and high-ranking officers were arrested, the malaise in the army was quite manifest and the president of the republic promised to improve conditions for the military.[547]

In-fighting among soldiers remains a reality, on 3 August 2005, a group of military officers headed by Colonel Ely Ould Mohamed Vall announced the overthrow of President MaaouiyaOuldSidi Ahmed Taya in a bloodless coup, while the President at the time of the coup in Saudi Arabia attending the funeral ceremonies for the late-King Fahd ben Abdel-Aziz.[548] President Mouaouiya Sid Ahmed OuldTaya has left Saudi Arabia but hasn't returned home, his presidential jet set down in Niamey the capital of Niger which is a neighbor of Mali which itself borders Mauritania and he became the guest of the Niger president MamadouTandja at the time of the coup.[549] This coup d'état brought new authorities into power, namely the chairperson of CMJD Colonel Ely Ould Mohamed Vall and a Government headed by Mr. Sidi Mohamed OuldaBoubacar, former Prime Minister and most recent ambassador to France prior to the change of government on August 3, 2005, and these military officers later organized a military council by the name of the Military Council for Justiceand Democracy (MCJD) to manage the

[546]. Ibid.
[547]. Ibid.
[548] . Alan Bryden,Supra Note.120. p.209
[549]. Bruce Maddy(2008),Mauritania's Military Coup:Domestic Implications and Regional Challenges. Available at: www.tau.ac.il/dayancenter/frameana.htm, accessed on 12/05/2012.

affairs of the state for a transitional period notexceeding two years, which will serve to institute a democratic and constitutional rule in Mauritania.[550]

The fact that the people of Mauritania took to the streets to celebrate the fall of the regime of President Taya combined with the fact that virtually all Mauritanian political and civil society organizations as well as foreign governments and organizations promptly supported the coup d'état are momentous.[551]The significance of the events that followed the August 2005 coup d'état stems from the fact that they signaled to the inauguration of a new era in Mauritania in which the people of Mauritania finally begin to experience life in a democratic system of governance that is regulated by a new legitimate and effective Constitution, then after, CMJD has certainly made tangible and commendable steps toward promoting the ideals of democracy in the country, that is, free and fair legislative and presidential elections are set for mid 2007 and the institutions that sustain any democratic movements have been supported.[552]

On 26 June 2006, in a referendum, Mauritanians overwhelmingly approved a new constitution which limited the duration of a president's stay in office, the leader of the junta, Col. Vall, promised to be abide by the referendum and relinquish power peacefully.[553] Then, in accordance to the promise of MCJD led by Colonel Ely Ould Mohamed Vall, legislative and municipal elections took place in November 2006 and January 2007 respectively, the 2007 election was the first Mauritania's fully democratic presidential election and this election effected the final transfer from military to civilian rule following the military coup in 2005 and this was the first time that the president had been elected in a multi-candidate election in the country's post-independence history, in other words, the 2007 election gave Mauritania a civilian head of state, Sidi Mohamed OuldCheikhAbdallahi, briefly making the country an international model of a peaceful transition to democracy.[554]

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[550] Ibid.
[551].Julius O. Ihonvbere, Towards a New Constitutionalism in Africa, Center for Development and Democracy, Occasional Paper Series No. 4. (London) April, 2000. Available at: www.kituochakatiba.org/index2.php?option=com...task., accessed on 12/07/2012.
[552]. Alan Bryden, SupraNote.120
[553]. BoubacarN'Diaye, SupraNote.203.
[554].Mauritania Facts. Available at: www.travelyourassoff.com/2012/.../mauritania-facts-national-geogra, accessed on 12/10/2012.

The 2007 election that brought Abdallahi to power were deemed to be free and fair, and heralded what seemed to be a new era in Mauritania's political development since Mauritanian independence in 1960.[555] Not only was Abdallahi the first democratically-elected leader of the state but he was also the first not to rely on the military as an insurer of his political power, however, support for Abdallahi had started to falter within parliament, as those Members of Parliament loyal to figures within the Mauritanian military establishment did not approve of new proposed military appointments by the President.[556]These new appointments would mean the axing of four top military commanders, including the Head of the Presidential Guard, General Mohamed Ould Abdel Aziz and then two weeks prior to the staging of the coup, the Mauritanian Parliament passed a motion of no confidence in the elected cabinet, leading some observers to suggest that a 'political coup' was staged prior to the military taking action.[557]

However, what had been perceived in 2007 election as the start of a new political era ended abruptly on 6 August 2008 in a coup d'état. On Wednesday 6th of August 2008, a group of high ranking military personnel, who were dismissed from their post earlier in the day, ousted the Mauritanian President Sidi Mohamed OuldCheikhAbdallahi and the Prime Minister YahyaOuld Ahmed El Waghef in a bloodless coup d'état, the coup occurred after series of events that had sharply diminished the popularity of the fledgling government, whose election was supported by the coup makers and General Mohamed Ould Abdel Aziz was instrumental in the August 2005 coup that got rid of MaaouyaSid'AhmedOuldTaya and ended his 21 years in power. [558]Some of the more significant events which were alleged to have led to the overthrow of the Abdallahi-government include the re-appointment of 12 ministers in May 2008, who were part of the former government, a number of whom had earlier been accused of corruption.[559]

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[555]. IAN COHAN-SHAPIRO,Coup in Mauritania:*Journal of Cultural Studies of the Middle East and North Africa* . *(2009)*.Available at www. «North Africa »journal.jcsmena.org/, accessed on 12/12/2012.

[556]. "Military Coup in Mauritania". Available at: http://www.afrol.com/articles/30157, accessed on 12/12/2012.

[557]. Ibid.

[558].Update Report No. 3: The Resurgence of Coups d'Etat in Africa **Expected Council Action. Available at:** www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTI**., accessed on 12/23/2012.**

[559].AlhassanAtta-Quayson:Mauritania, to be Sanctioned or Spared? November 2008.Availableat:www. archive.taqadoumyonline.com/en//index.php?option., accessed on**12/23/2012.**

Two days before the overthrow, the government suffered a severe blow when 25 members in the National Assembly together with 24 senators, out of the party's 45, broke away from the ruling party, depriving it of its parliamentary majority, finally, the very last but noteworthy among the events which culminated in the overthrow was the firing, on August 6, of senior military officials including General Mohamed Ould Abdel Aziz (formerly the head of presidential guard) and General Mohamed OuldCheikh Mohamed Ahmed (formerly the chief of staff), who were very instrumental in the election of President Abdallahi's government.[560] Although the junta claimed that the regime was corrupt and that they needed to save Mauritanian democracy, it is important to note that the coup came hours after the announcement of a presidential decree to remove the top four military officers, including Aziz, from their positions.

On August 7, 2008, the majority of the members of Parliament issued a statement in support of the coup and on the same day the junta promised to organize free and transparent presidential elections, this incident provoked vehement protests from the international community.[561]

As it has been mentioned, president Abdallahi was democratically elected by the country barely a year and a half before, after a transition that had too hastily been described as exemplary. This coup d'état ran counter to the political trend on the continent, now in favor of democracy and also to the desire of the African Union to see an end once and for all to unconstitutional regime changes, for which Africa holds the record.

The 6 August 2008 coup d'état gives the impression that the transition instead of leading to democracy that Mauritanians had been aspiring to since at least 1992, rather led to a political system that is the hostage of both the security and praetorian heritage and the political and social dynamics in place since the creation of the state of Mauritania, which were exacerbated by the OuldTaya regime.[562] In other words, the August 6th military takeover in Mauritania brought to a halt an eighteen month old democratization process, dashing hopes that Mauritania had

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[560]. Ibid.

[561].Dimitrakopoulou Marianna: Anatolia College Model United Nations 2012 TOPIC B: p.9. Available at: www.acmun.gr/documents/guides/GA4_Coups_d'Etats.pdf., accessed on 12/25/2012.

[562].EkiYemisiOmorogbe:A Club of Incumbents? The African Union and *Coups d'État*. *p.143.Available at:* www.vanderbilt.edu/jotl/manage/wp-content/.../omorogbe-cr.pdf, accessed on12/25/2012

overcome its historic political and social shortcomings and was emerging as a more stable, civilian run country.

After a year of conflict between Gen. Abdelaziz and former president Abdallahi, they agreed under the auspices of Senegal and the African Union to hold a presidential election and in July, 2009 general election took place, then Mohamed Ould Abdel Aziz won the election and became president of Moritania with 5-year term and will expire in 2014.[563] The 2009 election ended the 11-month political crisis caused by the 2008 coup d'état against former president SidiOuldCheikhAbdallahi. The presidential election declared generally free and fair by international observers.[564]

Following the election, the political situation stabilized, although the new authorities have been slow to respond to opposition calls for an inclusive political dialogue agreed under the Dakar Accord, the majority party Union for the Republic (UPR) overwhelmingly won the November 2009 senatorial elections, which the opposition denounced as tainted by political influence and tribal pressures.[565]

Given the current state of affairs, it would be premature to exclude any possibility of a return to democracy in Mauritania. However, it should be recognized that, whatever the outcome, the military coup and the unfortunate precedent it sets has been a setback to the process of democratization, not only in Mauritania but also for the Union which fought bitterly against unconstitutional change of government.

In general speaking, it can be concluded that a coup d'état is the ultimate proof that Mauritania's security sector is not functioning as it should, because Mauritania has demonstrated a couple of coup d'états in three years. First on 3 August 2005, then again on 6 August 2008, senior officers took over political power on behalf of the armed and security forces. As a result of these respective coups, especially the latter one resulted in deterioration and stepping back the democratization process that has been taken place in Mauritania. Since Abduallahi was the first President to ever be elected democratically in Mauritania, his election gave a wind of hope to the

563. BoubacarN'Diaye, SupraNote.203.
564. Ibid.
565. Ibid.

democratic regime in the country and a way out of enhancing recognized democratic governments in the continent.

4.4.2 AU Response to the Mauritania Coup D'états

As it has been elucidated in the above introductory part, Mauritania has had a long history of the military intervention in nearly every government and making putsches since the country gained its independence from France in 1960. For these recurrent coup d'états, specifically to the 2005 and 2008, the international community condemnation was swift and forceful, but the strongest diplomatic reaction came from the African Union, which suspended Mauritania's membership from the regional organization and demanded the restoration of constitutional order.[566]

In response to the 2005 coup d'état, AUPSC after recallingtheAlgiers Decisions on unconstitutional changes of government, the Lomé Declaration and the relevant principles of the Constitutive Act, Council firmly condemned the coup d'état in Mauritania on 3 August 2005 and demanded a prompt restoration of constitutional order, furthermore, the Council in conformity with the Lomé Declaration and Article 30 of the AU Constitutive Act, suspended Mauritania's participation in AU activities until the restoration of constitutional order in the country.567 However, the AU constitutive Act Article 30 suspends the government comes to power unconstitutionally not the member state. 568 This implies that the membership per se is unaffected as the AU does not allow the partaking of the representatives of the illegal regime. Thus, the AUPSC decision needs to be corrected as the coup makers have to be barred from the AU participation instead of suspending Mauritania. The AUPSC in its usual decision on unconstitutional change of government its decision is not in conformity with the AU Constitutive Act Article 30 and this may have negative implication on member states as well as the enforcement of the decisions and declarations of the regional instruments.

The Peace and Security Council of the African Union, at its 57th meeting held on 21 June 2006, considered the developments in the transition process in the Islamic Republic of Mauritania and

566. Mitchell Mackay, SupraNote.206.
567.A.U.P.S.C. Statement of the36 th Meeting, Doc. No PSC/PR/Stat.(XXXVI)-(ii),(Aug 4, 2005)
568.AU constitutive Act adopted on July11, 2000 Lom,Togo. Article 30

the briefing from the Special Envoy of the Chairperson of the Commission for Mauritania, as well as the statement by the Permanent Representative of Mauritania to the AU and visualizing the positive developments that have taken place in Mauritania since September 2005, towards the return to constitutional order, as well as the measures taken by the Mauritanian authorities. [569]

Though the AUPSC appreciated the development in Moritania, the Council yet not left the suspension. Despite the suspension, the military junta pushed forward with its democratic agenda. A referendum on June 25, 2006, made changes to the Constitution that limited the powers of the President and set a limit of two five-year terms for each President.[570] In March 2007, the junta held genuine democratic elections, which Sidi Mohamed OuldCheikhAbdallahi won.[571] Following this election, the AUPSC after taking in to cognizance of the developments that took place in Mauritania since the coup d'état of 3 August 2005 and the smooth conduct of the process of democratic transition, which culminated in the presidential elections of March 2007 and marked the return to constitutional order and also following the positive recommendation by the Chairperson of the AU Commission, [572] lifted the suspension measure taken against Mauritania by its 36th meeting held on 4 August 2005.[573]

Again the historical coup d'état of Mauritania happened on August 6th 2008 that deterred the infant democratization process of this nation. In response to this unconstitutional change of government, the AUPSC met for its 144th Meeting on the day the announcement declares that "Abdallahi was stripped of his powers and that the country shall be governed on transitional basis by an 11-member High Council of State, to be headed by General Abdel Aziz, until new presidential elections were held as soon as possible".574 Then the AUPSC condemned the military coup d'état; demanded the release of the personalities arrested and the preservation of their safety, security and dignity as well as of the members of their families; and

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[569] .A.U. P.S.C. *Communiqué* of the 57thMeeting,para 2,Doc.No. PSC/PR/Comm(LVII),(June 21, 2006)
[570].Constitution of the Republic Mauritania Islamic With the draft amendments submitted to referendum 25 June 2006. arts. 26–29. Available at: unpan1.un.org/intradoc/groups/public/.../un.../unpan042393.pdf, accessed on 12/24/2012
[571]. BTI 2010/Mauritania Country Report.P. 7. Available at: www.acmun.gr/documents/guides/GA4_Coups_d'Etats.pdf., accessed on 12/27/2012.
[572]. Report of the Chairperson of the Commission on the Evolving Developments in the Islamic Republicof Mauritania, PSC/PR/2(LXXVI), 10 April 2007.Available at www.peaceau.org/uploads/report-on-mauritania-eng-76th.pdf, accessed on 12/27/2012.
[573]. A.U. P.S.C. *Communiqué* of the 76 thMeeting,para 7,Doc.No. PSC/PR/Comm(LXXVI), (April 10 2007)
[574]. A.U. P.S.C. *Communiqué* of the 114th Meeting, Doc.NoPSC/PR/Comm(CLIV), (Aug 7 2008).

ordered the restoration of constitutional order and the re-establishment, without further delay, of the institutions that were democratically chosen by the Mauritanian people.[575] Though all these condemnations made by the AUPSC, the Council did not suspend the unconstitutional authorities of Mauritania. On the contrary, this Communiqué which condemns the putsch, stipulates that the AUPSC stressed the relevant provisions of the Constitutive Act, the Lomé Declaration and the Protocol Establishing the PSC, which provide in particular for the automatic suspension of the participation of the country concerned in the activities of the AU until the restoration of constitutional order. This implies that based on these legal instruments PSC considered that Mauritania had been suspended from AU.

The AUPSC in New York, on 22 September 2008 considered the situation in the Islamic Republic of Mauritania following the coup d'état that occurred in that country on 6 August 2008, and demanded the return to constitutional order through the unconditional restoration of Mr. SidiOuldCheikhAbdallahi, President of the Islamic Republic of Mauritania, in his functions by 6 October 2008, and warned the authors of the coup d'état and their civilian supporters against the risk of sanctions and isolation if they do not respond positively to this demand, furthermore, the Council also declared null and void all measures of constitutional, institutional and legislative nature taken by the military authorities and that followed the coup d'état of 6 August, 2008. [576]

When the deadline of 6 October 2008 expired, the PSC did not meet to consider the situation as well as did not release any measure while its deadline has been violated by the putsch. Rather it met a month later for its 156th Meeting, where it noted that no progress has been made and it expressed that despite all efforts deployed by the Commission and the other stakeholders and despite the Council's earlier decisions on the matter, especially its decision contained in the Communiqué of its 151st Meeting held at Ministerial level in New York on 22nd September 2008, no progress has been made towards a rapid return to constitutional legitimacy in Mauritania.[577] This being the situation, it is submitted that the PSC could and arguably ought to have imposed sanctions. However, it set aside this expected sanction and requested the

[575]. Ibid paragraphs2,3,and 4.
[576].A.U. P.S.C. *Communiqué* of the 151th Meeting, paras5-7, Doc.No. PSC/MIN/Comm.2 (CLI), (Sept 22,2008).
[577]. A.U. P.S.C. *Communiqué* of the156thMeeting,para 3,Doc.No.PSC/PR/Comm(CLVI), (Nov 11, 2008).

Commission to submit a report to it, as soon as possible, concrete measures to be put in place on the basis of its previous Communiqué adopted in New York and in accordance with the relevant provisions of the Lome Declaration of July 2000 on Unconstitutional Changes of Government.[578] There would appear to be no good grounds why the PSC adopted this stance. Clearly, the PSC was not allowed to delegate to the Commission the authority to impose sanctions and it was rather meaningless to ask the Commission to recommend sanctions because the array of sanctions to be inflicted are envisaged in the relevant AU instruments.

As recommend, the AU Commission forwarded its report, the report of the commission recommends that Pursuant to the pertinent provisions of the Lomé Declaration of July 2000 and the Protocol Relating to the Establishment of the Peace and Security Council on Unconstitutional Changes of Government, if by 5 January 2009, no progress is made, Council could consider imposing limited and targeted sanctions, especially visa denials, travel restrictions, the freezing of the assets of all civilian and military personnel, as well as those of economic operators, whose international travels are designed to maintain the unconstitutional status quo, additionally, the Commission suggested that the United Nations Security Council be encouraged to assess the impact of the concerted international measures taken to restore constitutional order in Mauritania since the adoption of its presidential declaration of 19 August 2008, and consider additional measures to move the situation forward.[579]

According to the Presidential Statement of 19 August 2008, the Security Council condemned the Mauritanian military's overthrow on 6 August of the democratically elected Government of Mauritania and the State Council's move to seize the powers of the presidency, then the Security Council demanded the immediate release of President Sidi Mohamed OuldCheikhAbdellahi and the immediate restoration of the legitimate, constitutional, democratic institutions, furthermore, the Council welcomed the statements by the African Union, European Union and other members of the international community condemning the coup.[580]

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[578]. Ibid, para,4.
[579].A.U. P.S.C. report of the Chairperson on the163thMeeting,Doc.No. PSC/MIN/3 (CLXIII) (Dec 22 2008).
[580].Security Council SC/9428 19 August 2008 Security Council Condemns 6 August Overthrow of Mauritanian Government, Demands Immediate Release of President, Restoration of Democratic Institutions. Available at: www.un.org/News/Press/docs/2008/sc9428.doc.htm, accessed on 12/29/2012.

The UNSC recognized the important role played by the African Union, as well as the support of regional and international partners, including Secretary-General Ban Ki-moon, through his Special Representative for West Africa, Said Djinnit; finally, the Council called on all to assist in restoring constitutional order in Mauritania. [581] Though the UNSC concerned on the unconstitutional change of government in Moritania, Presidential Statements cannot compel the UN membership to take specific action but at the same time they do serve to indicate that the Security Council has been seized of a situation, which, by necessary implication, falls into its competence.

The AUPSC preceded its effort to prevail constitutional order in Mauritania and assembled on 22 December 2008. This meeting advocated the Commission's recommendations and considered the release of President SidiOuldCheikhAbdellahi that this development partially responds to the demands of the international community but is not sufficient for a return to constitutional order. As a result the AUPSC decided in accordance to what has been recommended by the AU Commission report, finally, the Council decided to communicate its Decision to the UN Security Council for it to impart to the proposed measures a universal character in light of the above Presidential Statement of 19 August 2008.[582]

Next, the AUPSC considered the situation in Mauritania on the due date of the expiration of the ultimatum that the coup makers have to restore constitutional order. The Council after recalling the previous Communiqué', PSC/MIN/Comm.3(CLXIII), decided the sanctions to enter into force that are envisaged in the Communiqué of its 163rd Meeting held on 22 December 2008. [583] The commission alsoStressed that the entry into force of the sanctions should be accompanied by efforts of the AU and its partners involving all the Mauritanian parties towards a rapid return to constitutional order in Mauritania, further the Council urged the authorities borne out of the coup to extend their full cooperation to the AU Commission with a view to an

[581]. Ibid.
[582] .A.U. P.S.C. *communiqué* in the163th Meeting, para 9,Doc.No.PSC/MIN/Comm.3(CLXIII), (Dec 22. 2008)
[583] . A.U. P.S.C. *communiqué* in the168th Meeting, para 2,Doc.No. PSC/PR/(CLXVIII)(Feb 5, 2009)

immediate return to constitutional order and the quick resolution of the political crisis in the country.[584]

The council highly affirmed its decision of sanctions against all persons, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania, in this regard, Council decided that the sanctions shall apply to the following groups, these are: members of the High Council of State, members of the Government and all other persons, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania,in this respect, Council requested the Commission of the African Union to establish, within one month from this date, a detailed list of the above categories of persons.[585]

The request of the AUPSC to report the commission results in the non-implementation of the sanctions against those who deter Mauritania to return to constitutional order. The AUPSC instead of imposing sanction on the perpetrators of the coup d'état and unconstitutional order in Mauritania, it merely reviewed the developments which included a high-level visit to Mauritania by the Chairperson of the Executive Council and the Commissioner for Peace and Security in April 2009,furthermore, the Council requestedthe Commission, to report to it within a month from the adoption of this communiqué regarding its action and the evolution of the situation in Mauritania, as well as on the implementation of the communiqué of its 182nd meeting held on 24 March 2009.[586]This seems that the AUPSC is on the last verge of imposing sanction on Mauritania.

In June 2009, a political solution to the situation was found between the parties in Mauritania which culminated to the Dakar Framework Agreement, after the entry into force of the Agreement, the AUPSC in its 196thMeeting Commended the conclusion of the Dakar Framework Agreement.[587]

The Council after taking into consideration of the measures taken by the agreement particularly the formation of a national transitional union Government; the transformation of the High

[584]. Ibid, para 5.
[585].A.U. P.S.C. *communiqué* in the182th Meeting, para 4,Doc.No.PSC/PR/COMM.(CLXXXII) (Mar 24, 2009)
[586]. A.U. P.S.C. *communiqué* in the186th Meeting, paras5,6 4Doc.No.PSC/PR/COMM.(CLXXXVI) (May 6, 2009).
[587]. A.U. P.S.C. *communiqué* in the196th Meeting, para 1,Doc.No. PSC/MIN/COMM.(CXCVI) (June29,2009).

Council of State into a defense organ in accordance with Article 34 of the Mauritanian Constitution, is placed under the Government's authority; the implementation of the consensual transition in accordance with Article 40 of the Mauritanian Constitution; the decision of President Sidi Mohamed OuldCheikhAbdallahi to hand in his mandate to the Mauritanian people; and the President of the Senate taking over as acting President of the Republic, the Council lifted the suspension measure taken against Mauritania after the coup of 6 August 2008, as well as the sanctions set out in its communiqués of 22 December 2008.[588]

In light of the aforesaid and in accordance with the Lomé Declaration, the council asserted that all these measures marked the return of constitutional order in Mauritania, then the Council requested that all efforts should be deployed for the election to take place in the required conditions of transparency, fairness and freedom.[589] Council further requested the Chairperson of the Commission to report regularly on the evolution of the situation to enable it take any decision that may be required, including the re-imposition of sanctions, in the event that situations which warrant such a step are duly noted by Council.[590]

With regarding to the AUPSC sanction on Mauritania, there was unilateral act from the president of Libya which vitiates the collective arm of the Union's member states. While the AUPSC has imposed targeted sanctions measure on Mauritania, the then AU chairman and president of Libya, Muhammad Ghaddafi, has openly criticized the sanctions, calling for their lifting and initiating mediation between the military junta and political parties of the opposition.[591] This implies clear jeopardy of the Union's Rules of Procedure of the Assembly, Rule 37. However, the Union did not react for this unilateral act which violated the collective response of AU to unconstitutional change of government and the efforts of the organization to prevail recognized democratic governments in the continent.

Finally, at the July 2009 elections despite a few incidents, including the resignation of the president of the electoral commission and accusations of fraud, the international community

[588]. Ibid , paragraphs3 and 4.
[589]. Ibid, para 4.
[590]. Ibid.
[591]. A letter from Libya forwarding to the Security Council on 5 February2009, AU PSC communiqué imposing sanctions on Mauritania. Available at: www.securitycouncilreport.org/.../..., accessed on 12/29/2012.

declared the presidential election of 18 July, which Gen. Abdelaziz won by a wide margin, to have been free of any major irregularities.[592] In this regard, it is important to note that MohamedOuld Abdel Aziz who won the election was the one who had orchestrated the coup d'état in August 2005 and in August 2008. However, in accordance to the African Charter on Democracy, Election and Governance, the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.[593] On this violation of core principle of restoring constitutional order in the country as well as prevailing recognized democratic government in the continent, AUPSC did not release a communiqué or press statement that depicted any specific measure on this case.

[592]. Boubacar N'Diaye, SupraNote.203.
[593]. African Charter on Democracy, Supra Note 149, Article 25(5)

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

International law was conceived originally as a system of rules governing the relations of states amongst themselves. Consequently, states are the most important and most powerful subjects of international law. Therefore, it is vital to know when an entity is qualifies as a state. In accordance to the 1933 Montevideo convention on the rights and duties of states, a state as a person of intentional law should possess the qualification of a permanent population, a define territory, government and capacity to inter in to relations with other states. Then a state which qualified of these criteria recognized as a state. However, with regard to recognition of state, there is controversy between two schools of thoughts, declaratory and constitutive theories.

The constitutive theory denies that international personality is conferred by operation of international law. On the contrary, the act of recognition is seen as a necessary precondition to the existence of the capacities of statehood, i.e., if a sate is not recognized as a state, it is not a state or if a state is not recognized by the international community, it cannot have international personality. On the other hand, declaratory theory states that the general legal effects of recognition are limited. When an existing state recognizes a new state, this is said to be nothing more than an acknowledgment of pre-existing legal capacity, that infers, the act of recognition is not decisive of the new entity's claim to statehood, because that status is conferred by operation of international law. The implication of this theory dictates that international legal personality of a state does not depend on its recognition as such by other states. Though this theory elaborates that rights and duties are relative under international law, it does not mean that the unrecognized body has no international personality; rather, if the entity satisfies the criteria of statehood, especially those concerning actual and effective control, it will be a state irrespective of recognition. In other words, a state has capacity in international law as soon as it exists in fact.

The major concern of this paper, that is, recognition of government refers to the establishment of normal official relations by the recognizing government with the government recognized or an indication of readiness to do so. In most cases, recognition of government will lead to the establishment of bilateral relations which requires the consent of both parties. In view of the fact that recognition is only a unilateral act, it is therefore more precise to speak of an indication of

the free act by which one or several states acknowledge that a person or a group persons are capable of binding the state which they claim to represent and witness their intention to enter in to relations with them.

Thus, recognizing the new government is necessary for the purpose of defining the relationship with the new regime. Recognition or non-recognition of a government may thus manifest whether or not in the opinion of the recognizing authority, the government in question exists as such. Accordingly one can see that two separate recognitions are involved and they must not be confused. Recognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state. It is possible however, for recognition of state and government to occur together in certain circumstances, this can take place up on the creation of a new state. Recognition of the government implies recognition of the state but it does not work the other way. It should be noted that recognition of a government has not relevance to the establishment of new persons in international law; rather it is significant in realm of diplomatic relations.

In order to recognize a government, there are certain modalities that need to be satisfied. But these modalities are not required to be fulfilled all together. These are (a) effective control of much of the greater part of the territory of the state concerned. (b) Tobar doctrine or doctrine of legitimacy, advocates that governments which had risen to power through unconstitutional means should not be recognize. Logically, of course, the concept amounts to the promotion of non-recognition in all revolutionary situations and it is, and was, difficult to reconcile with reality and political consideration. © Automatic Recognition, provides recognition in all instances excluding political consideration and exigencies of state. However, this is unrealistic where there are competing governments. It has also been criticized as minimizing the distinction between recognition and maintenance of diplomatic relations. The problem, of course, was the recognition of a new government that has come to power in a non-constitutional fashion was taken to imply approval. (d) Estrada Doctrine, develops the policy of never recognizing government. This doctrine reflects the fact that the change of government in a state is legally an internal matter, whether in conformity with the national constitution or not, does not concern international law or other states. In practice, however, it merely substitutes implied recognition for express recognition.

Further more recognition could be de facto, de jure, express, implied, conditional, collective or diplomatic recognition. To brief some of them, de facto recognition is a provisional, conditional, implied, incomplete and or (more easily, revocable recognition), while de jure recognition is final, unconditional, express, full and or irrevocable recognition. On the other hand, collective recognition is the form of a joint declaration by a group of states to permit a new state to become a party to a multilateral treaty of a political character, such as peace treaty.

Recognition of government also inculcated the government in exile. A recognized government in exile is a legitimate government of a state that can validly conclude a treaty that involves the exercise of state sovereignty on its part.

Non-recognition is a contrary of recognition of government. Non-recognition is an act of moral disapproval, one nation may be able to lose such disruptive forces in another that the government of the latter cannot long survive or, at time, it assumes that the status conveyed through recognition might place a government so honored in a position of such strength that it would lost for a long time to come. Thus, non-recognition implies a refusal to admit the validity of the changed regime. This resulted in the agents of the unrecognized government have in the eyes of both international and municipal courts no more status than private individual.

Once recognition is given, it may in certain circumstances be withdrawn. This is more easily achieved with respect to de facto recognition, as that is by its nature a cautions and temporarily assessment of a particular situation. Where de facto government losses the effective of control it once exercised, the reason for recognition disappears and it may be revoked. De jure recognition, on the other hand, its recognition is final and once given cannot be withdrawn unless there is a fundamental change affecting the status of the entity recognized. Until this change is acknowledged by the recognizing state, de jure recognition will remain with the original entity.

Regarding the legal effects of recognition, if an entity satisfies the requirements of a state objectively, it is a state with all international rights and duties and other states are obliged to treat as such. However, in practice the legal effects or consequences of recognition in national law depend on the laws of each state. On the other side, the political existence of a state is

independent of recognition by other states, and thus unrecognized state must be deemed subject to the rules of international law. It cannot consider itself free from restraints as to aggressive behavior, nor can its territory be regarded as terra nullius.

With regard to recognition of a government in the regional organizations, the selected regional organizations of this research have their own protocols and declarations that inculcate recognition of government within their respective legal regimes with the exception of European Union.

Concerning the organization of Africa Union, to combat against unconstitutional change of government such as Coup d'état, this regional organization adopted a declaration on unconstitutional change of government (Lome declaration). This declaration enumerates what constitutes unconstitutional change of government and put unequivocally that it will deny recognition such regimes until the restoration of constitutional order. However, Lome Declaration did not visualize that when an elected government abusing its power beyond the constitutional limit vested up on it and ultimately overthrown by the electorate; the organization may not take measure because it is not covered under the declaration. Though this lacuna in the definition of the Lome declaration, when an unconstitutional change of government happened within the scope of the declaration, the chairman of the OAU and the secretary general, on behalf of the organization, immediately and publicly condemn and deny recognition the perpetrators of unconstitutional change of government as well as status in the organization activities.

This declaration is one mechanism of achieving constitutional order in the continent and fostering the emergence of recognized governments by the electorate of the concerned states and in the organization as well. However, regarding the nature and implementation of the sanction on the perpetrators of unconstitutional change of government especially trade restriction, may have adverse impact on the public at large. Since in the day to day activities of trade transactions, the one who involves in these transactions is mainly the public not the perpetrators of the coup d'état though the declaration stated that "ordinary citizens of the concerned country do not suffer disproportionately on account of the enforcement of sanctions".

The other developments within the same organization after the transformation of OAU to AU include: the constitutive act of AU; the adoption of the Rules and Procedure of the assembly of the union; and the charter on Democracy, Election and Governance.

The adoption of the constitutive act of AU marked a great departure from OAU regarding collective response to unconstitutional change of government in the continent. Under this constitution of the union, governments which came to power through unconstitutional means shall not be allowed to participate in the activities of the union, i.e., such regime is unrecognized. Furthermore, it puts sanctions on the perpetrators of the unconstitutional change of government. The commitment of the AU against unconstitutional change of government, further emphasized by the Rules and Procedure of the Assembly of the Union. The Rules and Procedure of the Union clearly envisaged that unconstitutional change of government shall not be tolerated and recognized by the union. Furthermore, it requests the AUPSC to discuss the matter and immediately suspend the member state from the union and participating in the organs of the union. Rule 37 is condemning the illegal change of government in the member state, that is, the perpetrators of unconstitutional change of government. However, the sanction is not only on the perpetrators of the named illegal act but also suspending the member state. This may not reconcile with the objective of this rule as well as art.30 of the Constitutive Act.

AU'S concern on the prevalence of recognized elected democratic governments in the continent again manifested by the adoption of the charter on Democracy, Election and Governance. This charter clearly stipulated additional definition on what constitutes unconstitutional change of government which is not found either in the constitutive act or in the Lome declaration. In accordance to this additional definition, "illegally amending or revising the constitution or legal instruments is an infringement on the principles of democratic change of government." This charter is not only peculiar in terms of the definition of unconstitutional change of government, but also the punitive measures on member state governments which came to power unconstitutionally. Further, the charter deters the perpetrators of unconstitutional change of government not to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state and, in the same vein, these perpetrators of unconstitutional change of government may also be tried before the competent court of the union.

The charter also imposed punitive measures on member states which are instigating or support unconstitutional change of government in another state. Furthermore, the democratic charter obliges state parties not to harbor or give sanctuary to perpetrators of unconstitutional change of government, as a result state parties are required to bring to justice the perpetrators of this illegal act and take the necessary step to extradite those perpetrators. However, this fascinating protocol did not take into account popular revolutions and the down fall of the regime through the named revolution such as the case of Libya.

This paper on its analysis part examined the case of Madagascar, Libya, Mali and Mauritania. In the case of Madagascar what has been envisaged in the study was that the AUPSC by tracing the relevant instruments of AU suspended Madagascar membership, not the perpetrators of the coup of 2009, Mr. Rajolina. Furthermore, the AUPSC imposed specific sanctions on the perpetrators of the coup d'état. These include: travel ban, freezing of funds and diplomatic isolations against Mr. Rajoelina. However, this collective measure of AUPSC to prevail a recognized democratic government in the member state of Madagascar vitiated by the Republic of South Africa. The African National Congress of South Africa by setting aside these sanctions invited Mr. Rajoelina to attend the 100th birth day of the party. But AU did not take any measure on the Republic of South Africa in defending its collective measure of the Union.

On the other hand in the case of Libya the decision of AU was different. Since the case of Libya is not coup d'état and related case, it is not covered under the legal instruments which are concerned with the unconstitutional change of government. Thus, AUPSC condemnation is on the indiscriminate and excessive use of force as well as lethal weapons against peaceful protestors. However, AU was absent at a time which it had to take the lead in the case of Libya before UN resolution of 1973 of no fly zone.

Furthermore, there was variance between the AUPSC and the three non-permanent members representing AU at the UNSC. The AUPSC rejected foreign military intervention in Libya, where as the representative countries of AU in UNSC voted for Security Council resolution 1973 which authorized the international enforcement of a no-fly zone over Libya. This was necessary

for the formal legitimacy of the intervention. This diverging views among African players in so far as Gaddafi regime was concerned depicted lack of coherence within the African group. This problem of coordination between AUPSC and the representative countries also envisaged among the member states in supporting and against the resolution.

Though all these misunderstandings, AUPSC in its decision of 29 1st meeting refused to immediately recognize the NTC and instead made its recognition conditional upon the establishment of an all-inclusive transitional government in Libya. Even if AU in its PSC denied recognition, some member states like Ethiopia and Nigeria recognized the NTC of Libya by setting aside the collective act of the union to deny or permit recognition of government. Finally the AU recognized the NTC on 20 September 2011 as the representative of the Libyan people. Though AU recognized the NTC, there is clear lacuna on the Lome Declaration and other legal instruments on unconstitutional change of government that did not provide any room for the popular revolution like this case of Libya.

In the case of Mali, the overthrow of a democratically elected government elicited condemnation from the international community, specifically the UNSC, AU and ECOWAS. The UNSC unanimously, under chapter VII of the UN charter, passed a resolution 2071, presented by France, approving an African-led force to assist the army of Mali in combating the Islamist Militants in turn, AUPSC on 23 March 2012 suspended Mali, not the perpetrators of the coup d'état, from membership and condemned the unconstitutional change of government and make liable the perpetrators of the coup d'état in accordance to the pertinent provision of the charter on Democracy, election and governance. In this regard ECOWAS also played depth role of the maintenance of security in Mali by suspending the country in crisis from the sub-regional organization, imposing sanctions and coordinating regional peacekeeping force to be settled in Mali, even though, there is no consent on the side of Mali. With regard to the unilateral act of member state, like the preceding cases, there was violation of the collective act of the Union by the Egyptian president. He says that he opposed to any military intervention in Mali. Currently AFISMA stationed in Mali to prevail constitutional order.

The last case that has been dealt is the case of Mauritania. As it has been elucidated in the analysis part of this paper, Mauritania has had a long history of coup d'état. In response to the

2005 coup d'état's, the AUPSC suspended Mauritania from membership not the perpetrators of the coup d'état like that of the preceding cases.

This implies that the AUPSC in its usual decision on unconstitutional change of government, its decision is not in conformity with the AU constitutive Act Article 30 and this may have negative implication on member state as well as the enforcement of its decisions.

The AUPSC after considering the reinstated constitutional order in the country lifted the sanction on 4 August 2005. Even though this is a good development in Mauritanian, a new coup d'état that deterred the 18 month old democratization has happened on August 6th 2008. In this regard, AU immediately condemned the coup and suspended Mauritania. However, the council did not put sanction on the perpetrators of this coup d'état, rather it requested the AU commission to recommend sanctions on the state. But the AUPSC in its duties is not supposed to delegate its power of imposing sanction for the AU commission. Ultimately, like the previous cases, there is also unilateral act that vitiates the collective act of the union from the president Muhammad Gadaffi. He openly criticized the sanction and called for the lifting of the sanctions.

Therefore, in order to enhance and make efficient AU in its collective act on the recognition of government as well as to make AUPSC stronger in its decision of combating against unconstitutional change of government and to prevail the custom of recognizing democratically elected governments in the continent, the following recommendations are suggested based on the above findings and concluding remarks of the paper.

There is no room for the popular revolution in the Declaration of unconstitutional change of government (Lome Declaration) and the charter on Democracy, Election and Governance. This lacuna needs to be addressed through amendment in order to respond the current revolutions visualized in the continent.

The in discriminatory sanction system in the Lome Declaration such as trade restriction has adverse effect on the public has to be changed and reinstated by other sanctions targeted on the perpetrators of unconstitutional change of government.

Rule 37(4)(e) of the Rules and Procedure of the Union suspend the member state where unconstitutional government happened. However, Art 30 of the constitutive act condemn and suspend the perpetrators of unconstitutional change of government. This vividly depicted that there is problem of reconciliation of the two legal instruments. Thus, this requires corrective measure to enforce the laws of AU coherently.

There are unilateral measures taken by member states that vitiate the decision of the AUPSC against unconstitutional change of government. This unilateral measure has its own adverse impact on the Union's effort towards the prevalence of recognized democratic governments in the continent as well as it is a clear violation of the continent legal framework on unconstitutional change of government. Thus first the Union has to bridge this gap by inculcating the relevant provision that deters unilateral act, and second to enhance the current collective act of the Union against unconstitutional change of governments, the concerned organ needs to have strong punitive measures on countries which are unilaterally violating those laws prescribing collective act of the Union on recognition of a government.

African Union was absent at a time while it had to take the lead in the case of Libya before UN resolution of 1973. The delayed response of AU has its own negative impact on the future decision that concern member states as well as on its influence in the international affairs. Thus, a limited period of time should be inculcated in the Rules and Procedure of the Assembly while it provides verdict on the member states cases.

Divergence of views has been envisaged between the decision of AUPSC and the three AU member states representing African in the UNSC. AUPSC condemns foreign intervention in Libya; however, the three African states supported resolution 1973 which favors foreign intervention. This variance also appeared among member states that are in favor and against the UNSC resolution. All these misunderstandings which affect the organizational strong hold on collective recognition of government must be deterred by the deliberation and resolution of the heads of states and governments.

The analysis of this research clearly envisaged that there is problem of disloyalty of member States towards their own regional legal instruments that they approved and domesticated. This

adversely affects the motive of the Union to prevail constitutional order in the continent. Thus, member States of the Union particularly the Heads of States and Governments have to be unequivocally committed towards the pervasiveness of constitutionalism in the continent.

The AUPSC has the mandate of imposing sanctions where there is unconstitutional order in the continent. However, in the case of MouritaniaMohamedOuld Abdel Aziz who won the election was the one who had orchestrated the coup d'état in August 2005 and in August 2008. However, in accordance to the African Charter on Democracy, Election and Governance art.25(5), the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State. In this regard AUPSC did nothing to enforce its duty. This needs to have been given due regard in the decision of AUPSC.

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