CONSTITUTIONAL COUPS AS A THREAT TO DEMOCRATIC GOVERNANCE IN AFRICA

John Mukum Mbaku[†]

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† John Mukum Mbaku is Brady Presidential Distinguished Professor of Economics & John S. Hinckley Research Fellow at Weber State University (Ogden, Utah). He is also a Nonresident Senior Fellow at the Brookings Institution, Washington, D.C., and an Attorney and Counselor at Law (licensed in the State of Utah). He received a J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the S.J. Quinney College of Law, University of Utah, where he was Managing Editor of the *Utah Environmental Law Review*, and a Ph.D. (economics) from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

I. INTRODUCTION

In the last several years, many countries in Africa have either adopted new constitutions or revised or amended[1] their existing constitutions to meet general or specific societal needs.[2] Since 2000, more than ten African countries have engaged in constitutional reforms in order to address various issues.[3] While some of these institutional reforms have been based on nation-wide efforts to improve governance, deepen and institutionalize democracy, generally enhance the ability of the country

1 For example, in 2008, Cameroon amended its constitution to allow the incumbent president, Paul Biya, to stand for another term in office and to provide him with immunity from prosecution for all crimes committed while in office. *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON pmbl.

2 *See generally* Elisha Z. Ongoya, *Separation of Powers*, *in* CONSTITUTION OF KENYA: CONTEMPORARY READINGS 181, 181-201 (P.L.O. Lumumba, Morris Kiwinda Mbondenyi & Steve O. Odero eds., 2011) (discussing how Kenya's 2010 constitution introduced the separation of powers with checks and balances, helping to strengthen the country's democracy).

3 *See, e.g.*, Kamissa Camara, *Here's How African Leaders Stage 'Constitutional Coups': They Tweak the Constitution to Stay in Power*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power.

to manage diversity, promote peaceful coexistence, and promote inclusive economic growth and human development,[4] others have essentially been engineered by opportunistic elites seeking ways to stay in power indefinitely.[5]

Consider, for example, Paul Kagame, President of the Republic of Rwanda. Following the end of the Rwandan genocide,[6] the Tutsi-backed Rwandan Patriotic Front ("RPF"), whose efforts contributed significantly to ending the genocide, transformed itself into the country's ruling political party. Its leader, Paul Kagame, first served as vice president and minister of defense but became president in 2000. In 2003, Rwanda approved a new constitution, under which Kagame was elected to serve a seven-year term. In 2010, he was re-elected to another and final seven-year term as mandated by the country's constitution. He was expected to step down after his mandate was concluded in 2017. Nevertheless, beginning in 2013, he began a two-year effort to secure a constitutional amendment to allow him to run for a third term. In December 2015, Rwandan voters approved a constitutional amendment allowing Kagame to potentially remain in office until 2034.[7] This opportunistic approach to constitutional revisions is not unique to Rwanda and Cameroon or Paul Kagame and Paul Biya. Other African heads-of-state have engaged in similar efforts to manipulate the constitutional design or amendment process to either strengthen their power base or extend their mandates.

In 2017, the United States celebrated the 230th anniversary of its constitution. The Twenty-Second Amendment limits presidential terms to a maximum of two.[8] Since the passage of the U.S. Constitution, no

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4 *See, e.g.*, Ongoya, *supra* note 2, at 181-201 (providing background to and motivations for the 2010 constitutional exercise in Kenya).

5 For example, Paul Biya (Cameroon), Pierre Nkurunziza (Burundi), and Paul Kagame (Rwanda).

6 The Rwandan genocide involved the mass murder of Tutsi and their Hutu sympathizers by the Hutu majority. In one hundred days (April 7, 1994 to mid-July 1994), as many as one million Rwandans were hacked to death by their fellow citizens. *See generally* LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2006) (providing an examination of the key actors involved in the massacre of Tutsi and their Hutu sympathizers).

7 *See, e.g.*, Claudine Vidal, *Rwanda: Paul Kagame is in Line to Stay in Office Until 2034*, THE CONVERSATION (Jan. 18, 2016, 7:17 AM), https://theconversation.com/rwanda-paul-kagame-is-in-line-to-stay-in-office-until-2034-53257 (the amended constitution stipulated that Kagame could run for another seven-year term in 2017, which he subsequently did and was sworn-in as President of the Republic of Rwanda. In 2024, which is year zero for the new Constitution, the term of office for the president would be changed to five years, renewable once. Such an arrangement offers Kagame the possibility of running for two new mandates in 2024 and potentially remaining in office until 2034).

president of the United States has attempted to eliminate the limits on the presidential term of office.

While the presidents of South Africa and Kenya have made no effort to change their constitutions to seek a third term in office, those of Cameroon and Rwanda have successfully changed their national constitutions to secure third terms and remain in office indefinitely.[8] Since the early-1990s, when many African countries began their transitions to democracy, as many as thirty presidents have made efforts to extend their regimes by changing constitutional term limits.† These presidents have utilized what is now referred to as the "constitutional coup" to extend their terms in office, as well as monopolize presidential power, but do so with the appearance of legality or adherence to democratic values or the rule of law.[9]

In the 1960s, the military coup d'état emerged as a major contributor to extra-constitutional regime changes in Africa. The first military coup d'état in post-independence Africa took place in Egypt on July 23, 1952 when King Farouk was deposed by members of the Free Officers Movement. Although Col. Gamal Abdel Nasser was the brains behind the decision to overthrow King Farouk and end what the officers believed was the domination of Egypt and Sudan by the British, General Muhammad Naguib was asked to assume leadership of the movement because of Nasser's fear that he and his fellow soldiers might not be taken seriously because of their youth.[10] About two years later, on February 28, 1954, Nasser overthrew Muhammad Naguib and assumed the presidency of Egypt.[11] While military intervention in African politics has lessened significantly during the last few decades, the "constitutional coup" has

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[8] *See, e.g.*, *Cameroon Parliament Extends Biya's Term Limit*, FRANCE 24 (Apr. 11, 2008), http://www.france24.com/en/20080411-cameroon-parliament-paul-biya-term-limit-extension; *Rwandan President Paul Kagame to Run for Third Term in 2017*, THE GUARDIAN (UK) (Jan. 1, 2016 4:42 AM), https://www.theguardian.com/world/2016/jan/01/rwanda-paul-kagame-third-term-office-constitutional-changes.

† *See* Camara, *supra* note 3.

[9] *See, e.g.*, Tracy McVeigh, *Rwanda Votes to give President Paul Kagame Right to Rule Until 2034*, THE GUARDIAN (UK) (Dec. 19, 2015, 7:05 PM), https://www.theguardian.com/world/2015/dec/20/rwanda-vote-gives-president-paul-kagame-extended-powers (usually, the constitutional amendment is approved by a legislature that is totally subservient to the president and usually with no effort made to provide the people, especially members of the opposition, with the opportunity to provide input into the amendment process. For example, during Rwanda's 2015 constitutional referendum, international organizations, such as Human Rights Watch, accused the government of making it extremely difficult for anyone to oppose the referendum.

[10] *See* JOEL GORDON, NASSER'S BLESSED MOVEMENT: EGYPT'S FREE OFFICERS AND THE JULY REVOLUTION 4 (1992) (examining, inter alia, developments in Egypt following the military coup of 1952 and the role played by Nasser's Free Officers).

[11] *See id.*

emerged as the most important threat to democratic institutions and individual liberty, as well as peaceful coexistence in the continent.[12]

The "constitutional coup" usually involves amending or revising the constitution to eliminate presidential term limits. In some cases, incumbent presidents have amended the constitution to invalidate the candidacies of their opponents, weaken the opposition, and guarantee regime survival.[13] This so-called "softer, gentler coup d'état" has become a very popular way for many African heads of state to prolong their stay in power and do so in a way that appears legitimate to their domestic and foreign supporters.[14] They tweak their constitutions, usually with the help and willing participation of a parliament, and then conduct elections in which the incumbent president is guaranteed to win.[15] These leaders ensure their victory, either in the ratification of the new constitutions or in winning elections that follow the constitutional changes by weakening the opposition and denying the latter access to public press media.

In this paper, I examine the constitutional coup and its emergence as a major challenge to the deepening and institutionalization of democracy in the African countries. I shall do so by drawing lessons from several case studies, including Cameroon, Côte d'Ivoire, Zimbabwe, and The Gambia. Constitutional coups have taken place in many African countries during the last several decades.[16] I have chosen these countries as case studies because their experiences provide very important lessons about how the African Union ("AU") is responding to these situations and for Africans who are interested in deepening and institutionalizing democratic values, providing themselves with governing processes undergirded by true separation of powers with effective checks and balances,

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12 *See* Joleen Steyn Kotze, *Africa Faces a New Threat to Democracy: The 'Constitutional Coup'*, THE CONVERSATION (Feb. 8, 2017, 10:36 AM), https://theconversation.com/africa-faces-a-new-threat-to-democracy-the-constitutional-coup-72011.

13 For example, in 1996, Zambian President Frederick J. Chiluba had the constitution amended to invalidate the candidacy of former president Kenneth David Kaunda who was challenging Chiluba for the presidency of the country. *See* Sebastian Kohn, *Abusing Citizenship in Zambia—Again*, OPEN SOCIETY FOUNDATIONS (Oct. 17, 2011), https://www.opensocietyfoundations.org/voices/abusing-citizenship-zambia-again.

14 *See, e.g.*, Marco Chown Oved, *Constitutional Coups: How African Leaders Stay in Power*, TORONTO STAR (Dec. 8, 2015), https://www.thestar.com/news/world/2015/12/08/constitutional-coups-how-african-leaders-stay-in-power.html.

15 *See, e.g.*, Filip Reyntjens, *The Changes Made to Rwanda's Constitution are Peculiar—Here is Why*, THE CONVERSATION (Jan. 28, 2016, 9:25 AM), https://theconversation.com/the-changes-made-to-rwandas-constitution-are-peculiar-heres-why-53771 (answering that the constitutional changes were approved by 98.3% of the voters).

16 *See, e.g.*, Isaac Mufumba, *Presidents Who Amended Constitution to Stay in Power*, DAILY MONITOR (UGANDA) (Dec. 17, 2017), http://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html.

and minimizing the occurrence of constitutional coups. However, before I examine constitutional coups, I first take a look at other forms of extra-constitutional regime changes in the continent. I note that although the Organization of African Unity ("OAU") and its successor organization, the AU, have been able to develop policy to deal with military coups, which emerged in the immediate post-independence period as a popular way to illegally change government, the AU has not been effective in attacking and eliminating constitutional coups.

In Section II, I examine the military coup as a form of extra-constitutional governmental change in the continent and how the OAU and subsequently the AU, have struggled to deal with these illegal regime changes, in view of these organizations' adherence to the international law principle of non-interference with the internal affairs of member States. In Section III, I examine the development of new policy approaches to international peace and security under the auspices of the AU. The discussion in this section will include the evolution of the responsibility to protect principle and the gradual demise of the non-intervention doctrine adopted by the OAU at its founding in 1963. Section IV is devoted to an examination of the experiences of the OAU and the AU with non-interference and non-indifference. In Section V, I examine the constitutional coup as a new and major threat to democracy and the rule of law in Africa. In doing so, I draw lessons from a few case studies. Section VI is devoted to the AU's response to constitutional coups. In Section VII, I provide policy recommendations and ideas for a way forward for the AU and African countries. I pay special attention to the ways in which Africans can deal effectively with constitutional coups and provide themselves with governing processes that are undergirded by the separation of powers with effective checks and balances.

II. DEALING WITH THE MILITARY COUP AS A FORM OF UNCONSTITUTIONAL REGIME CHANGE IN AFRICA

A. Introduction

Post-independence Africa's first military coup took place in Egypt on July 23, 1952 when King Farouk was deposed by members of the Free Officers Movement under the direction of Col. Gamal Abdel Nasser.[17] Following Egypt's example, military coups emerged as one of the most

17 *See* ERIC CARLTON, THE STATE AGAINST THE STATE: THE THEORY AND PRACTICE OF THE COUP D'ÉTAT (1997) (describing, inter alia, the Egyptian military coup of 1952, which overthrew King Farouk).

important challenge to democratic political change in Africa as more and more colonies gained independence.[18] In countries, such as Nigeria, military intervention in politics set the stage for the type of sectarian violence that has continued to define governance in these countries to this day.[19]

When the OAU came into being in 1963, it was expected that the organization would help liberate the rest of the continent, accelerate the decolonization process, and help the remaining colonies, including apartheid South Africa, to gain their independence; promote democratic governance throughout the continent; advance the protection of human rights; and provide the enabling institutional environment for the creation of the wealth that was needed to deal fully and effectively with poverty and promote economic and human development.[20] While the OAU was aware of the fact that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples,"[21] the organization's Charter did not specifically make the promotion of democracy and good governance one of its purposes or objectives.[22] Instead, member States were required to adhere to certain principles, which included "[n]on-interference in the internal affairs of [member] States" and "[r]espect for the sovereignty and territorial integrity of each Sate and for its inalienable right to independent existence."[23]

For many African countries, these principles meant that the OAU, as a continental organization, could not intervene to prevent extra-constitutional regime changes, including military coups.[24] Yet, it was obvious, even to a casual observer, that military coups were a direct affront and constraint to the maintenance of the type of governance systems that promote many of the ideals (e.g., freedom, equality, and justice) that gave

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18 *See, e.g.*, A.B. ASSENSOH & YVETTE M. ALEX-ASSENSOH, AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, 1900–PRESENT 135 (2001) (providing a historical overview of military coups in Africa).

19 *See* JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970, 50-59 (2016) (examining, inter alia, the contributions of the military to the decision by several subcultures to secede from the federation, leading to the civil war).

20 *See* Charter of the Organization of African Unity pmbl., Sept. 13, 1963, 479 U.N.T.S. 39 [hereinafter OAU Charter].

21 *Id.*

22 The OAU Charter lists five purposes but none of them deals with democracy or good governance. *See id.* at art. ii.

23 *Id.* at art. iii.

24 *See, e.g.*, U. O. Umozurike, *The Domestic Jurisdiction Clause in the OAU Charter*, 78 AFR. AFFAIRS 197, 199 (1979) (arguing, inter alia, that the OAU's principle of non-intervention in the internal affairs of its Member States prevented it from taking decisive action to prevent human rights abuses in many countries in the continent).

impetus to the founding of the OAU.[25] The first challenge to the OAU's adherence to the principle of non-interference in the internal affairs of member States came in 1963 with the military overthrow and subsequent assassination of the Togolese President Sylvanus Olympio on January 13, 1963.[26] Although the military coup in Togo took place before the official founding of the OAU, the latter was still forced to confront the new Togolese government.[27] When the OAU met for its inaugural summit in Addis Ababa on May 25, 1963, the delegation sent by the successor Togolese government was not allowed to attend the summit.[28] In fact, the chair that would have been occupied by President Olympio in the Conference Hall was left vacant.[29]

Based on their experiences under colonial exploitation, African leaders should have recognized the fact that well-governed and progressive societies are built on the principles of constitutionalism and constitutional government. Denying the military delegation a seat at the inaugural summit of the OAU was an appropriate beginning to signal their dedication to recognizing and prioritizing these constitutional principles and condemning the coup action in Togo.[30] Unfortunately, by July 1963, just seven months after the military coup d'état and savage assassination of President Olympio outside the U.S. Embassy in Lomé, the OAU

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25 *See, e.g.*, Ufo Uzodike, *Pan-African Governance Architecture*, *in* THE STATE OF AFRICA 2010/11: PARAMETERS AND LEGACIES OF GOVERNANCE AND ISSUE AREAS 87, 87-88 (Korwa G. Adar, Monica K. Juma & Katabaro N. Miti eds., 2010) (examining, inter alia, the impetus to the formation of the Organization of African Unity).

26 *See generally* ZEUS KOMI AZIADOUVO, SYLVANUS OLYMPIO: PANAFRICANISTE ET PIONNIER DE LA CEDEAO (2013) (providing an examination of the times and life of the father of Togolese independence, Sylvanus Olympio).

27 *See* A. Bolaji Akinyemi, *The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, 46 BRIT. Y.B. INT'L L. 393, 399 (1972–73) (the Organization of African Unity was founded on May 25, 1963 in Addis Ababa with 32 signatory governments. This was five months after the Togolese military coup.

28 *See id.*

29 *See* Syerramia Willoughby, *Remembering Sub-Saharan Africa's First Military Coup D'état Fifty Years On*, LONDON SCH. OF ECON.: FIROZ LALJI CTR. FOR AFR. (Aug. 19, 2013), http://blogs.lse.ac.uk/africaatlse/2013/08/19/remembering-sub-saharan-africas-first-military-coup-detat-fifty-years-on.

30 Many scholars of African politics have argued that leaving the seat that would have been occupied by President Olympio "conspicuously empty in the conference hall, known as Africa Hall," actually sent "a chilling message to the assembled leaders and future ones on how vulnerable their governments were to subversion by a mere handful of soldiers." *See* GODFREY MWAKIKAGILE, NYERERE AND AFRICA: END OF AN ERA 59 (5th ed. 2010). The gesture, it is argued, "was also a warning to aspiring coup makers that coups and assassinations would not be tolerated on the continent." *See id.* Unfortunately, both African countries and the OAU did not strictly adhere to this doctrine as evidenced by the fact that the Togolese regime was soon given recognition by the OAU and its member States.

allowed the Togolese delegation to take part in the OAU's meetings.[31] In fact, by this time, all African countries had granted recognition to Togo's new post-coup government despite the fact that it had come into being through violent and non-constitutional means. Had both the OAU and Africa's immediate post-independence leaders adopted and sustained a policy of opposition to extra-constitutional regime changes, they may have prevented the emergence of the military coup as the most popular source of regime change in the continent during the period from the early-1960s to the late-1990s.[32]

B. Evolution of OAU/AU Policy Toward Unconstitutional Regime Change

It has been argued that in the immediate post-independence period in Africa, the military coup d'état emerged as a major source of government dysfunction.[33] Evolution of the OAU and its successor organization, the AU policy on unconstitutional (or extra-constitutional) change of government ("UCG") can be found in three important instruments. First, is the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government ("Lomé Declaration").[34] The second instrument is the African Charter on Democracy, Elections and Governance ("Democracy Charter"), which was adopted at the Eighth Ordinary Session of the Assembly of the African Union on January 30, 2007 and came into effect on February 15, 2012.[35] The third instrument is the Constitutive Act of the African Union ("Constitutive Act"), which was signed on July 11, 2000 in Lomé, Togo.[36] It is important to note that the AU's *modus operandi* is to cooperate with various regional economic communities ("REC") in order to fully implement its policy toward unconstitutional change of government. Some of the RECs have actually

31 *See, e.g.*, PHILIP ROESSLER, ETHNIC POLITICS AND STATE POWER IN AFRICA: THE LOGIC OF THE COUP-CIVIL WAR TRAP 85 (Cambridge University Press, 2016) (arguing, inter alia, that only "a brief period of ostracism, Togo was allowed to reenter normal diplomatic relations with other African countries and to sign the Charter of the Organization of African Unity.").

32 *See* SAMUEL M. MAKINDA, F. WAFULA OKUMU & DAVID MICKLER, THE AFRICAN UNION: ADDRESSING THE CHALLENGES OF PEACE, SECURITY, AND GOVERNANCE (2d ed. 2015) (providing an overview of the evolution of the African Union's policy toward extra-constitutional regime changes).

33 ISSAKA K. SOARÉ, THE AU AND THE CHALLENGE OF UNCONSTITUTIONAL CHANGES OF GOVERNMENT IN AFRICA 1 (2009), https://www.files.ethz.ch/isn/105906/P197.pdf.

34 Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, July 10-12, 2000, O.A.U. Doc. AHG/Decl.5 (XXXVI) [hereinafter Lomé Declaration].

35 African Charter on Democracy, Elections and Governance, Jan. 30, 2007, O.A.U. Doc. Assembly/AU/Dec.47 (VIII) [hereinafter Democracy Charter].

36 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

developed their own instruments to deal with extra-constitutional change of regime. One such regional instrument is the one developed by the Economic Community of West African States ("ECOWAS") called Protocol on Democracy and Good Governance ("ECOWAS Protocol").[37]

The Lomé Declaration outlines the following as situations that can be considered as producing an unconstitutional change of government: (1) military coup d'état against a democratically elected Government; (2) intervention by mercenaries to replace a democratically elected Government; (3) replacement of democratically elected Governments by armed dissident groups and rebel movements; and (4) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.[38]

The Democracy Charter has the same four situations elaborated in the Lomé Declaration. Nevertheless, the Democracy Charter has an additional situation, which addresses constitutional changes that interfere with democratic regime change and states: "Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government."[39] But, what is a military coup? Military coups d'état usually involve the "forceful removal from office of individuals who hold leadership positions in the polity's political institutions."[40]

While varying slightly, definitions of "coup d'état" emphasize several important points that make it an illegal action, differentiate it from a civil war, and affect officials at the highest level of government. First, military intervention and seizure of the government is an illegal or

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37 Protocol on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dec. 2001, ECOWAS Doc. A/SP1/12/01 [hereinafter ECOWAS Protocol].

38 Lomé Declaration, *supra* note 5, at para. ix. It is important to note that the Lomé Declaration does not address intervention to replace a non-democratic government.

39 Democracy Charter, *supra* note 36, at art. 23(5).

40 JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 92 (1997) (Other definitions include "events in which existing régimes are suddenly and illegally displaced by the action of relatively small groups, in which members of the military, police, or security forces of the state play a key role, either on their own or in conjunction with a number of civil servants or politicians.") [hereinafter MBAKU, INSTITUTIONS AND REFORM IN AFRICA]; *see* Pat McGowan & Thomas H. Johnson, *African Military Coups D'état and Underdevelopment: A Quantitative Historical Analysis*, 22 J. MOD. AFR. STUD. 633, 634-635 (1984); *see also* John Mukum Mbaku, *Military Coups as Rent-Seeking Behavior*, 22 J. POL. & MILITARY SOCIO. 241, 243 (1994) (Others define it as "an irregular transfer of a state's chief executive by the regular armed forces or internal security forces through the use (or threat) of force," that specifically excludes "nonmilitary irregular transfers such as cabinet reshufflings and palace coups that lack military participation.") [hereinafter Mbaku, *Military Coups as Rent-Seeking Behavior*]; J. Craig Jenkins & Augustine J. Kposowa, *Explaining Military Coups D'état: Black Africa, 1957–1984*, 55 AM. SOC. REV. 861, 861 (1990).

unconstitutional act. Second, the officials deposed are found at the highest level of government (e.g., a president or prime minister). Third, the operation does not involve large numbers of military officers. If the action involves a large number of military officers, it could become indistinguishable from a civil war. Finally, the military coup d'état is usually of short duration.[41]

C. The OAU/AU and Unconstitutional Regime Change

On July 9, 2002, the OAU was disbanded and replaced by the African Union.[42] This section of the paper takes a closer look at the position taken by the OAU/AU with respect to unconstitutional changes of government ("UCG") as defined both in the Lomé Declaration and the Democracy Charter.[43]

The Lomé Declaration and the Democracy Charter provide a general framework that the African Union can use to respond to unconstitutional changes of government. Of all the situations named by both instruments as constituting instances of UCG, emphasis is placed on military coups d'état. There have been suggestions that this is due to the fact that many African leaders believed that military coups were the most pervasive of the four or five forms of extra-constitutional change of government.[44] Some scholars have argued, however, that some African leaders, notably those who came to power through military coups, might see the latter as a much more significant threat to their regime's security and stability than other forms of unconstitutional changes of government.[45]

One may wonder why military coups rarely ever occur in some countries, such as the United States, Canada, the United Kingdom, and other matured democracies. The answer may lie in the fact that all these countries have governing processes undergirded by separation of powers with effective checks and balances, which include independent judiciaries, robust civil societies, openness and transparency in government communication, and free and independent media.[46] One way for African countries to minimize the incidence of unconstitutional change of

41 Lomé Declaration, *supra* note 34.

42 *See* DIEDRE L. BADEJO, THE AFRICAN UNION 12 (2008). For more on the OAU, *see* GORDON HARRIS, THE ORGANIZATION OF AFRICAN UNITY (1994).

43 *See* Lomé Declaration, *supra* note 35; Democracy Charter, *supra* note 36.

44 *See generally* SOARÉ, *supra* note 34.

45 *See generally* SOARÉ, *supra* note 34.

46 *See, e.g.*, Judith A. Best, *Fundamental Rights and the Structure of Government, in* THE FRAMERS AND FUNDAMENTAL RIGHTS 37-56 (Robert A. Licht ed., 1992); *see generally* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447 (1991).

government, including military coups d'état, then, is for them to practice good governance—that is, each of them should provide itself with institutional arrangements undergirded by the rule of law. The emphasis is on strengthening, deepening and institutionalizing democracy, as well as significantly improving each country's democratic institutions.[47]

Both the Lomé Declaration and the Democracy Charter list several factors which they believe would reduce or minimize the risk of intervention in politics by military officers. Specifically, the Lomé Declaration provides nine "principles as a basis for the articulation of common values and principles for democratic governance."[48] These are:

- adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally accepted principles of democracy;
- respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament;
- separation of powers and independence of the judiciary;
- promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process;
- the principle of democratic change and recognition of a role for the opposition;
- organization of free and regular elections, in conformity with existing texts;
- guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stakeholders;
- constitutional recognition of fundamental rights and freedoms in conformity with the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981
- guarantee and promotion of human rights.[49]

These nine principles reflect certain attributes of good governance, which include respect for the constitution and the rule of law, separation of powers and judicial independence, change in government through

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47 *See generally* JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 11-13 (2018) [hereinafter MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES] (arguing, inter alia, that institutional arrangements, undergirded by effective checks and balances, can help African countries minimize government impunity and enhance peaceful coexistence).

48 Lomé Declaration, *supra* note 35.

49 Lomé Declaration, *supra* note 35; *see also* Democracy Charter, *supra* note 35, at art. 3 (elaborating on similar principles).

democratic processes only, recognition of the opposition as an important player in governance, organization of free, credible, fair and regular elections in conformity with the constitution, and independent and free media that is accessible to all political actors, including especially those in the opposition. The hope of the signatories to the Lomé Declaration is that adherence to these principles would significantly minimize unconstitutional or extra-constitutional regime changes in the African countries.

The OAU/AU's policy response to unconstitutional regime changes is that such activities are undemocratic, must be rejected, and represent "an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions."[50] But, what action should the OAU/AU and African countries take whenever an unconstitutional change of government has taken place in an OAU/AU Member State? Chapter 8 of the Democracy Charter provides practical actions that should be taken by the OAU/AU in response to an UCG.[51] The Lomé Declaration also makes similar suggestions for OAU/AU member states, including that: unconstitutional regime changes should be immediately and publicly condemned; the PSC should convene to discuss moving forward; the member State where the UCG took place should be immediately suspended from participating in activities of the Union; the perpetrators of the UCG should be given six months to restore constitutional order; and there should be sanctions if the perpetrators do not restore constitutional order within six months.[52]

While Article 25 of the Democracy Charter provides for a similar policy, it also adds two critical measures. First, the perpetrators of the UCG are not allowed to participate in elections or hold any position of responsibility in political institutions of their State.[53] Secondly, the state should be sanctioned if it is proven that the state instigated or supported an UCG in another state.[54] In other words, coup-makers may not "democratize" themselves and become part of the post-coup democratic civilian government.

What is the rationale for this anti-coup policy, especially considering the fact that the founding document of the OAU specifically supported a policy of non-interference in the internal affairs of Member

50 Lomé Declaration, *supra* note 35.

51 Democracy Charter, *supra* note 36, at art. 23(5).

52 *See* Lomé Declaration, *supra* note 35; Democracy Charter, *supra* note 36; *see also* Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3, at art. 30 (lending additional support to these sanctions and states as follows: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the [African] Union.").

53 *See* Democracy Charter, *supra* note 36, at art. 25(4).

54 *See id.* at art. 25(6).

States? Could it be that African leaders had come to the realization that military coups d'état and other forms of unconstitutional regime change were at odds with the wave of democratization that was sweeping the continent and other parts of the world? By the mid-1990s, especially after South Africa's successful transition from the racially-based apartheid system to a multi-racial and democratic political dispensation, many Africans came to see multiparty democracy and constitutionalism as the only legitimate way to change government, as well as to enhance and ensure peaceful coexistence and minimize sectarian conflict.[55]

From the early 1950s to the early-to-mid 1990s, when military coups d'état were pervasive throughout Africa, there was no continent-wide policy, at least not one advocated by an organization such as the OAU, on their danger to democracy.[56] Most opposition to and condemnation of military coups were based on or derived from the nature of the coups, the type of treatment meted out to members of the ousted regime by the coup leaders, and the immediate post-coup behavior of the coup makers. In some cases, ethnicity and religion played a significant role in determining the nature of the reaction, especially by different factions of the country, to the coup.[57]

Other military coups gained national and even international notoriety because of their brutality or the behavior of the coup makers after they came into power. For example, the coup conducted by Master Sergeant Samuel Doe and a group of Krahn soldiers on April 12, 1980 against the

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55 For example, it was this recognition of democracy and constitutionalism as a better and more effective political dispensation that swept Zambia's long-time dictator, Kenneth Kaunda, out of power and catapulted trade unionist, Frederick Chiluba, to the presidency of Zambia in 1991. *See, e.g.*, JULIUS O. IHONVBERE, ECONOMIC CRISIS, CIVIL SOCIETY, AND DEMOCRATIZATION: THE CASE OF ZAMBIA 103-43 (1996) (providing, *inter alia*, an examination of the fall of Kenneth Kaunda and the rise of Frederick Chiluba in Zambian politics).

56 SOARÉ, *supra* note 34 at 4.

57 For example, the military coup that overthrew the government of Nigeria's First Republic on January 15, 1966 was led by Major Patrick Chukwuma Kaduna Nzeogwu—the latter was born in Nigeria's northern region of Igbo immigrant parents. *See* ADEWALE ADEMOYEGA, WHY WE STRUCK: THE STORY OF THE FIRST NIGERIAN COUP (1981). The coup was extremely bloody and was marked by the murders of several prominent Nigerians, including the country's Prime Minister, Alhaji Tafawa Balewa, the Premier of the now defunct Northern Region, Sir Ahmadou Bello, the Premier of the now defunct Western Region, Sir Samuel Ladoke Akintola, and top army officers from the Northern and Western Regions. *See id.* Many critics of the coup have argued that because Nzeogwu and his fellow coup executors did not kill any top politicians and military officers from the Eastern Region, the military action was not an attempt to eliminate corrupt politicians and restore respectability and efficiency to the Nigerian political and civil services, as argued by the coup leaders. *See id.* Instead, argue these critics, the coup was an Igbo conspiracy designed to enhance the ability of the Eastern Region to subjugate the rest of the country, including the Northern Region, where most of the high-profile victims were from. *See id.*

government of Liberia was extremely brutal and bloody.[58] In addition to killing the President of Liberia, William R. Tolbert, Jr., the coup makers also massacred twenty-six of Tolbert's supporters and publicly executed thirteen members of Tolbert's cabinet.[59] Doe went on to preside over a government that was characterized by extreme corruption, barbarism, and the gross violation of human rights.[60]

On January 25, 1971, Idi Amin overthrew the government of Ugandan President Milton Obote. Although the coup against Obote was not considered bloody, Amin went on to preside over one of the most dysfunctional and oppressive governments in post-independence Africa. In addition to purging the military of members of some ethnic groups, particularly the Acholi and Lango, he also forced into exile many people of Indian ancestry. During his eight years in control of the government of Uganda, Amin is said to have killed many people, including religious leaders, journalists, artists, senior civil servants, judges, lawyers, students and other intellectuals, and foreign nationals.[61]

It was within this environment, one in which many Africans, regardless of their ethnic or religious affiliation, were increasingly aware of their fundamental rights and were eager for their countries to transition to democracy, with governing processes undergirded by the rule of law, that African Heads of State and Government, meeting in Harare, Zimbabwe for the thirty-third summit of the Organization of African Unity took steps to adopt a uniform policy for dealing with unconstitutional regime changes, including, especially, the military coup.[62]

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58 Master Sergeant Doe was a member of the Krahn ethnic group, one of the 16 ethnic groups coexisting in Liberia. *See* GEORGE KLAY KIEH, JR., THE FIRST LIBERIAN CIVIL WAR: THE CRISES OF UNDERDEVELOPMENT 19, 70-71 (2008).

59 *After the Takeover, Revenge*, Time (Apr. 28, 1980), http://www.time.com/time/magazine/article/0,9171,924057,00.html [https://web.archive.org/web/20080928150953/http://www.time.com/time/magazine/article/0,9171,924057,00.html]. *See, e.g.*, AUSTIN O. BINITIE, BLOOD & BONES IN LIBERIA (1998); GABRIEL I. H. WILLIAMS, LIBERIA: THE HEART OF DARKNESS 13 (2002).

60 In fact, it was Doe's brutality and extreme repression of the Liberian people that triggered Liberia's first civil war, which lasted from 1989 to 1997 and was responsible for killing as many as 200,000 people. KIEH, supra note 59, at 157-58.

61 *See* ALICIA C. DECKER, IN IDI AMIN'S SHADOW: WOMEN, GENDER, AND MILITARISM IN UGANDA (2014).

62 *See* PROTECTING DEMOCRACY: INTERNATIONAL RESPONSES 118 (Morton H. Halperin & Mirna Galic eds., 2005) (arguing, inter alia, that when the OAU met for its annual summit in Harare, Zimbabwe, Member States passed "a resolution condemning coups d'état." Later, "the Heads of State Assembly at the 1999 OAU Summit in Algiers agreed on a resolution barring at its next summit, in Lomé in 2000, those members whose governments had been deposed since the Harare Summit and who had not held credible elections.").

The Harare summit of the OAU took place on June 2, 1997, but even as the delegates were settling down to the deliberations, Nigerian ships were bombarding Freetown, the capital of Sierra Leone, in an effort to dislodge the government of Major Johnny Paul Koroma. In August 1996, Koroma had been arrested and subsequently imprisoned for his involvement in a military coup against the civilian government that was led by President Ahmad Tejan Kabbah. Nevertheless, on May 25, 1997, seventeen junior military officers from the Sierra Leone Army broke into the central prison in Freetown and freed Koroma, who was subsequently named the country's head of state and chairman of the Armed Forces Revolutionary Council ("AFRC"). Shortly after assuming the position of head of state, Koroma invited members of the rebelling and murderous Revolutionary United Front ("RUF"), which had been fighting the government for more than six years, to join the government.[63] At the Zimbabwe summit, African leaders unanimously and unequivocally condemned and rejected the coup. They went further to condemn and disavow all unconstitutional regime changes in the continent.

In attendance at the Zimbabwe summit was UN Secretary-General Kofi Annan, who, in his opening address to attendees, condemned the coup in Sierra Leone and proclaimed as follows: "Where democracy has been usurped, let us do all in our power to restore it to the people."[64] He went on to add that "[n]eighboring states, regional groups and international organizations must all play their parts to restore Sierra Leone's constitutional and democratic government."[65] Similar remarks were made by then President of Zimbabwe, Robert Gabriel Mugabe.[66] He declared that "[d]emocracy must be restored in Sierra Leone as a matter of urgency."[67] He continued: "We are getting tougher and tougher on coups. Coup-plotters and those who overthrow democratic governments will find it more difficult to get recognition from us. Democracy is getting stronger in Africa and we now have a definite attitude against coups."[68]

The OAU then went on to authorize members of the regional organization called Economic Community of West African States (ECOWAS)

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63 *See generally* LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE (2005).

64 Andrew Meldrum, *Coups No Longer Acceptable: OAU*, AFR. RENEWAL ONLINE (July 1997), https://www.un.org/africarenewal/magazine/july-1997/coups-no-longer-acceptable-oau.

65 *Id.*

66 Mugabe served as the Chairperson of the OAU from June 2, 1997 to June 8, 1998. *See* RICHARD SCHWARTZ, COMING TO TERMS: ZIMBABWE IN THE INTERNATIONAL ARENA 176 (2001) (discussing, inter alia, Mugabe's term of service as the Chairperson of the OAU).

67 Meldrum, *supra* note 65.

68 *Id.*

to take military action against the military-installed government in Sierra Leone with the aim of returning democratic governance to the country.[69] It is important to note that the coup in Sierra Leone took place on May 25, 1997, in the midst of successful efforts by ECOWAS to secure a peace agreement that brought an end to the country's seven-year brutal civil war, which had been started by the RUF's actions against the government.[70] Following ECOWAS' successful efforts to broker peace, multiparty elections were held in 1996 and Ahmed Tejan Kabbah had emerged as the undisputed winner.[71] However, some disgruntled elements of the RUF had rejected the peace and sought to overthrow the government. Many African leaders, who were attending the Harare summit saw the Sierra Leone military coup as a major setback, not just for peace, peaceful coexistence, and the deepening and institutionalization of democracy in Sierra Leone, but also in Africa generally.[72] The events in Sierra Leone, thus, provided the impetus to the unequivocal condemnation and rejection of the military coup and other forms of unconstitutional regime changes on the continent. These leaders then resolved to be united in their rejection of any regime change that came into being through a military coup or other unconstitutional means. They believed that democracy held the key to peace, security, and development in Africa. This united front against unconstitutional change of government, including rejection of the military coup as a way to achieve regime change, provided the foundation for the eventual adoption, in July 2000, of the Lomé Declaration.[73]

It has been argued that some military coups d'état in Africa actually produced regimes that were better and more beneficial to governance and the welfare of Africans than those that had existed before the military intervention.[74] One prominent example is Mali, where a military coup in 1991 ousted President Moussa Traoré, a dictator, and ended a more than

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69 *See* Peter A. Dumbuya, *ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity or Multipolarity?*, 25 J. THIRD WORLD STUD. 83, 87 (2008).

70 *See* REGIONAL ORGANIZATIONS IN AFRICAN SECURITY 57 (Fredrik Söderbaum & Rodrigo Tavares eds., 2011) (discussing, inter alia, the military coup that took place in Sierra Leone in March 1997).

71 *See* LARRY J. WOODS & COLONEL TIMOTHY R. REESE, MILITARY INTERVENTIONS IN SIERRA LEONE: LESSONS FROM A FAILED STATE 32 (2008) (discussing, inter alia, the election of Ahmad Tejan Kabbah and his political party, the Sierra Leone Peoples Party, as president and ruling party, respectively, in Sierra Leone in March 1996).

72 *See* Meldrum, *supra* note 65.

73 *See generally* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION, at xiv-xv (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012) (providing an overview of the origins of AU institutions and how they have responded to unconstitutional regime changes, including military coups d'état).

74 *See* SOARÉ, *supra* note 34.

two-decades dictatorship. Subsequently, multiparty elections were held and a civilian government established.[75]

The second case is the coup in Mauritania, which ousted the totalitarian regime of President Maaouya Ould Taya in 2005, who himself had come to power through a military coup in 1984.[76] The coup leader, Ely Ould Mohamed Vall refused to accept the title of president and together with other coup leaders, agreed not to run for president. Presidential elections were subsequently held, and Vall handed power over to the winner in 2007.[77]

These examples may be the reason why some commentators have argued that some coups may be acceptable and welcomed as a way to extricate a country from a political quagmire made possible by pervasive impunity, corruption, and tyranny by incumbent leaders.[78]

Professor Paul Collier, a well-known scholar of African political economy, has made similar arguments, stating that since many African elections are often not fair or free, donor countries should be willing to accept a military coup d'état if it is determined that this is the only way to rid a country of a political tyrant.[79] He makes specific reference to Zimbabwe's Robert Gabriel Mugabe and states that "[a] truly bad government in a developing country is more likely to be replaced by a coup than by an election."[80] The proposition that "some coups are acceptable, and therefore could be said to be good coups, whereas others are not acceptable, and are therefore bad coups," poses a number of worrying

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75 *See, e.g.*, SUSANNA D. WING, CONSTRUCTING DEMOCRACY IN TRANSITIONING SOCIETIES OF AFRICA: CONSTITUTIONALISM AND DELIBERATION IN MALI 88-89 (2008) (examining the construction of democratic institutions, with specific emphasis on post-independence Mali).

76 BOUBACAR N'DIAYE, MAURITANIA'S COLONELS: POLITICAL LEADERSHIP, CIVIL-MILITARY RELATIONS AND DEMOCRATIZATION 6 (2018).

77 *See generally id.* (providing, inter alia, a detailed examination of the Ould Taya era in Mauritania).

78 *See, e.g.*, STAFFAN WIKING, MILITARY COUPS IN SUB-SAHARAN AFRICA: HOW TO JUSTIFY ILLEGAL ASSUMPTIONS OF POWER (1983).

79 Paul Collier, *Let Us Now Praise Coups*, WASH. POST (June 22, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/06/19/AR2008061901429_pf.html. *See, e.g.*, PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT (2007).

80 *Id.* (on November 14, 2017, soldiers from the Zimbabwe Defense Forces ("ZDF") seized control of the Zimbabwe Broadcasting Corporation ("ZBC") and eventually placed President Robert Gabriel Mugabe under house arrest. Mugabe was subsequently forced to resign. The ZDF, however, told the nation that what they had done was not a coup d'état). *See* Jason Burke, *Military urges calm in Zimbabwe after it seizes key sites in capital*, THE GUARDIAN (Nov. 15, 2017, 3:32 PM), https://www.theguardian.com/world/2017/nov/14/tensions-rise-in-zimbabwe-as-military-drives-through-outskirts-of-capital; *see* Norimitsu Onishi & Jeffrey Moyo, *Robert Mugabe Resigns as Zimbabwe's President, Ending 37-Year Rule*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/world/africa/zimbabwe-mugabe-mnangagwa.html.

problems.[81] For example, most of the regimes that have come to power in Africa through unconstitutional means have generally not governed any better than the constitutional regimes that they ousted. In fact, many military regimes that overthrew what they claimed were corrupt civilian regimes went on to be more corrupt and inefficient than the regimes that they had replaced.[82]

Many of Africa's post-coup "military rulers turned out to be at least as corrupt and authoritarian as the civilians whom they replaced."[83] When the military overthrew the government of the First Nigerian Republic in 1966, its leader, Major Kaduna Nzeogwu, told the nation that the army's intention was not to rule the country but to get rid of corrupt, parasitic, and irresponsible civil servants and politicians and restore respectability to the country's public services.[84] Once that was done, they would return to the barracks.[85] Despite these promises, the military governments that ruled Nigeria between 1966 and 1999 were pervaded by "corruption, nepotism, and economic mismanagement."[86] Mbaku argues that although the military came into power in Nigeria in 1966 "claiming to be on a reformist mission, its post-coup behaviors did not support that claim. Instead, military leaders behaved as individuals whose main objective was to use the apparatus of government to plunder the economy and amass wealth for themselves at the expense of the rest of the country."[87]

Those who argue in favor of so-called "good coups"—that is, coups designed by the military to get rid of despots—see the military as having the wherewithal to add significant "value to the management of the affairs of the state."[88] Nevertheless, while the "military has a certain contribution to make towards the development of a state, this contribution has not

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81 FRANCIS NGUENDI IKOME, GOOD COUPS AND BAD COUPS: THE LIMITS OF THE AFRICAN UNION'S INJUNCTION ON UNCONSTITUTIONAL CHANGES OF POWER IN AFRICA 35 (2007), http://igd.org.za/jdownloads/Occasional%20Papers/igd_occasional_paper_55.pdf.

82 *See, e.g.*, JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2007).

83 John F. Clark, *The Decline of the African Military Coup*, 18 J. OF DEMOCRACY 141, 141 (2007).

84 *See Radio Broadcast by Major Chukwuma Kaduna Nzeogwu—Announcing Nigeria's First Military Coup on Radio Nigeria, Kaduna on January 15, 1966*, VANGUARD NEWSPAPER (Sept. 30, 2010, 7:26 PM), https://www.vanguardngr.com/2010/09/radio-broadcast-by-major-chukwuma-kaduna-nzeogwu-–-announcing-nigeria's-first-military-coup-on-radio-nigeria-kaduna-on-january-15-1966.

85 *See id.*

86 MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 41, at 123.

87 *Id.* at 124.

88 Naison Ngoma, *Coups and Coup Attempts in Africa: Is There a Missing Link?*, 13 AFR. SECURITY STUD. 85, 88 (2004).

always been successful."[89] During the last several decades in Africa, national militaries have not been institutions that have contributed positively to the development of their respective countries. In addition to the fact that "[r]elatively poor economic management and restrained political activity have tended to manifest in virtually all the [African] countries that have had military regimes,"[90] the armed forces of several countries have actually been the source of many of these countries' multifarious economic and political problems.[91]

Sustainable economic and human development can only take place within institutional environments that are characterized by predictability. An important element of the legal concept referred to as the "rule of law" is that "the law must not be administered arbitrarily and capriciously."[92] Unlike a well-constituted tribunal, whose decision-making process would be guided by the law, including, especially in common law countries, judicial precedent, and hence, would behave or function in a relatively predictable manner, coup makers are likely to make their decisions in an arbitrary and capricious way, guided solely by their corporate interests and not by those of the people writ large. Coup makers generally are opportunistic individuals whose main interest is self-enrichment. The evidence from Africa's more than fifty years' experience with military coups is that, in virtually every one of them, post-coup leaders, regardless of the reasons that they gave for overthrowing the government, have usually shown very little interest in national development. Instead, these individuals have proceeded to use their new power to exploit their national economies for their personal benefit and that of their benefactors.

It is virtually impossible to categorize a coup as "good" until after the coup makers have actually handed government to another set of elites. Coup makers usually start their military intervention with "good promises" and it is only after they have lived up to those promises would one be able to make a judgment as to whether the coup was a good one or not. Hence, citizens of a country that is being terrorized by a despotic leader cannot be certain that the military leaders that they hope would liberate them from this state of affairs would design and carry out a "good coup." They may have to wait for many years to find out if the coup makers keep their promise and return the country to civilian democratic rule.

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89 *Id.* at 88.

90 *Id.*

91 *See, generally*, A. O. SANDA, OLUSOLA OJO & VICTOR AYENI, THE IMPACT OF MILITARY RULE ON NIGERIA'S ADMINISTRATION 52-60 (1987) (providing an overview of the impact of military rule on general administration in Nigeria).

92 John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 1022 (2013).

Another issue that is relevant to the discussion of so-called "good coup" is how to determine if an incumbent government qualifies for overthrow through a military coup. Will the military grant deference to the courts and allow them to make that determination or will the military make such a decision by itself? If national institutions, including the courts, are capable of making such a determination, why not allow them to peacefully remove from power a regime that has lost its legitimacy to govern? If, however, the military is the institution that must determine whether an incumbent government must be removed from power, how can the citizens of such a country be sure that the military is not acting opportunistically to maximize its corporate interests and not to promote democracy, sustainable development, and peaceful coexistence?

Many African leaders who came to power through constitutional means have since violated "their terms of office and the very constitutional arrangements that brought them to power."[93] Nevertheless, when this occurs, there are more peaceful ways, than military coups, to force such recalcitrant leaders to give up their *ultra vires* behaviors and subject themselves to the law. Of course, one can argue that in many African countries with unconstitutional regimes, national institutions, including the courts and the legislature, are not capable of peacefully ousting despotic and/or tyrannical governments or forcing them to conform to the law. Throughout most of post-independence Africa, unconstitutional regime changes have usually led to or produced unconstitutional regimes.[94] Thus, military coups and other unconstitutional approaches to regime change cannot lead to the deepening and institutionalization of democracy in the continent. In fact, these unconstitutional approaches to change of government are actually a major constraint to the development and the sustaining of the norms of good governance in African countries. As has been argued by several scholars and observers, the rationale behind the Lomé Declaration and the Democracy Charter—that coups and assassinations would not be tolerated and that political competition and constitutional government are the most effective ways to ensure peace and development in Africa—forms the foundation on which Africans need to build their governance institutions.[95]

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93 SOARÉ, *supra* note 34, at 5.

94 *See* Richard Obinna Iroanya, *Coups and Countercoups in Africa, in* THE PALGRAVE HANDBOOK OF AFRICAN POLITICS, GOVERNANCE AND DEVELOPMENT 243, 244 (Samuel Ojo Oloruntoba and Toyin Falola eds., 2018) (defining "unconstitutional governments" as "those regimes which came to power through the barrel of the gun or other forceful means").

95 Muna Ndulo, *The Prohibition of Unconstitutional Change of Government, in* THE AFRICAN UNION: LEGAL AND INSTITUTIONAL FRAMEWORK: A MANUAL ON THE PAN-AFRICAN ORGANIZATION 251, 264 (Abdulqawi A. Yusuf & Fatsah Ouguergouz eds., 2012) (arguing, inter

Coups, as a method of regime change, are a major obstacle to political and economic development in Africa. Qualifying some coups as "good" does not change the fact that such an unconstitutional method of regime change only breeds unconstitutional regimes and stunts political development in these countries. For African countries, the way forward is for them to build and sustain governing processes undergirded by separation of powers with effective checks and balances so as to minimize the chances that civil servants and political elites would act with impunity and engage in activities that undermine the country's democratic institutions.[96] In countries with dysfunctional governing systems, state custodians (i.e., civil servants and political elites) are most likely to act opportunistically and with impunity.[97] The most effective way to remedy this state of affairs is not military coups but grassroots efforts to reconstruct the state and provide more effective governance institutions.[98]

III. THE AFRICAN UNION AND THE EVOLUTION OF THE RESPONSIBILITY TO PROTECT DOCTRINE

A. Introduction

On September 1999, at the fourth Extraordinary Session of the OAU Assembly of African Heads of State and Government, which was held in Sirte, Libya, the delegates adopted what came to be known as the Sirte Declaration.[99] As stated in paragraph 8 of the Sirte Declaration, the delegates agreed to: (1) establish the African Union; (2) accelerate the implementation of the Abuja Treaty—the latter was designed to create an African Economic Community, African Central Bank, African Monetary Union, African Court of Justice, and Pan-African Parliament; (3) prepare a Constitutive Act of the African Union that was expected to be ratified

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alia, that it was concern for unconstitutional change of government that led the OAU to adopt the Lomé Declaration, the Democracy Charter, and other conventions).

96 *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 48.

97 Cleo Calimbahin, *An Ambivalent State: The Crossover of Corruption and Violence in the Philippines, in* HANDBOOK OF GEOGRAPHIES OF CORRUPTION (Barney Warf ed., 2018) 331, 338 (arguing, inter alia, that "corruption breeds a climate of impunity").

98 Although this approach may appear quite difficult, it is not impossible, as evidenced by the defeat of Blaise Compaoré's political opportunism in Burkina Faso through civil protests. *See* John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, BROOKINGS INST. (Oct. 30, 2014), https://www.brookings.edu/blog/africa-in-focus/2014/10/30/burkina-faso-protests-extending-presidential-term-limits [hereinafter Mbkau, *Burkina Faso Protests Extending Presidential Term Limits*].

99 *See, e.g.*, THOMAS KWASI TIEKU, GOVERNING AFRICA: 3D ANALYSIS OF THE AFRICAN UNION'S PERFORMANCE 91, 99 (2017) (examining, inter alia, how the African Union has faced the continent's multifarious problems since its establishment in 2001).

by December 31, 2000 and become effective in 2001; (4) empower the then Chairman of the OAU, President Abdelaziz Bouteflika of Algeria and South African President Thabo Mbeki, working in collaboration with the OAU Contact Group on Africa's External Debt, to negotiate a cancellation of the continent's debt; and (5) convene an African Ministerial Conference on Security, Stability, Development and Cooperation on the Continent.[100]

The Fourth Extraordinary Session of the OAU Assembly of African Heads of State and Government was held in Sirte, Libya five years after the Rwanda genocide, considered one of the most challenging political and humanitarian issues faced by the continental organization during the 1990s.[101] It was also five years after the liberation of South Africa from the bondage of white supremacy as embodied in the apartheid system.[102] Although delegates believed that the end of apartheid in South Africa marked the final fulfillment of the OAU's goal of totally liberating the continent from the yoke of colonialism, there is some question about whether this is true, considering the fact that the Western Sahara (Sahrawi Arab Democratic Republic) remains under Moroccan occupation.[103] In fact, Morocco, a founding member of the OAU, left the organization in 1984 after the OAU decided to seat a delegation which claimed that it was representing an independent state named the Sahrawi Arab Democratic Republic ("SADR"). The OAU had admitted the SADR in 1982.[104] Nevertheless, in 2017, Morocco rejoined the continental organization even though the question of self-determination for the people of the Western Sahara remains unresolved.[105]

In addition to "strengthening solidarity among African countries and reviving the spirit of Pan-Africanism," the delegates also took the

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100 Sirte Declaration, Sept. 9, 1999, O.A.U. Doc. EAHG/Decl. (IV) Rev.1.

101 The Rwandan genocide took place for one hundred days (April 7 to mid-July) in 1994. During that period, as many as 1,000,000 Rwandans were murdered. The killings were undertaken by members of the Hutu majority government and the victims were Tutsi and their Hutu sympathizers. *See, e.g.*, MELVERN, *supra* note 6.

102 *See generally* LIZ SONNEBORN, THE END OF APARTHEID IN SOUTH AFRICA (2010); PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1997).

103 *See generally* BELLA HOLT, WESTERN SAHARA, SAHRAWI ARAB DEMOCRATIC REPUBLIC: PROTRACTED SAHRAWI DISPLACEMENT AND CAMPING (2017).

104 *See* Clifford D. May, *Morocco Quits O.A.U. Over Polisario*, N.Y. TIMES (Nov. 13, 1984), https://www.nytimes.com/1984/11/13/world/morocco-quits-oau-over-polisario.html.

105 *See* Conor Gaffey, *Why Has Morocco Rejoined the African Union After 33 Years*, NEWSWEEK (Feb. 2, 2017, 11:27 AM), http://www.newsweek.com/morocco-african-union-western-sahara-551783.

decision to draft a Constitutive Act for the AU.[106] The Constitutive Act of the African Union was subsequently signed in Lomé, Togo, on July 11, 2000.[107] The African Union was officially inaugurated in Durban, South Africa, on July 10, 2002 under the auspices of its first president, Thabo Mbeki of South Africa.[108]

B. Evolution of Responsibility to Protect

To fully understand and appreciate the concept of "responsibility to protect," especially as it applies to Africa, we must begin with the UN's *An Agenda for Peace*, which was authored by the organization's Secretary-General, Boutros Boutros-Ghali, in 1992.[109] In the report, Boutros-Ghali elaborated on suggestions, which he believed would enhance the ability of intergovernmental organizations to respond quickly, fully, and effectively to threats to international peace and security. The report was focused on three critical problem areas, as requested by the UNSC: (i) preventive diplomacy; (ii) peacemaking; and (iii) peace-keeping. Boutros-Ghali added one more "closely-related concept": (iv) post-conflict peace-building.[110]

Boutros-Ghali's report was released in 1992, as the Cold War was just coming to an end and many countries were eager to assert their national sovereignty. In fact, the UNSC was quite reluctant to "issue . . . resolutions that [could be] perceived as infringing the sovereignty of Member States."[111] The failure of the UN Security Council to take an active role in dealing with threats to international peace and security contributed significantly to the failure of the international community to fully and effectively manage violent sectarian conflict, particularly that originating with UN Member States. African countries were especially at risk during this decade—there were violent and destructive sectarian conflicts in Angola, Democratic Republic of Congo, Liberia, Sierra Leone, Sudan, and Rwanda. In fact, by the beginning of the new millennium, the UN

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106 Tim Murithi, *The African Union's Transition from Non-Intervention to Non-Indifference: An Ad Hoc Approach to the Responsibility to Protect*, 1 J. FOR INT'L REL. & GLOBAL TRENDS 90, 90 (2009).

107 *See* Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

108 The Durban Declaration in Tribute to the Organization of African Unity on the Occasion of the Launching of the African Union, July 10, 2002, 41 I.L.M. 1029 [hereinafter Durban Declaration].

109 U.N. Secretary-General, *An Agenda for Peace: Preventative Diplomacy, Peacemaking, and Peace-Keeping*, ¶ 5, U.N. Doc. A/47/277-S/24111 (June 17, 1992). Boutros-Ghali was an Egyptian diplomat and politician who was the sixth U.N. Secretary-General.

110 *See id.*

111 Murithi, *supra* note 107, at 91.

and various African-centered multilateral organizations (e.g., the African Union) had still not developed and implemented effective humanitarian intervention policies.[112] As a consequence, Sudan's genocidal war in the country's Darfur region continued unabated and unattended to by the international community.[113]

At the dawn of the twenty-first century, then, the issue of humanitarian intervention emerged as an important challenge in international relations.[114] Kofi Annan, the Ghanaian diplomat, who became UN Secretary-General on January 1, 1997 and served until December 31, 2006, made pleas to the UN General Assembly to try and find effective ways to deal with the multifarious peace-and-security-related issues that were plaguing the global community.[115] In 1999 at the UN General Assembly and again, in 2000, Kofi Annan "made compelling pleas to the international community to try to find, once and for all, a new consensus on how to approach these issues, to 'forge unity' around the basic questions of principle and process involved."[116] Annan posed an important question to the global community, one that implicated the failure of the UN in particular and the international community in general to respond adequately to past humanitarian crises:

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?[117]

It was in response to this challenge to the international community that the Government of Canada, with the assistance of several foundations, established the International Commission on Intervention and State Sovereignty ("ICISS").[118] In its report to the UN General Assembly in September 2000, the Government of Canada told delegates that the ICISS

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112 *See, e.g.*, THE PALGRAVE MACMILLAN: THE HISTORY AND PRACTICE OF HUMANITARIAN INTERVENTION AND AID IN AFRICA (Bronwen Everill & Josiah Kaplan eds., 2013) (presenting a series of essays that examines the history and practice of humanitarian intervention and aid in Africa).

113 *See generally* JANEY LEVY, GENOCIDE IN DARFUR (2009).

114 Murithi, *supra* note 107, at 91.

115 *See* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 5 (The New Press, 3rd ed. 2007) (arguing, inter alia, that the origin of the word "impunity" can be found in its use by then UN Secretary-General, Kofi Annan, as well as Amnesty International, "to refer to the freedom which tyrants should never have, to live happily after their tyranny").

116 INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at vii (2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf [hereinafter RESPONSIBILITY TO PROTECT].

117 *Id.*

118 *See id.*

had been asked to deal with a "whole range of questions" that were "legal, moral, operational and political" and that the ICISS would consult with as many people and institutions as possible in seeking solutions to these issues.[119] They would then present their report to the UN Secretary-General and the General Assembly, with the hope that some common ground could be reached on how to confront threats to international peace and security.[120] The ICISS established a new approach to dealing with threats to international peace and security called "The Responsibility to Protect" ("R2P").[121] Below, I provide an overview of the R2P.

The responsibility to protect, as detailed in the ICISS Report, incorporates and embraces three important elements: (1) "[t]he responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk"; (2) "[t]he responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention"; and (3) "[t]he responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert."[122]

C. The African Union: From Non-Intervention to Responsibility to Protect

Article 4 of the African Union's Constitutive Act elaborates the "principles" under which the organization would function and these include: (1) "prohibition of the use of force or threat to use force among Member States of the Union"; (2) "non-interference by any Member State in the internal affairs of another"; and (3) "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely, war crimes, genocide and crimes against humanity."[123] As detailed in these principles, while the AU was granted the right to intervene in a Member State under certain prescribed circumstances, Member States were strictly prohibited to intervene in the internal affairs of other Member States.[124]

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119 *Id.*

120 *Id.*

121 *See id.*

122 *See* id., at xi.

123 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4.

124 *See id.*

During the last several decades, government impunity and the abuse of human rights have been pervasive throughout the continent. Genocide, violent sectarian conflict, war crimes, and crimes against humanity have been among some of the threats to international security and peace that have pervaded the continent. It was the failure of regional, continental, and international actors to protect vulnerable populations against these international crimes, including especially during the Rwandan genocide, that served as the impetus to the adoption by the UN, of the principle of responsibility to protect (R2P).[125] The UN's commitment to the R2P specifically provides that (1) States have the responsibility to protect their populations from international crimes; and (2) States should cooperate with each other in their efforts to fulfill their obligations regarding the protection of their populations from international crimes. If, however, a State is unwilling or unable to fulfill its obligations under the R2P, the international community will take action, either through peaceful means or the use of force if the former fails to resolve the problem.[126]

According to the Report produced by the International Commission on Intervention and State Sovereignty and adopted by the United Nations,

> When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases—but only extreme cases—they may also include military action.[127]

Gradually, Africans have warmed up to the principle of R2P. During its existence, the Organization of African Unity ("OAU") did not have the legal power to intervene in internal conflicts on the continent and remained essentially inactive when it came to protecting populations from international crimes.[128] Nevertheless, the OAU's successor, the African Union, has been granted the right to intervene in the internal affairs of Member States in respect of "war crimes, genocide and crimes against humanity[.]"[129]

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125 *See, e.g.*, BRIAN BAUGHAN, HUMAN RIGHTS IN AFRICA (2014) (discussing, inter alia, the history of human rights in Africa). For more on the R2P, see generally RESPONSIBILITY TO PROTECT, *supra* note 117.

126 *See* RESPONSIBILITY TO PROTECT, *supra* note 117.

127 *Id.* at 29.

128 Pieter Brits & Michelle Nel, *Compliance with International Humanitarian Law in Africa: A Study, in* ON STRATEGY: STRATEGIC THEORY AND CONTEMPORARY AFRICAN ARMED CONFLICTS 199, 211 (arguing, inter alia, that the OAU had neither the power nor the capacity to intervene in the internal affairs of Member States).

129 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h).

Alpha Oumar Konaré, who had served as the Chairperson of the African Union Commission from September 16, 2003 to April 28, 2008, advocated a policy that would move the AU from a culture of "non-intervention" to one of "non-indifference."[130] Within the African Union, the main responsibility for the implementation of the principle of R2P (or in continental parlance, "non-indifference") is the Peace and Security Council ("PSC").[131] The AU's PSC was established in 2004 through the Protocol Relating to the Establishment of the Peace and Security Council of the African Union ("AU Protocol").[132] According to Article 2(1) of the AU Protocol,

> There is hereby established, pursuant to Article 5(2) of the Constitutive Act, a Peace and Security Council within the Union, as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa."[133]

As detailed in Article 3 of the AU Protocol, the PSC was established to: (1) "promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development"; (2) "anticipate and prevent conflicts"; (3) "promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence"; (4) "co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects"; (5) "develop a common defense policy for the Union, in accordance with article 4(d) of the Constitutive Act"; and (6) "promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts."[134]

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130 *See generally* Ndubuisi Christian Ani, *The African Union Non-Indifference Stance: Lessons from Sudan and Libya*, 6 AFR. CONFLICT & PEACEBUILDING REV. 1 (2016).

131 Jan Wouters, Philip de Man & Marie Vincent, *The Responsibility to Protect and Regional Organizations, in* RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 247, 257 (Julia Hoffmann & André Nollkaemper eds., 2012) (arguing, inter alia, that the Assembly of Heads of State and Government has the sole authority to approve intervention upon recommendation from the AU Peace and Security Council).

132 Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, O.A.U. Doc. Assembly/AU/Dec.16 (II Sess.) [hereinafter PSC Protocol].

133 *Id.* at art. 2(1).

134 *See id.* at art. 3(1)(a–f).

As the key institution tasked with "carrying out peace operations on the continent,"[135] the PSC is assisted and supported by the AU Commission and three dedicated bodies: the Panel of the Wise,[136] the Continental Early Warning System,[137] and the African Standby Force.[138] The PSC is also expected to receive assistance and support from the UN's Military Staff Committee.[139] Additional assistance to the PSC is expected to come from the New Partnership for Africa's Development (NEPAD),[140] and the AU's various human rights institutions, including the African Commission on Human and Peoples' Rights ("ACHPR")[141] and the African Court on Human and Peoples' Rights ("ACHPR").[142]

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135 Murithi, *supra* note 107, at 92.

136 *See Panel of the Wise (PoW)*, AFR. UNION PEACE AND SECURITY DEP'T, http://www.peaceau.org/en/page/29-panel-of-the-wise-pow (last visited April 25, 2018) [hereinafter Panel of the Wise] (The Panel of the Wise is

one of the critical pillars of the Peace and Security Architecture of the African Union (APSA). Article 11 of the Protocol establishing the Peace and Security Council (PSC), sets up a five-person panel of "highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent" with a task "to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention).

137 The Continental Early Warning System (CEWS) is one of five pillars of the African Peace and Security architecture (APSA). *See The Continental Early Warning System (CEWS)*, AFR. UNION PEACE AND SECURITY DEP'T, http://www.peaceau.org/en/page/28-continental-early-warning (last visited April 25, 2018) [hereinafter Continental Early Warning System]. The CEWS collects data and analyzes and provides advice to the PSC and other institutions with interest in peace and security in Africa. *See id.*

138 The African Standby Force (ASF) is a multidisciplinary peacekeeping force consisting of military, police and civilian contingents. *See The African Standby Force (ASF)*, AFR. UNION PEACE AND SECURITY DEP'T, http://www.peaceau.org/en/page/82-african-standby-force-asf-amani-africa-1 (last visited April 25, 2018) [hereinafter African Standby Force]. The ASF functions under the direction of the African Union and supports the latter's right to intervene in a Member State in grave circumstances, as prescribed in Article 4(h) of the Constitutive Act of the African Union. *See* Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h).

139 The Military Staff Committee is a UN Security Council subsidiary body, whose main function is "to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament." *See United Nations Military Staff Committee*, U.N. SECURITY COUNCIL SUBSIDIARY ORGANS, https://www.un.org/sc/suborg/en/subsidiary/msc (last visited April 25, 2018).

140 *See, e.g.*, AFRICA & DEVELOPMENT CHALLENGES IN THE NEW MILLENNIUM (J. O. Adésínà, Yao Graham & A. Olukoshi eds., 2006) (presenting a series of essays that examine the founding of the NEPAD and evaluate its performance so far).

141 *See generally* RACHEL MURRAY, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS AND INTERNATIONAL LAW (2000) (analyzing, inter alia, the applicability of international law to African situations).

142 *See* LUIS GABRIEL FRANCESCHI, THE AFRICAN HUMAN RIGHTS JUDICIAL SYSTEM (2014) (examining the international judicial function in Africa with specific emphasis on the African Court on Human and Peoples' Rights).

But, what about the fact that there may be a conflict between the right of the AU to intervene and the requirement that prior authorization be obtained from the UN Security Council before the use of force in Member States of the AU? Clarification is provided in the Ezulwini Consensus.[143] In the Ezulwini Consensus, the AU argued that it was necessary and important for regional organizations to act in the case of threats to peace and security and if necessary, approval could be sought from the UN Security Council after the fact.[144]

1. The Responsibility to Protect (R2P): Unanimous Political Commitment to Act to Prevent International Crimes

The Responsibility to Protect (R2P), since 2005, has been recognized as the unanimous commitment of the global society to prevent and deal with international crimes.[145] This global commitment to fight threats to international peace and security was formally expressed in the UN's 2005 World Summit Outcome Document ("2005WSOD").[146] According to Paragraph 138 of the 2005WSOD, "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[147] In the case where States fail to perform their duties to protect, the international community, working through the United Nations, "has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[148] In addition, if the peaceful approach does not successfully and fully resolve the situation, the international community is "prepared to take collective action, in a timely and decisive manner, through the [U.N.] Security Council, in accordance with the [U.N.] Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate."[149]

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143 The Ezulwini Consensus is a position on relations between nations and the reform of the United Nations system that was agreed upon by the African Union, adopted in 2005. *See* The Common African Position on the Proper Reform of the United Nations: "The Ezulwini Consensus," A.U. Doc. Ext/EX.CL/2 (VII) (Mar. 8, 2005) [hereinafter Ezulwini Consensus]. The consensus is named after the valley in central Swaziland—the Ezulwini valley—where the agreement was concluded in 2005.

144 *See id.*

145 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

146 *See id.*

147 *Id.* ¶ 138.

148 *Id.* ¶ 139.

149 *Id.*

R2P is political commitment and not a legally binding obligation on the part of the Member States of the UN. Nevertheless, it flows directly from binding international norms (e.g., norms assumed under the Convention on the Prevention and Punishment of the Crime of Genocide[150] and various emerging norms of customary international law).

As early as 2003, the UN had shown significant support for R2P. At that time, then UN Secretary-General Kofi Annan convened the High-level Panel on Threats, Challenges and Change, and in 2004 the Secretary-General published a report on the panel's work.[151] The report endorsed

> [T]he emerging norm that there is a collective international responsibility to protect, exercisable by the [U.N.] Security Council authorizing military intervention as a last resort, in the event of genocide and other largescale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.[152]

The following year, 2005, UN Secretary-General Kofi Annan, presented a five-year progress report on the implementation of the Millennium Declaration of 2000 in response to a request by the UN General Assembly. The report made clear that "the primary responsibility for implementing human rights lies with Governments."[153]

The UN Security Council ("UNSC") granted official and formal recognition to R2P in 2006 through Resolution 1674 and in doing so, the UNSC reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[154] The next UN Secretary-General, that is, Kofi Annan's successor, Ban Ki-moon, also gave his full support to R2P. In 2008, Ban Ki-moon appointed Edward C. Luck as the UN's first Special Adviser on the responsibility to protect.[155]

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150 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

151 U.N. High-Level Panel Report on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

152 *Id.* ¶ 203.

153 UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, U.N. Doc. A/59/2005/Add.3 (May 26, 2005), at para. 22.

154 UN Security Council, Security Council Resolution 1674 (2006) on Protection of Civilians in Armed Conflict, U.N. Doc. S/RES/1674 (Apr. 28, 2006), at para. 4.

155 Press Release, Secretary-General, Secretary-General Appoints Edward C. Luck of United States Special Adviser, U.N. Doc. SG/A/1120 (Feb. 21, 2008).

Ban Ki-moon also produced several reports which were designed to inform the UN General Assembly about progress in implementing R2P. In one such report titled *Implementing the Responsibility to Protect*, the Secretary-General articulated a three-pillar strategy for the implementation of R2P.[156] The first pillar addressed the responsibility of each Member State with respect to the implementation of R2P.[157] Each Member State must bear the primary responsibility to protect its population from "genocide, war crimes, ethnic cleansing, and crimes against humanity."[158]

The second pillar addresses the need for international assistance and capacity-building.[159] Specifically, "[i]t seeks to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system."[160] Furthermore, the "[p]revention, building on pillars one and two, is a key ingredient for a successful strategy for the responsibility to protect."[161]

Pillar three deals with the contributions to R2P of the international community, as embodied in Member States.[162] The latter must respond "collectively in a timely and decisive manner when a State is manifestly failing to" protect its citizens against genocide, war crimes, crimes against humanity, and ethnic cleansing.[163]

In 2009, the UN General Assembly ("UNGA") recognized R2P through Resolution 63/308 of October 7, 2009 and in doing so, the UNGA made reference to the World Summit Outcome Document and indicated that it would "continue its consideration of the responsibility to protect."[164] The UNGA then engaged in several interactive dialogues to deal with different aspects of R2P and its implementation.

2. Remembering the OAU and Its Failure to Protect

The Organization of African Unity ("OAU"), which was established on May 25, 1963 in Addis Ababa, Ethiopia, had many objectives. In

156 U.N. Secretary-General, *Implementing the Responsibility to Protect* 8-9, U.N. Doc. A/63/677 (Jan. 12, 2009).

157 *See id.*

158 *Id.* at 5.

159 *See id.* at 9.

160 *See id.*

161 *Id.*

162 *See id.*

163 *Id.*

164 The Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

addition to liberating the remaining colonies, including South Africa, which was under minority-white-rule, and helping them gain their independence, the OAU also had as one of its objectives the promotion of regional cooperation among the new African countries that were emerging from colonialism.[165]

Since the OAU did not have the power to pass binding legislation, it was expected to carry out its purposes or objectives primarily through the harmonization of the policies of its Member States.[166] The highest governing organ of the OAU was the Assembly of Heads of State and Government ("AHSG") whose job was to "discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization."[167] The operationalization of the work of the AHSG was undertaken by the Council of Ministers ("CM")[168]—the CM consisted of foreign or other ministers of the Member States and was specifically tasked with implementing the decisions of the AHSG and coordinating inter-African cooperation in accordance with instructions from the AHSG.[169] Besides the CM and AHSG, the OAU also had two other institutions—a General Secretariat located in Addis Ababa and a Commission of Mediation, Conciliation and Arbitration ("CMCA")—the latter was established to function as the OAU's dispute resolution mechanism and was granted jurisdiction over disputes between Member States only. Nevertheless, disputes could be referred to the CMCA only with the prior consent of the States concerned. Unfortunately, the CMCA never became operational because African countries remained distrustful of third-party adjudication.

In 1993, the OAU established the Mechanism of Conflict Prevention, Management and Resolution ("MCPMR")—designed to prevent, manage and resolve conflict.[170] Despite arming itself with a dedicated

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165 *See* OAU Charter, *supra* note 21, at art. II.

166 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, FROM NON-INTERFERENCE TO NON-INDIFFERENCE: THE AFRICAN UNION AND THE RESPONSIBILITY TO PROTECT 9 (2017), http://refugee-rights.org/wp-content/uploads/2017/09/AU-R2P-final.pdf [hereinafter INTERNATIONAL REFUGEE RIGHTS INITIATIVE].

167 OAU Charter, *supra* note 21, at art. VIII.

168 The Council of Ministers ("CM") usually met twice a year or in a special session. The CM was subordinate to the Assembly of Heads of State and Government. The CM's principal responsibility was to prepare the Assembly's agenda and implement the Assembly's decisions. It eventually emerged as the OAU's driving force. *See* MARVIN NII ANKRAH, CONFLICT RESOLUTION IN AFRICA: THE CASE OF THE ORGANIZATION OF AFRICAN UNITY (OAU) 26 (2004) (stating, inter alia, that the Council of Ministers was one of the major organs of the OAU and was subordinate to the Assembly of Heads of State and Government).

169 OAU Charter, *supra* note 20, at art. XIII (1–2).

170 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 9.

conflict prevention institution, the OAU achieved only modest success in the area of conflict resolution—in fact it failed woefully when it came to resolving or preventing some of the major sectarian conflicts that pervaded the continent beginning in the early-to-mid 1990s.[171] While many reasons have been advanced to explain this failure to protect, it is generally believed that it was the OAU's "legal framework which presented a particular impediment to its potential for conflict prevention and resolution."[172] The OAU's Charter specifically mandated a policy of "[n]on-interference in the internal affairs of [Member] States," effectively placing internal conflict beyond the purview of the OAU and its various organs.[173] As a consequence, the MCPMR was essentially unable to respond to conflict within Member States, except in the very rare instances in which the affected states had consented to intervention.[174]

It is important to note that the OAU Charter also stressed the need to respect the territorial integrity of each Member State and the latter's "right to independent existence."[175] In addition, Member States had pledged to settle their disputes peacefully by "negotiation, mediation, conciliation or arbitration."[176] The decision by the OAU to adhere strictly to these principles, including especially that of "non-intervention," in addition to significant resource constraints, effectively destroyed any chances that the continental organization would act fully and effectively to protect populations from war crimes, genocide and crimes against humanity.

3. The African Union and R2P

While there are many reasons to explain why Africans decided to transform the OAU into the African Union, one of them is that the OAU, as constituted, had failed to deal fully and effectively with many continental conflicts, some of which, like the Rwandan Genocide, had caused the deaths of many people, created major humanitarian crises, and destroyed significant amounts of economic infrastructures.

The formal indication that the OAU had outlived its usefulness and was no longer relevant to emerging African political and economic issues was evidenced by the release of the 1990 Declaration on the Political and

171 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 9.

172 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 9.

173 OAU Charter, *supra* note 21, at art. III(2).

174 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 164, at 9-10.

175 OAU Charter, *supra* note 21, at art. III(1) & III(3).

176 *Id.* at art. III(4).

Socio-Economic Situation in Africa.[177] The report emphasized the belief of many African countries that the continent was entering a new era in its political economy in which less emphasis would be placed on liberation from colonialism and more on economic development and regional integration.[178] In line with the continent's emphasis on economic development and integration, a treaty establishing the African Economic Community was adopted in 1991, known generally as the Abuja Treaty.[179] The Abuja Treaty's primary objective was "[t]o promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development."[180] This was to be accomplished through "[t]he strengthening of existing regional economic communities and the establishment of other communities where they do not exist."[181]

Several years later, in 1999, at the OAU Assembly of Heads of State and Government summit in Sirte, Libya, African leaders decided to create a continental organization, which they believe would be able to "fast track the creation and implementation of the institutions contemplated by the Abuja Treaty."[182] That organization was the African Union, which superseded the OAU and incorporated the African Economic Community ("AEC").[183] Some scholars and observers have described the African Union as "essentially a merger of the largely political ambitions of the OAU and the mainly economically minded AEC, with the addition of some organs and with an acceleration of pace in economic integration, as stipulated in the Sirte Declaration."[184] It is generally believed that the AU "supplanted the OAU largely out of a sense of frustration among African leaders about the slow pace of economic integration and awareness that the many problems on the continent necessitated a new way of doing things."[185]

In creating the AU, African leaders modified the OAU's Charter Principles and in doing so, they were "[c]onscious of the fact that the

177 Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, July 11, 1990, O.A.U. Doc. AHG/Decl. I (XXVI).

178 *See id.* para. 2.

179 Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 [hereinafter Abuja Treaty].

180 *Id.* at art. 4(1)(a).

181 *Id.* at art. 4(2)(a).

182 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 10.

183 *See id.* The Sirte Declaration paved the way for the founding of the African Union. *See* Sirte Declaration, *supra* note 101.

184 FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 164 (2d ed. 2012).

185 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 10.

scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda."[186] In its Article 4, the Constitutive Act of the African Union still prohibits "the use of force or threat to use force among Member States of the Union"[187] and retains the OAU's principle of "[n]on-interference by any Member State in the internal affairs of another."[188] Nevertheless, this is followed by a principle that recognizes "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[189] Each Member State of the AU has the right "to request intervention from the [African] Union in order to restore peace and security."[190]

The various provisions mentioned above, which were included in the Constitutive Act of the African Union, are quite similar to those found in the R2P. They were included in the AU's Constitutive Act because of concern by African leaders of the OAU's inability to deal fully and effectively with internal conflicts, the widespread abuse of human rights within Member States, including those perpetuated by state- and non-state actors. Some scholars have argued that although the OAU's non-interference principle may have contributed to the minimization of certain conflicts in the continent, it, at the same time, may also have contributed to either the initiation and/or intensification of other types of conflict.[191] It did so by helping maintain and perpetuate oppressive regimes, as well as pushing to the periphery of political discourse, the legitimate grievances of marginalized and disaffected groups. As a consequence, public policy totally neglected the concerns and interests of many minority subcultures, giving rise to violent and destructive mobilization by these aggrieved groups to improve their political and economic participation.

By the mid-1990s, as prodemocracy movements were gaining significant ground throughout the continent and authoritarian regimes were being dislodged, new prominence was being given to the protection of

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186 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at pmbl.

187 *Id.* at art. 4(f).

188 *Id.* at art. 4(g).

189 *Id.* at art. 4(h).

190 *Id.* at art. 4(j).

191 *See, e.g.*, James Busumtwi-Sam, *Architects of Peace: The African Union and NEPAD*, 7 GEO. J. INT'L AFF. 71 (2006).

human rights. Despite these improvements in political governance, the violation of human rights by state- and non-state actors, especially those of minority religious and ethnic groups, remained a major problem in many countries.[192] It was within this institutional context that Africa's leaders embarked on a transition from the OAU to the African Union. The 16 "principles" of the African Union are provided in the latter's Constitutive Act.[193] Of these, six of them make explicit or implicit reference to human rights, including "respect for democratic principles, human rights, the rule of law and good governance,"[194] and "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."[195] The AU's "objectives" also make reference to human rights—the organization pledged to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."[196] In addition, the AU also pledged to work closely with its Member States to promote peace, security, stability, democracy, and good governance.[197]

To put the principle of non-indifference into practice and promote good governance throughout the continent, the AU created "a dedicated . . . machinery" which "supports the [AU's] commitment to intervene in respect of war crimes, genocide and crimes against humanity."[198] This dedicated machinery consisted of the Peace and Security Council ("PSC"), as well as several of the PSC's subsidiary organs—the New Partnership for Africa's Development ("NEPAD"), the African Charter on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("Malabo Protocol"), and the Ezulwini Consensus.[199]

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192 *See, e.g.*, HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004); ISSA G. SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA (1989).

193 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4.

194 *Id.* at art. 4(m).

195 *Id.* at art. 4(o).

196 *Id.* at art. 3(h).

197 *See id.* at art. 3(a), (f)-(h).

198 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 12.

199 Some of these institutions have already been mentioned and briefly discussed. *See, e.g.*, AFRICA'S NEW PEACE AND SECURITY ARCHITECTURE: PROMOTING NORMS, INSTITUTIONALIZING SOLUTIONS (Ulf Engel & João Gomes Porto eds., 2016) (examining, inter alia, the necessary machinery to support the AU's commitment to intervene in respect of international crimes).

3.1 The AU's Peace and Security Council and R2P

The Peace and Security Council of the African Union was established in May 2004 after the PSC Protocol entered into force.[200] The PSC was established as a "standing decision-making organ for the prevention, management and resolution of conflicts."[201]

Specifically, the PSC is expected to perform the following functions, which are directly linked to P2P: (1) "promote peace, security and stability in Africa"; (2) "anticipate and prevent conflicts"; (3) "promote and implement peace-building and post-conflict reconstruction activities to consolidate peace and prevent the resurgence of violence"; (4) "co-ordinate and harmonize continental efforts in the prevention and combating of international terrorism in all its aspects"; (5) "develop a common defense policy for the Union, in accordance with article 4(d) of the Constitutive Act"; and (6) "promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts."[202]

The PSC consists of fifteen Member States, who are "elected on the basis of equal rights."[203] Specifically, ten Members are elected for a two-year term, and five Members are elected to serve a three-year term.[204] The voting rule adopted by the PSC is one in which decision-making is to "be guided by the principle of consensus."[205] Nevertheless, if a consensus cannot be achieved, the PSC shall reach "its decisions on procedural matters by a simple majority."[206] Regarding other matters, "decisions . . . shall be made by a two-thirds majority vote of its Members voting."[207]

In performing its functions, the PSC receives assistance from the African Union, including the latter's Peace and Security Department, in addition to three dedicated institutions or bodies that were created under the PSC Protocol, namely, the Panel of the Wise,[208] the Continental Early Warning System ("CEWS"),[209] the African Standby Force ("ASF"), and

200 *See* PSC Protocol, *supra* note 133.

201 *Id.* at art. 2(1).

202 *Id.* at art. 3.

203 *Id.* at art. 5(1).

204 *See id.*

205 *Id.* at art. 8(13).

206 *Id.*

207 *Id.*

208 *See* Panel of the Wise, *supra* note 137.

209 *See* Continental Early Warning System, *supra* note 138.

the Peace Fund.[210] The PSC, its three organs and the Peace Fund are collectively referred to as the African Peace and Security Architecture ("APSA").[211] It is important to note that the African Union has the primary responsibility for "promoting peace, security and stability in Africa."[212] In doing so, the AU cooperates with Regional Economic Communities ("RECs") and other regional institutions dedicated to conflict management and resolution. This cooperation is a key and integral component of the APSA.

The Panel of the Wise ("PoW") consists of five "highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent."[213] The PoW provides necessary and critical support to the work of the AU and the PSC by advising them on "all issues pertaining to the promotion, and maintenance of peace, security and stability in Africa."[214] In 2010, the PoW was expanded to ten members and in 2013, a Pan-African Network of the Wise ("PANW") was created.[215] The PANW includes mediators from the AU and the RECs.[216]

The CEWS was created under the Organization of African Unity's Mechanism of Conflict Prevention, Management and Resolution and was subsequently integrated into the PSC after the creation and coming into effect of the African Union.[217] The CEWS consists of (1) "an observation and monitoring center," known as "The Situation Room," which is "located at the Conflict Management Division of the African Union and is responsible for data collection and analysis"; and (2) "the observation and monitoring units of the Regional Mechanism for Conflict Prevention, Management and Resolution," which are "linked directly through appropriate means of communication to the Situation Room, and which shall collect and process data at their level and transmit the same to the Situation Room."[218]

The African Standby Force ("ASF") is a multidisciplinary rapid deployment force that is expected to be deployed to deal with specific

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210 *See* African Standby Force, *supra* note 139.

211 African Union, *The African Peace and Security Architecture (APSA)* (Oct. 2, 2012), http://www.peaceau.org/en/topic/the-african-peace-and-security-architecture-apsa.

212 *Id.*

213 Panel of the Wise, *supra* note 137.

214 PSC Protocol, *supra* note 133, at art. 11(3).

215 ACCORD & AFRICAN UNION, AFRICAN UNION MEDIATION SUPPORT HANDBOOK 14 (2014), http://www.peaceau.org/uploads/au-mediation-support-handbook-2014-1-.pdf.

216 *See id.*

217 *See* PSC Protocol, *supra* note 133.

218 *Id.* at art. 12(2).

crises, as determined by the African Union.[219] The ASF is mandated to perform various functions, including: (1) "observing and monitoring missions"; (2) "other types of peace support missions"; (3) "intervention in a Member State" to "restore peace and security"; (4) preemptive positioning to prevent conflict from escalating, spreading, or resurging; (5) "peace-building, including post-conflict disarmament and demobilization"; and (6) "humanitarian assistance".[220]

The AU Commission determines the rules of engagement for each of the ASF's missions, which subsequently, must be approved by the PSC.[221] So far, the AU has not yet deployed the ASF, despite the fact that in various crises the AU has been called upon to send troops to intervene. Instead, the AU has opted for ad hoc arrangements. Some experts have argued that the way forward calls for a revision of the ASF doctrine, especially given recent developments in political economy in the continent. Although the ASF was declared operationally ready in 2016, it "has not been deployed in its originally designed form," and it "has not yet attained full operational capability."[222] Some observers have argued that the failure of the AU to employ the ASF as originally intended is due to interference from lack of cooperation by Regional Economic Communities/Regional Mechanisms (RECs/RMs)—the latter are the continent's sub-regional security structures.[223]

3.2 NEPAD and R2P

The New Partnership for Africa's Development (NEPAD) was adopted by the OAU Assembly of African Heads of State and Government at their thirty-seventh session in Lusaka, Zambia in July 2001.[224] In 2002, the AU, the successor to the OAU, endorsed the adoption of NEPAD as a program of the AU at the AU Inaugural Summit as "a socio-economic development flagship programme."[225] NEPAD is expected to provide African countries with a framework within which they can significantly improve their economic and political governance systems, as well as peace and security, and place themselves in a position to become

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219 *See id.* at art. 13(1).

220 *See id.* at art. 13(3).

221 *See id.* at art. 13(5).

222 Linda Darkwa, *The African Standby Force: The African Union's Tool for the Maintenance of Peace and Security*, 38 CONT. SECURITY POL'Y 471, 471 (2017).

223 *See id.* at 477.

224 *New Partnership for Africa's Development (NEPAD)*, U.N. OFFICE OF THE SPECIAL ADVISER ON AFR., http://www.un.org/en/africa/osaa/peace/nepad.shtml (last visited May 1, 2018).

225 *Id.*

more globally competitive.[226] Hence, good governance and peace and security are important goals of NEPAD.[227] Some scholars of African political economy have argued that NEPAD "holds the greatest promise for sustained peace and security in Africa by articulating a strong stance on domestic governance issues that are at the root of instability and insecurity on the continent."[228]

In 2003, the NEPAD Heads of State and Government Implementation Committee (HSGIC) established the African Peer Review Mechanism (APRM) "to assess progress made in [g]overnance and [s]ocio-economic [d]evelopment in Member States."[229] The APRM was created "to foster policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration."[230]

3.3 Continental Judicial Institutions

The institutional architecture of the African Union includes judicial institutions, which are expected to, among other things, promote the protection of human rights and enhance the maintenance of the rule of law in member states. The instrument for the promotion and protection of human rights in Africa is the African Charter on Human and Peoples' Rights (also known as the Banjul Charter).[231] The job of overseeing and interpreting the Banjul Charter is placed in the hands of the African Commission on Human and Peoples' Rights (ACHPR)—the latter was set up in 1987 and has its headquarters in Banjul, Gambia.[232] In 1998, a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) was adopted, providing for the creation of an African Court on Human and Peoples' Rights (ACHPR).[233]

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226 *See id.*

227 *See* John Mukum Mbaku, *NEPAD and Prospects for Development in Africa*, 41 INT'L STUD. 387, 397 (2004).

228 Busumtwi-Sam, *supra* note 192, at 79.

229 *African Peer Review Mechanism (APRM)*, AFR. UNION, https://au.int/en/organs/aprm (last visited May 2, 2018).

230 *Id.*

231 African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 [hereinafter Banjul Charter].

232 *Id.*

233 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, June 9, 1998, O.A.U. Doc. OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter African Court Protocol].

The Protocol Relating to the Establishment of the Peace and Security Council of the African Union mandates that "[t]he Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate."[234] The Commission on Human and Peoples' Rights, on its part, is required to "bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council."[235] Where there are systemic and/or severe human rights violations, the ACHPR is required to make this known to the Assembly of Heads of State and Government.[236]

The African Commission on Human and Peoples' Rights has engaged directly with the Responsibility to Protect Resolution (R2P). For example, the ACHPR, meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, from November 15, 2007 to November 28, 2007, adopted a resolution on strengthening the R2P (the "R2P Resolution").[237] The preamble of this Resolution specifically references Article 4(h) of the Constitutive Act of the African Union, the Ezulwini Consensus, and indicates its awareness of the UN World Summit Outcome Document. The R2P Resolution then goes on to commend the States Parties to the African Charter for contributing troops to the AU Mission in Darfur ("AMIS"). It additionally condemns the armed rebel groups engaged in the conflict in Darfur for their attacks on AMIS. It further commends the UN Security Council for Resolution 1769 (2007) of July 31, 2007, which establishes the AU/UN Hybrid Operation in Darfur (UNAMID). The Resolution further recognizes and recommends specific actions by certain parties:

- Commends the States Parties to the African Charter, which have contributed troops to the African Union Mission in Sudan, AMIS, and the role of AMIS under difficult circumstances;
- Condemns the armed rebel groups in the Darfur conflict for attacks on AMIS troops and the humanitarian relief agencies;
- Commends the UN Security Council for its Resolution 1769 (2007) of 31st July, 2007, to establish the AU/UN Hybrid Operation in Darfur – UNAMID;

234 PSC Protocol, *supra* note 133, at art. 19. 122.136, at art. 19. 122.136, at art. 19. 122.

235 *Id.*

236 Banjul Charter, *supra* note 232, art. 58(3).

237 Afr. Comm'n on Human and Peoples' Rights [ACHPR], Comm'n Res. 117, *Strengthening the Responsibility to Protect*, ACHPR Doc. ACHPR/Res.117 (XXXXII) (Nov. 28, 2007) [hereinafter R2P Resolution].

- Calls on African States, African Union and the United Nations to expedite the operationalization of the UN-AU Hybrid operation in Darfur – UNAMID, by contributing troops to the said force;
- Calls on the UN and AU to enhance the AU Peace-keeping forces in Somalia, in order to provide enhanced protection against the violation of International Humanitarian Law and the fundamental rights of the people of Somalia;
- Calls on the UN and AU to enhance the AU Peace-keeping forces in Somalia, in order to provide enhanced protection against the violation of International Humanitarian Law and the fundamental rights of the people of Somalia;
- Urges the parties to the conflicts in north-east DRC, Chad and Central Africa Republic, to observe their obligations under international human rights law and to ensure that they respect the fundamental human rights of the civilian population, in particular the rights of women, children and internally displaced peoples.[238]

On July 1, 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights, which provided for the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (the "Merged Court Protocol").[239] The Merged Court Protocol was amended in 2014 (the "Malabo Protocol"), which created the African Court of Justice and Human and Peoples' Rights (the "New Merged Court").[240] As indicated in Articles 3(1) and 28A, the Malabo Protocol anticipates or foresees the expansion of the jurisdiction of the New Merged Court to incorporate criminal jurisdiction over crimes such as genocide, crimes against humanity, war crimes, as well as other international crimes.[241] Unfortunately, the Protocol exempts sitting heads of state from the New Merged Court's international criminal jurisdiction.

The Malabo Protocol recalls the "the right of the [African] Union to intervene in a Member State pursuant to a decision of the Assembly in

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238 *Id.*

239 Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008, A.U. Doc. Assembly/AU/Dec.196 (XI) [hereinafter Merged Court Protocol] (when this protocol was adopted, the Court of Justice of the African Union had been proposed but had not yet been established).

240 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 15, 2014, A.U. Doc. STC/Legal/Min/7(I) Rev. 1 [hereinafter Malabo Protocol]. The Malabo Protocol was adopted by the A.U. Assembly at its Twenty-Third Ordinary Session. *See* Decision on the Draft Legal Instruments, June 27, 2014, A.U. Doc. Assembly/AU/Dec.529 (XXIII).

241 *Id.* at arts. 3(1), 28A (as of May 2, 2018, the New Merged Court has been signed by 11 countries, out of 55. The 55 countries include the Sahrawi Arab Democratic Republic. No country has ratified the Protocol).

respect of grave circumstances."[242] It is expected and hoped that when the New Merged Court is eventually established and becomes functional, it will utilize its international criminal jurisdiction in a way that supports and enhances the operation of the R2P principle.[243] The African Court of Human and Peoples' Rights ("ACtHPR") has already demonstrated that the AU's judicial institutions can have a significant impact on R2P. For example, in 2011, the ACtHPR ordered Libya to "refrain from any action that would result in loss of life or violation of physical integrity of persons."[244]

3.4 The Ezulwini Consensus

The AU's common position on reforms to the UN system is expressed in a document known as the Ezulwini Consensus. In the Ezuwini Consensus, the AU's Executive Council formally endorsed the R2P and noted that "[a]uthorization for the use of force by the Security Council should be in line with the conditions and criteria proposed by the [High Level] Panel, but this condition should not undermine the responsibility of the international community to protect."[245] The Executive Council also reiterated "the obligation of [Member] states to protect their citizens but clarified that this obligation of Member States to protect their citizens "should not be used as a pretext to undermine the sovereignty, independence and territorial integrity of states."[246] The AU has continued to engage with the principle of R2P. For example, on October 23, 2008, the African Union hosted a "Round-table High-level Meeting of Experts on the Responsibility to Protect in Africa" at Addis Ababa, Ethiopia. The round-table was designed to reflect on R2P and its application in Africa.[247]

Since the AU was established, there has been a question regarding its right to intervene (even if forcefully) under Article 4(h) of its

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242 Malabo Protocol, *supra* note 241, at pmbl., para. 9.

243 *See* INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167.

244 African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Application No. 004/2011, Order for Provisional Measures, ¶ 25 (Mar. 25, 2011), https://afchpr-commentary.uwazi.io/en/document/0l8ae3ayxwhwu3di (last visited May 2, 2018).

245 The Ezulwini Consensus, *supra* note 144, at 6.

246 *Id.*

247 *See* Jean Ping, Chairperson, Afr. Union Comm'n, *K*eynote Address by His Excellency Mr. Jean Ping, Chairperson of the African Union Commission at the Round-table high-level meeting of experts on "the responsibility to protect in Africa" (Oct. 23, 2008), https://appablog.wordpress.com/2008/10/23/keynote-address-by-his-excellency-mr-jean-ping-chairperson-of-the-african-union-commission-at-the-round-table-high-level-meeting-of-experts-on-"the-responsibility-to-protect-in-africa/ (last visited May 2, 2018).

Constitutive Act[248] on the one hand and the U.N. Charter, which reserves the right to make decisions regarding the use of force, on the other hand.[249] The Executive Council argued that since the U.N. Security Council and the U.N. General Assembly are often far away from the location where the conflict is actually taking place and hence, may not be in a position to properly appreciate the nature and extent of the conflict, it is imperative that regional organizations and/or institutions, which are located close to the conflicts, be empowered to act and deal with the conflicts. The Executive Council went on to agree with the High-Level Panel that intervention by regional organizations should be undertaken with the approval of the UN Security Council. Nevertheless, the Executive Council noted that in situations requiring urgent action or response, the UN Security Council's approval could be granted "after the fact."[250]

Under the "after the fact" doctrine, in cases where urgent response is required, then, the AU Heads of State and Government are willing to agree to intervention and then seek approval from the UN Security Council at a later time.[251] Ratification of the decisions of sub-regional organizations to intervene "after the fact" by the UN Security Council has occurred on several occasions, including ECOWAS' interventions in Liberia, Sierra Leone, and Guinea-Bissau. Nevertheless, "after the fact" ratification has not yet occurred in the context of African Union decisions to intervene because the AU has not yet invoked its power under Article 4(h) of the Constitutive Act of the African Union.[252]

IV. THE OAU AND THE AU AND THEIR EXPERIENCES WITH NON-INTERFERENCE AND NON-INDIFFERENCE

In order to appreciate the AU's interaction with R2P, as well as examine the ways in which the AU responds to conflicts and atrocities on the continent, it is necessary to take a look at a few cases in which both the AU and its predecessor, the OAU, actually intervened to restore the peace.

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248 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4.

249 *Id.* at art. 4(h); U.N. Charter art. 39, http://www.un.org/en/sections/un-charter/introductory-note/index.html (last visited May 2, 2018).

250 Ezulwini Consensus, *supra* note 144, at 6.

251 *See, e.g.*, Jeremy Sarkin, *The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect,* 53 J. AFR. LAW 1 (2009).

252 *See* Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h).

A. The OAU and the Principle of Non-Interference

One of the founding principles of the Organization of African Unity ("OAU"), which came into being in 1963, was "non-interference in the internal affairs of [Member] States."[253] The first test of that policy came in 1963 when the Kingdom of Morocco attempted to claim the Tindouf and Bechar border areas of Algeria as Moroccan territory.[254] After its independence in 1956, the Kingdom of Morocco claimed these western-most areas of Algeria as part of Morocco. Upon its independence in 1962, the new Algerian republic refused to accept Morocco's claims. The outcome was the 1963 Sands War, which was fought along the Moroccan-Algerian border in the Tindouf region.

During the month of October 1963, as hostilities between Morocco and Algeria escalated, it became evident that mediation by third parties might be necessary.[255] Subsequently, Presidents Gamal Abdel Nasser of Egypt, Habib Bourguiba of Tunisia, Modibo Keita of Mali, as well as Emperor Haile Selassie of Ethiopia, and diplomats from the Arab League, attempted to resolve the dispute and restore the peace. The efforts by Nasser and Bourguiba to secure the peace failed, but Selassie's mediation efforts appeared to be more successful. Selassie was successful in getting President Ben Bella of Algeria and King Hassan of Morocco to attend a meeting with the Emperor and President Keita at Bamako, Mali, on October 29, 1963.[256]

The hope was that the Bamako meeting would bring about a uniquely African solution to the conflict between Algeria and Morocco, and provide an important precedent that could be relied upon in the future for dealing with continental issues.

Ultimately, the Bamako meeting, which took place during October 29–30, 1963, achieved only limited success. The final communiqué produced by the four heads of state at Bamako asked for "immediate end of hostilities," "creation of a committee . . . which would define a demilitarized zone," "supervision of security and military neutrality in the demilitarized zone," and "the request for an extraordinary meeting of the O.A.U. Council of Ministers, for the purpose of creating a committee of

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253 OAU Charter, *supra* note 21, at art. III(2).

254 *See, e.g.*, ANTHONY H. CORDESMAN, A TRAGEDY OF ARMS: MILITARY AND SECURITY DEVELOPMENTS IN THE MAGHREB (2002) (examining, inter alia, the conflict between Morocco and Algeria over Tindouf and neighboring Bechar areas in western Algeria).

255 Patricia Berko Wild, *The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes Among African States*, 20 INT'L ORG. 18 (1966).

256 *Id.* at 26.

arbitration to effect a definitive solution of the Algerian-Moroccan border dispute."[257]

The Bamako meeting did not resolve the conflict. The next opportunity for a peaceful settlement came about with the session of the OAU Council of Ministers that was held at Addis Ababa during November 15–18, 1963. The meeting was declared open by Emperor Haile Selassie, who was optimistic that Africans would be able to resolve their own conflicts through an African framework. He declared that in signing and ratifying the OAU Charter, Africans had agreed to the peaceful resolution of border disputes. Perhaps, more importantly, the Emperor emphasized, both Algeria and Morocco had agreed to a peaceful settlement of the conflict at the Bamako meeting.[258]

At the time that the OAU met to consider the conflict between Algeria and Morocco, the Commission of Mediation, Conciliation and Arbitration, which had been contemplated in the OAU Charter,[259] had not yet been set up. As a consequence, the OAU's Council of Ministers agreed that a special committee, whose membership was to be made up of Ethiopia, Côte d'Ivoire, Mali, Nigeria, Senegal, Sudan, and Tanzania, would work to resolve the conflict. This Special Committee of Seven was to function much like the still undeveloped Commission of Mediation, Conciliation, and Arbitration. Nevertheless, the Bamako Communiqué granted the Committee to be formed by the OAU wide discretion on how to approach the resolution of the conflict.[260]

On February 20, 1964, both Algeria and Morocco announced that they had signed an agreement providing for an end to the disputes and the resumption of diplomatic relations.[261] Relations between the two countries continued to improve and in mid-April 1964, an exchange of prisoners took place and on May 11, 1964, an Algerian-Moroccan communiqué "expressed satisfaction with the work of the OAU Special Committee and established a mixed committee on an ambassadorial level."[262]

While the OAU's involvement with the Algerian-Moroccan conflict achieved some level of success, the organization had a negative response to the Nigerian Civil War. The war, which pitted the government of the Federal Republic of Nigeria against the break-away region of Biafra, took place from July 6, 1967 to January 15, 1970. The OAU Charter's

257 Wild, *supra* note 256, at 27.

258 Wild, *supra* note 256.

259 OAU Charter, *supra* note 20, at art. VII(4).

260 Wild, *supra* note 256, at 31–32.

261 Wild, *supra* note 256, at 32.

262 Wild, *supra* note 253, at 33.

principle of non-interference in the internal affairs of Member States was a major constraint to the organization's ability to intervene in the Nigerian Civil War.[263] Hence, when the OAU Assembly of Heads of State and Government met for its 4th Ordinary Session in Kinshasa, DRC, from September 11–14, 1967, the Organization was aware of its "impotence."[264] Nevertheless, the OAU did not want to appear as if it was insensitive to the sufferings of the peoples of Nigeria. At its Kinshasa meeting, the issue of Nigeria was discussed. The resolution adopted at the end of the summit concluded that the Nigerian Civil War was an internal affair that had to be dealt with by Nigerians. The OAU declared that the "services of the Assembly" would be placed "at the disposal of the Federal Government of Nigeria."[265]

In addition to declaring that the conflict was an internal affair whose solution was the responsibility of the Government of Nigeria, the final resolution also stated that a delegation would be sent to meet with the head of Nigeria's federal government to make clear to him that the OAU would respect the country's "territorial integrity, unity and peace."[266] Some scholars argue that by sending a delegation to see the Federal Government—one of the parties in the conflict—the OAU effectively violated one of its operating principles: it interfered in the internal affairs of a Member State.[267] Munya argues further that the "OAU interfered not as an impartial umpire bent on genuinely mediating between the parties and ending the conflict, but as a supporter of the federal government."[268]

But, what may have contributed to the OAU's failure to intervene and resolve the conflict between Nigeria and Biafra?[269] Yashpal Tandon argued that the O.A.U. framework collapsed because of the following factors: (1) as an essentially conservative organization, it is an anti-secessionist, anti-interventionist, and anti-border changes; (2) its inability to enforce its decisions on Member States; and (3) neither the OAU, nor any

263 OAU Charter, *supra* note 21, at art. III (2) (describing the principle of non-interference).

264 P. Mweti Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L. J. 537, 573 (1999).

265 STREMLAU, *supra* note 20, at 93.

266 *Id.*

267 Munya, *supra* note 265, at 574.

268 Munya, *supra* note 265, at 574.

269 Radha Krishna Ramphul, *The Role of the International and Regional Organizations in the Peaceful Settlement of Internal Disputes (With Special Emphasis on the Organization of African Unity)*, 13 GA. J. INT'L & COMP. L. 371 (1983).

of its members, possess the power to insulate African problems from extra-regional intervention.[270]

Some scholars of African political economy have described the OAU's response to the Nigerian Civil War as an "unmitigated diplomatic blunder."[271] This, it is argued, resulted from the "tension between the desire [of the OAU] to resolve the conflict and to remain faithful to the OAU Charter,"[272] particularly, the principle of non-interference in the internal affairs of member states.[273] This principle colored the OAU's response to the civil war in Chad,[274] which erupted in 1965, barely five years after it gained independence from France.

In 1981, the Assembly of Heads of State and Government of the OAU approved, for the first time, the establishment of a peace-keeping force for Chad.[275] President Daniel arap Moi of Kenya, who at the time was the Chairman of the Assembly of Heads of State and Government, indicated that there was a requirement that the peace-keeping force had to be invited by the Chadian government. There was a second requirement, and that is that Libyan troops, which had been sent into Chad by Col. Muammar al-Gaddafi in 1980 at the invitation of then Chadian President Goukouni Oueddei, had to leave Chad before the OAU peace-keeping force could enter the country. President arap Moi stated what he believed was the proper role to be played by the OAU peace-keeping force in Chad. The purpose of OAU involvement in Chad, he stated, "is to enable the people of Chad to decide on a national government of their choice through free and fair elections supervised by the OAU with the help of an African peace-keeping force."[276]

The OAU envisioned a neutral role for its peace-keeping force by assisting in negotiations that were expected to lead to a transition to democracy, without getting involved in the internal affairs of the country.

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270 Yashpal Tandon, *The Internationalization of the Civil War: Lessons from the Congo, Nigeria and Vietnam, in Africa in* WORLD AFFAIRS: THE NEXT THIRTY YEARS, 63, 68 (Ali A. Mazrui & Hasua H. Patel eds., 1973).

271 Munya, *supra* note 265, at 574.

272 Munya, *supra* note 265, at 574.

273 OAU Charter, *supra* note 21, at art. III(2).

274 MARIO J. AZEVEDO, ROOTS OF VIOLENCE: A HISTORY OF WAR IN CHAD (Taylor & Francis e-library 2005) (1998) (providing an overview, inter alia, of the civil war in Chad).

275 *See* Assembly of Heads of State and Government of the Organization of African Unity, *Resolutions Adopted by the Eighteenth Assembly of Heads of State and Government*, AHR/Res. 102 (XVIII)/Resolution on Chad (decision to send a peace-keeping force to Chad was made at the Assembly of Heads of State and Government's Eighteenth Ordinary Session, held in Nairobi, Kenya, from 24 to 27 June 1981).

276 G. J. Naldi, *Peace-keeping Attempts by the Organization of African Unity*, 34 INT'L & COMP. L. QUARTERLY 593, 594 (1985).

From the point of view of Chadian President Goukouni, the OAU peace-keeping force simply represented additional soldiers that he could use to help entrench himself. Perhaps more importantly, is that in addition to the fact that the force's mission was not fully clarified, "the OAU lacked the necessary machinery to control such an operation"[277] and did not have adequate financial resources to fully fund the project.[278]

It soon became clear to the OAU peace-keepers that the rival Chadian military forces were stubborn, and unwilling to negotiate a ceasefire. Perhaps more importantly, peace-keepers were "becoming embroiled in hostilities while [Chadian] President Goukouni accused it [OAU] of worsening the situation."[279] On June 7, 1982, N'Djamena, the capital of Chad, was captured by President Hissène Habré's forces and on June 11, 1982, the OAU Chairman ordered that the OAU peace-keepers leave the country by June 30, 1982, ending what was generally considered an "abject failure."[280]

Perhaps, the OAU's most significant military and moral failures occurred in the Western Sahara and Rwanda. In February 1976, the former Spanish colony of the Western Sahara unilaterally declared its independence and took the name Sahrawi Arab Democratic Republic (SADR). That year, Morocco and Mauritania occupied the territory in an effort to pursue "their territorial claims that had been dismissed by the International Court of Justice."[281] The OAU became formally involved in the Western Sahara conflict when it adopted Resolution 92(XV),[282] by establishing an ad hoc committee of at least five OAU Heads of State to seek a solution to the Western Sahara conflict.

In 1981, the OAU created another committee, the Implementation Committee, which was composed of diplomats from Guinea, Kenya, Mali, Nigeria, Sierra Leone, Sudan and Tanzania, under Resolution 103(XVIII).[283] The Implementation Committee was directed "to meet before the end of August 1981 and in collaboration with the parties in conflict to work out the modalities and all other details relevant to the implementation of the ceasefire and the conduct and administration of the referendum"[284] in the Western Sahara. The *Frente Popular de Liberación*

277 *Id.*

278 *Id.* at 594–95.

279 *Id.* at 595.

280 *Id.*

281 *Id.* at 596.

282 Resolution on the Question of Western Sahara, July 18–22, 1978, O.A.U. Doc. AHG/Res. 92 (XV).

283 Resolution on Western Sahara, June 24–27, 1981, O.A.U. Doc. AHR/Res. 103 (XVIII).

284 *See id.*; *see also* Naldi, *supra* note 277, at 596–97.

de Saguía el Hamra y Río de Oro (also known simply as Polisario), represented the people of the Western Sahara, and Morocco. Polisario was unable to agree on what constituted the population of the Sahrawi for purposes of the referendum mandated by OAU Resolution 114 (XVI)[285] thus causing a major stumbling block in finding a sustainable solution to the conflict.

In 1982, the OAU admitted the SADR as a member of the organization and stated further that the SADR was being recognized as the sovereign government of the Western Sahara.[286] In response, Morocco withdrew from the OAU in 1984.[287] In 2017, Morocco rejoined the OAU/AU after a 33-year absence.[288] Nevertheless, the problem of the Western Sahara remains unresolved. The OAU failed in its efforts to resolve the Western Sahara conflict and some scholars have argued that this remains one of the OAU's most significant challenges.[289]

The OAU's response to the Rwandan Genocide was an even greater failure than its involvement in the Western Sahara. The OAU's involvement in Rwanda began in 1990 after the Rwandan Patriotic Front ("RPF"), a rebel group whose membership primarily consisted of exiled members of the Tutsi ethno-cultural group, invaded the country. The invaders' main objective was to restore the right of their members to return to Rwanda from exile.[290]

The OAU successfully brokered a ceasefire between the government of Rwanda and the RPF. This effort eventually led to the signing of the Arusha Peace Agreement.[291] The peace agreement was the outcome of fourteen months of negotiations and consultations between the main parties—the government of the Republic of Rwanda and the RPF—with the assistance of the OAU and the governments of France, Belgium, and the

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285 Naldi, *supra* note 277, at 595.

286 STEFAN TALMON, GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 187 (1998) (examining, inter alia, the recognition of SADR by the OAU and some of its Member States).

287 STEPHEN ZUNES & JACOB MUNDY, WESTERN SAHARA: WAR, NATIONALISM, AND CONFLICT IRRESOLUTION 175 (2010) (examining Morocco's decision to withdraw from the OAU).

288 Hamza Mohamed, *Morocco Rejoins the African Union after 33 Years*, ALJAZEERA, Jan. 31, 2017, https://www.aljazeera.com/news/2017/01/morocco-rejoins-african-union-33-years-170131084926023.html (last visited May 4, 2018).

289 Munya, *supra* note 265, at 561.

290 ADRIEN FONTANELLAZ & TOM COOPER, THE RWANDAN PATRIOTIC FRONT: 1990–1994 (2015) (examining, inter alia, the evolution and participation of the RPF in Rwandan political economy).

291 *See* Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, August 3, 1993, U.N. Doc. A/48/824, Annex 1 [hereinafter Arusha Peace Agreement].

United States.[292] The Arusha Peace Agreement was intended to achieve certain objectives, the most important of which were to (1) end the war between the Government of the Republic of Rwanda and the RPF, which had been raging since 1990; (2) impose the Constitution of June 10, 1991, and the Arusha Peace Agreement on Rwanda as its fundamental law during the transitional period; (3) establish that "in case of conflict between the provisions of the Fundamental Law and those of other Laws and Regulations, the provisions of the Fundamental Law should prevail"; (4) establish that the government of Rwanda and the RPF were required to respect the peace accords and make every effort to "promote National Unity and Reconciliation"; and (5) require that the Hutu-dominated government share power with the Tutsi-dominated RPF, thus providing avenues for the effective integration of Tutsi exiles into Rwandan society, especially within the government. Other efforts of this agreement were to democratize the government of Rwanda, and dismantle the Hutu monopolization of power, which had existed for over 20 years. The OAU then proceeded to attempt the implementation of the Arusha Peace Agreement.

On April 6, 1994, President Habyarimana of Rwanda was killed in a plane crash. The belief by the Hutu-dominated government that his death was an assassination led to the demise of the peace accords. On April 7, genocidal killings of Tutsi and their Hutu sympathizers began. About 100 days later, nearly one million Rwandans had been killed. Those murdered were exclusively Tutsi and their Hutu sympathizers. The OAU refused to refer to the mass killings as genocide. In the report produced by the International Panel of Eminent Personalities ("the Panel"), the latter concluded that:

> Under the circumstances of the time, this Panel finds that the silence of the OAU and a large majority of African Heads of State constituted a shocking moral failure. The moral position of African leaders in the councils of the world would have been strengthened had they unanimously and unequivocally labelled the war against the Tutsi a genocide and called on the world to treat the crisis accordingly. Whether their actual influence would have been any greater we will, of course, never know.[293]

The Panel noted that the OAU's condemnations were "strangely impartial" and that "no group was condemned by name, implying that the two combatants were equally culpable."[294] When the Assembly of Heads of State and Government of the Organization of African Unity met for its

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292 *See id.*

293 *Id.* para. 15.87.

294 *Id.* para. 15.86.

annual summit in Tunis, Tunisia, from June 13–15, 1994, the OAU recognized the interim government as Rwanda's official representative, even though as many as fourteen African heads of state had, just a few days earlier, condemned the events occurring in Rwanda and labeled them a genocide.[295]

Although the International Panel of Eminent Personalities referred to the OAU's unwillingness or failure to label the mass killings of Tutsi and their Hutu sympathizers as "a shocking moral failure," the Panel nonetheless stated that the OAU had made significant efforts to seek a diplomatic solution to the conflict. The Panel concluded that "[t]ragically, none of these efforts succeeded."[296] The Panel went on to say that "[j]ust as Rwanda, when the crunch came, did not finally matter to the international community, neither did the world heed the appeals of Africa's leadership."[297] Some observers have argued that had the OAU's pleadings been more forceful, including especially the use of terms such as "genocide," the world may have acted or responded differently.[298]

B. The African Union and the Principle of Non-Indifference

It is argued that since the Treaty of Westphalia in 1648, international relations have been dominated by the principle of sovereignty.[299] Once a state was recognized by the international community, "it possessed the right to sovereignty, an 'exclusive and final jurisdiction over territory, as well as resources and populations that lie within the territory.'"[300] Taking into consideration the principle of sovereignty of states, "national security was recognized as the pillar of individual and international security."[301] Within this framework, the "international community saw its role as primarily preserving the sovereignty of states and protecting them

295 Org. of African Unity (OAU) Council of Ministers, *Resolutions Adopted by the Sixteenth Ordinary Session of the Council of Ministers*, CM/RES.1514–1552 (LX) (June 6, 1994).

296 *See Rwanda: The Preventable Genocide: International Panel of Eminent Personalities* ¶ 15.88 (July, 2000), http://www.refworld.org/pdfid/4d1da8752.pdf (the International Panel of Eminent Personalities was commissioned by the OAU to investigate and report on the 1994 Rwandan Genocide and the surrounding events).

297 *Id.*

298 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167

299 *See generally* DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS (2010) (Princeton University Press, 2001) (examining, inter alia, the Treaty of Westphalia, international relations and the sovereignty of nations).

300 Ani, *supra* note 131, at 7.

301 *Id.* at 7.

against attacks from external forces as endorsed in Article 2.4 of the Charter of the United Nations."[302]

The OAU emerged in 1963 under this international framework, in which state sovereignty was considered sacrosanct. This is evidenced by the fact that one of its most important operating principles was non-interference in the internal affairs of Member States, which ultimately prevented the OAU from having any significant impact on the politics of Member States, and effectively precluded intervention by the OAU to stop the gross abuse of human rights. The OAU's non-interference principle and the organization's desire to maintain the sovereignty of Member States forced it to evolve into "a guardian of incumbent state regimes at the expense of the rights of ordinary citizens."[303]

Mass atrocities committed during civil wars in Nigeria, Liberia, Sierra Leone, Somalia, as well as the Rwandan Genocide, showed the OAU and Africans, first, "that internal conflicts will ebb away if left alone"[304] and, second, that international involvement is critical in the effective resolution of these conflicts. Hence, one of the reasons for the establishment of the African Union was "to provide African solutions to security challenges in the continent."[305] Specifically, Article 4(h) of the Constitutive Act of African Union mandates that the AU intervene in a Member State to respond to war crimes, genocide and crimes against humanity.[306]

The question is: Has the AU transcended the OAU's "fixation with the state-centric model of security to a human security model that advances the rights and security of people rather than that of state regimes?"[307] The crisis in Burundi represented the first opportunity for the AU to test its ability to deliver on peace and security, and do so in a more effective and sustainable way than its predecessor, the OAU. The political crisis in Burundi started long before the founding of the African Union in 2001. Since its independence in 1962, Burundi has been besieged with sectarian violence, which has produced two civil wars and genocides.[308]

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302 *Id.*

303 *Id.* at 8.

304 *Id.* at 10.

305 *Id.* at 11.

306 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

307 Ani, *supra* note 131, at 11.

308 *See generally* GODFREY MWAKIKAGILE, CIVIL WARS IN RWANDA AND BURUNDI: CONFLICT RESOLUTION IN AFRICA (2013) (the first civil war and genocide began in April 1972 and resulted in the deaths of 80,000 to 210,000 citizens, mostly members of the Hutu majority. The second civil war and genocide began in October 1993 after the assassination of Melchior Ndadaye, leader of the Hutu-dominated Front for Democracy in Burundi (*Front pour le Démocratie au Burundi*). Ndadaye was assassinated by Tutsi soldiers and this act was followed by a genocide against the Tutsi population of Burundi).

Sectarian conflict re-emerged in Burundi after the assassination of the country's first democratically-elected president, Melchior Ndadaye, on October 21, 1993 by the Tutsi-dominated government army.[309] Ndadaye was also the first Hutu president of Burundi. The assassination of President Ndadaye increased conflict between the Hutu and Tutsi political organizations and produced a significant level of sectarian conflict.

Beginning in 1996, regional leaders, including those from civil society and women's organizations, and including several African heads of state, mediated between the feuding parties and eventually produced an agreement that came to be referred to as the Arusha Peace and Reconciliation Agreement for Burundi (Arusha Agreement for Burundi). The latter was signed in Arusha, Tanzania, on August 28, 2000 by the government of Burundi, the National Assembly and representatives of major Hutu and Tutsi political parties.[310]

The Arusha Agreement for Burundi included provisions for the development and institution of "a new political, economic, social and judicial order . . . in the context of a new constitution inspired by Burundian realities and founded on the values of justice, the rule of law, democracy, good governance, pluralism, respect for the fundamental rights and freedoms of the individual, unity, solidarity, equality between women and men, mutual understanding and tolerance among the various political and ethnic components of the Burundian people."[311] Additionally, it provided for the "[a]doption of constitutional provisions embodying the principle of separation of powers (executive, legislative and judicial),"[312] as well as for power sharing between the two major ethnic groups—the Hutu and Tutsi.[313]

The Arusha Agreement for Burundi asked the Government of Burundi to "submit to the United Nations a request for an international peacekeeping force."[314] Nevertheless, the UN was not willing to commit troops to Burundi in the absence of a comprehensive ceasefire. Subsequent ceasefire agreements were concluded in the context of negotiations

309 *See* MELVERN, *supra* note 6, at 71–73.

310 *See* Arusha Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000, https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf; *see also* Eki Yemisi Omorogbe, *Can the African Union Deliver Peace and Security?*, 16 J. CONFLICT SECURITY L. 35, 45 (2011).

311 Arusha Peace and Reconciliation Agreement for Burundi, *supra* note 311, Protocol I, ch. II, art. 5(1).

312 *Id.* at Protocol I, ch. II, art. 5(5).

313 *See id.* at Protocol II, ch. II, art. 15(12).

314 *Id.* at Protocol V, art. 8.

facilitated by Jacob Zuma, who at the time was the Vice President of South Africa. This permitted the AU to fulfill its peacekeeping role. On February 3, 2003, the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of the African Union approved the deployment of the African Mission in Burundi (AMIB) to help secure the peace.[315]

Unfortunately, AMIB suffered from severe underfunding and was unable to secure the financial resources needed to effectively fulfill its mission. The latter included (1) monitoring and ensuring the operation of various ceasefire agreements; (2) providing support to disarmament, including the demobilization and subsequent re-integration of members of various militias into society; and (3) security for various politicians.[316] The mandate of AMIB, however, did not include explicit protection for civilians.[317]

The AMIB was expected to be a temporary arrangement pending the arrival of a United Nations military force in Burundi.[318] On March 25, 2004, the African Union announced that it had renewed AMIB's mandate for one month and appealed to the UN to implement Secretary-General Kofi Annan's proposal to deploy a UN peacekeeping mission in Burundi.[319] The AMIB's mandate was renewed to May 2, 2004 with the expectation that by the end of that period, a UN peacekeeping force would have been deployed to Burundi. The AU formally disbanded the AMIB in May 2004. On May 21, 2004, the UN Security Council, acting under Chapter VII of the United Nations Charter, "decided to authorize the deployment of the United Nations Operation in Burundi (ONUB) for an initial period of six months."[320] ONUB worked in Burundi until December 31, 2006 and provided necessary stability for a successful transition—the latter ended in September 2005, after the people of Burundi held

315 Omorogbe, *supra* note 311, at 45–47 (the decision was made at the 91st Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level (MCPMR), and is officially referred to as: *Communique of the Ninety First Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level* ("Central Organ Communique"), Central Organ/MEC/AMB/Comm. (XCI), Addis Ababa, Ethiopia, Apr. 2, 2003, http://www.peaceau.org/uploads/comapr03.pdf (last visited May 6, 2018)).

316 *Id.* at 46.

317 *See generally* Central Organ Communiqué, *supra* note 316, at para. 5(iii); *see also id.*

318 *See* Central Organ Communiqué, *supra* note 316, at para. 5(iii); *see also* Omorogbe, *supra* note 311, at 46.

319 *Burundi: UN Begins Preparations for Peacekeeping Mission*, RELIEFWEB (Apr. 6, 2004), https://reliefweb.int/report/burundi/burundi-un-begins-preparations-peacekeeping-mission.

320 *Burundi-ONUB-Background*, UN (2006), https://peacekeeping.un.org/sites/default/files/past/onub/background.html (the ONUB was authorized by UN Res. 1545 (2004)).

democratic elections, selected members of the National Assembly and the Presidency, and the subsequent installation of a government as provided for in the Arusha Agreement on Burundi.[321]

Although the AU's performance during the Burundi crisis indicated that it could successfully deal with sectarian conflict and "de-escalat[e] a potentially volatile situation,"[322] it also revealed one of the AU's most important weaknesses—it "lacks the resources necessary to deploy its troops, sustain its mission or to fulfil its mandate."[323]

Sectarian conflict re-emerged in Burundi in April 2015 after then President Pierre Nkurunziza declared that he would stand for what many citizens believed was an unconstitutional third term in office.[324] Shortly after the announcement, riots erupted throughout Burundi and soldiers even attempted to overthrow the government.[325] Nkurunziza went on to win a highly controversial presidential election in the midst of intense sectarian violence, increased government restrictions on basic liberties, and an emerging humanitarian crisis.[326]

The AU's most recent involvement in Burundi began when the organization called on the government of Burundi to postpone the proposed July 2015 presidential elections, arguing that the political environment was extremely hostile and too unstable for there to be a fair, free and credible election.[327] In October 2015, the AU's Peace and Security Council ("PSC") "adopted a resolution calling for individual sanctions (travel bans and asset freezes) against 'all Burundian stakeholders whose actions and statements contribute to the perpetuation of violence' and asked the African Commission ("AC") to draw up a list of names."[328] However, the AC has not yet identified any individuals for sanctions.[329]

In July 2015, as the situation in Burundi continued to deteriorate, the PSC granted authorization for the deployment of military observers to supervise the disarming of many of the youth groups that were involved

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321 *See generally* Arusha Agreement on Burundi, *supra* note 311; *see also id.*

322 Omorogbe, *supra* note 311, at 48.

323 *Id.*

324 *Burundi President Pierre Nkurunziza Confirms Third-Term Bid*, BBC NEWS (April 25, 2015) http://www.bbc.com/news/world-africa-32464054; International Refugee Rights Initiative (IRRI), *Burundi: A Country on the Edge* at 3 (April 2016), http://www.refworld.org/docid/57b6f9364.html [hereinafter International Human Rights Initiative (IRRI)].

325 *Burundi President Nkurunziza Faces Attempted Coup*, BBC NEWS (May 13, 2015), http://www.bbc.com/news/world-africa-32724083.

326 *See* International Refugee Rights Initiative (IRRI), *supra* note 325, at 3.

327 *See id.* at 7.

328 *Id.* at 17.

329 *Id.*

in the sectarian violence in the country.[330] In December 2015, the PSC announced that it would deploy 5,000 peacekeepers to the country[331] and invited the UN Security Council to endorse the proposed peace mission with a Chapter VII[332] resolution. Although the UNSC responded quickly to the AU PSC's request, the former did not adopt a resolution, but rather only issued a press statement.[333] The AU then gave the government of Burundi ninety-six hours to accept the PSC's peacekeeping force, which was to be called the African Prevention and Protection Mission in Burundi ("MAPROBU").[334] This bold action by the AU was expected to "st[and] out as [the] exemplar of the AU's mantra of 'African solutions for African problems.'"[335] Nevertheless, the Burundian government refused to accept the peacekeeping force, arguing that "it would deem any intervention as hostile and would attack any incoming force."[336]

At the January 2016 summit of the Assembly of Heads of State and Government of the African Union in Addis Ababa, leaders failed to endorse the deployment of the 5,000-strong MAPROBU as recommended by the AU PSC.[337] At the summit, "the high-minded ideas about continental solutions ran headlong into the crude political realities of an institution that has long been accused of prioritizing the interests of member heads of state over all else."[338] At the summit, dictators such as The Gambia's Yahya Jammeh, publicly opposed MAPROBU and eventually the AU Assembly of Heads of State and Government decided against the proposed peacekeeping mission.

While it is true that the AU has done a much better job and played "a much more aggressive role than its predecessor in solving the continent's myriad armed conflicts,"[339] it has failed to fully embrace the role of an effective continental police force. In fact, all the peacekeeping missions that the AU has deployed have been done so only at the request or invitation of the host government. During the January 2016 summit of the Assembly of Heads of State and Government, the AU had the opportunity

330 *Id.*

331 *Id.* at 17-18. [http://www.refworld.org/pdfid/57b6f9364.pdf]

332 *See* U.N. Charter art. 39-51; *see also id.* at 18.

333 *See* INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 325, at 17.

334 *Id.*

335 Ty McCormick, *The Burundi Intervention That Wasn't*, FOREIGN POLICY (Feb. 2, 2016), http://foreignpolicy.com/2016/02/02/the-burundi-intervention-that-wasnt/#.

336 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 325, at 17.

337 International Crisis Group, *The African Union and the Burundi Crisis: Ambition versus Reality*, Breifing No. 122, (Sept. 28, 2016), https://www.crisisgroup.org/africa/central-africa/burundi/african-union-and-burundi-crisis-ambition-versus-reality.

338 McCormick, *supra* note 336.

339 *Id.*

to override the objections of a national government and deploy peacekeepers without the consent of the host government, in accordance with Article 4(h) of the AU Constitutive Act. The demise of MAPROBU was considered a colossal failure for the AU and a major stain on the continental organization's legacy. It appears that despite the AU's replacement of the doctrine of "non-interference" with "non-indifference," it does not currently have the political will and the capacity to carry out its duties under Article 4(h) of its Constitutive Act.

C. Reconciling the UNSC's Controlling Power and the AU PSC's Right to Intervene

Burundi is not the only failure the AU has seen. Although the AU PSC did deploy a peacekeeping force to Sudan's Darfur region called the AU Mission in Sudan (AMIS), they were unable to function effectively due to financial constraints.[340] In early 2006, the AU PSC suggested the transformation of AMIS into a UN force, but the government of Sudan opposed such a transition, arguing that it would represent a re-colonization of the country.[341] In response, the UNSC's five permanent members proposed a hybrid AU-UN peacekeeping mission.[342] In July 2007, the AU-United Nations Mission in Darfur ("UNAMID") was established and granted a Chapter VII mandate to protect the civilians of the region.[343] UNAMID took over from AMIS on December 31, 2007, however, the situation in Darfur remains intolerable for its citizens and UNAMID has been criticized for failing to protect the people outside the camps.[344]

Although the AU appears to have garnered some success in Comoros, that mission was carried out by a coalition of states, including the United Republic of Tanzania, Senegal and Sudan, and not by an AU force. In Somalia, peacekeepers have failed to protect the people. Al-Shabaab, one of the perpetrators of a significant amount of the violence in the country, remains quite resilient.

The AU was somewhat successful in Kenya's disputed December 2007 presidential elections. The Assembly of Heads of State and Government convened the Panel of Eminent African Personalities, headed by former UN Secretary-General, Kofi Annan, to mediate the crisis. The Panel ultimately resolved the crisis, and produced a power-sharing agreement, which was signed on February 28, 2008.

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340 *See* Arusha Peace Agreement, *supra* note 292; Omorogbe, *supra* note 311.

341 *Id.*

342 *Id.*

343 S.C. Res. 1769, ¶ 5 (July 31, 2007).

344 *See generally* INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167.

The responsibility to protect (R2P) is not an African Union concept. The principle was formalized by the International Commission on Intervention and State Sovereignty, which includes members from Africa. Nevertheless, R2P is an international effort and was endorsed at the global level by the UN General Assembly. Of course, R2P "is clearly reflected in aspects of the AU's legal as well as its institutional framework."[345]

The AU's institutional framework, especially Article 4(h) of the AU's Constitutive Act, can be reviewed as reflective of the AU's "commitment to non-indifference, which itself may be viewed as the regional analogue of the more general R2P."[346] It can be argued that African countries have an obligation to protect their populations from international crimes by virtue of their international commitments, including commitments assumed under international human rights treaties. Taken together, these obligations give rise to R2P. At the regional level, these same protective obligations also apply—they are derived from such regional instruments as the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights. These regional-level commitments to the protection of the various populations in each country are together termed as "non-indifference"—while "R2P is rooted in international obligations," . . . "non-indifference is rooted in regional ones."[347] It is important to note, however, that the international and regional communities are bound by both principles.

There are two relevant points here, the first being that "the commitment underlying R2P extends to genocide, war crimes, ethnic cleansing and crimes against humanity."[348] The AU's right to intervene under Article 4(h) of the Constitutive Act does not include "ethnic cleansing."[349] Nevertheless, Article 4(j) of the AU Constitutive Act grants Member States the right to "request intervention from the Union in order to restore peace and security"—this language is sufficiently broad to include ethnic cleansing.[350] Of course, "war crimes and crimes against humanity" are "defined sufficiently broadly under international treaty and customary law as to include ethnic cleansing."[351] The second point is that non-indifference in Africa has emphasized legal remedies for international

345 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 28.

346 *Id.*

347 *Id.*

348 *Id.*

349 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h).

350 *Id.* at art. 4(j).

351 INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167, at 28.

crimes.[352] These developments point to, and reflect, a much stronger commitment to justice and the rule of law "as an integral element of post-conflict reconstruction in building lasting peace and security"[353] in Africa.

Regarding the duty or obligation to intervene in a Member State, the AU's Constitutive Act is significantly vague. Both Articles 4(h) and 4(j) are framed in terms of rights—"the right of the Union to intervene" and the "right of Member States to request intervention from the Union."[354] The Constitutive Act, however, does not provide for a duty or obligation on the part of the AU to intervene.[355]

While Article 3(f) states that one of the objectives of the AU is to "promote peace, security, and stability on the continent," the AU is not subjected to any specific obligations nor is the AU mandated to take any specific types of actions to achieve peace.[356] The AU PSC Protocol imposes a more specific obligation on the PSC and states that "[i]n circumstances where conflicts have occurred, the Peace and Security Council shall have the responsibility to undertake peace-making and peace-building functions for the resolution of these conflicts."[357] Nevertheless, this directive leaves the PSC with significant discretion regarding how to act.

Since its establishment in 2001, the AU has not intervened in the internal affairs of Member States.[358] In addition to the fact that the AU has not yet formally invoked Article 4(h) of its Constitutive Act, the continental organization's practice, as it relates to intervention to maintain peace and security in Member States, does not reflect any consistent and

352 An example is the AU's support of the prosecution and subsequent conviction of former Chadian President Hissène Habré. *See, e.g.*, Ruth Maclean, *Ex-Chad Dictator's Conviction for Crimes Against Humanity Upheld by Dakar Court*, THE GUARDIAN (Apr. 27, 2017, 12:53 PM), https://www.theguardian.com/world/2017/apr/27/conviction-chad-hissene-habre-crimes-against-humanity-upheld.

353 *See* INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167.

354 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h)-(j).

355 *See generally id.*

356 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(h)-(j).

357 *See* PSC Protocol, *supra* note 133.

358 Some of the situations in which the AU intervened were described earlier. *See, e.g.*, JOHN MARK IYI, HUMANITARIAN INTERVENTION AND THE AU-ECOWAS INTERVENTION TREATIES UNDER INTERNATIONAL LAW: TOWARDS A THEORY OF REGIONAL RESPONSIBILITY TO PROTECT (2016) (examining, inter alia, the legal questions involved in intervention by the AU and ECOWAS to maintain international peace and security in Africa); LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION (Aidan Hehir & Robert Murray eds., 2013) (presenting a series of essays that examines the responsibility to protect, using humanitarian intervention in Libya as a case study).

recognizable approach.[359] Granted, conflicts differ from country to country and no two conflicts are the same. Thus, how the AU responds to a conflict in a Member State will be determined, to a great extent, by the nature of the conflict. Nevertheless, the AU PSC must establish a general legal and institutional framework for dealing with conflict situations that is credible, effective, and shows a significant level of consistency. If the AU is to function as a continental organization with authority to undertake certain activities on behalf of its Member States, it must have the legal authority to act when the situation calls for it to do so. Perhaps, more importantly, the AU must act purposefully and forcefully when a situation in a Member State triggers its right to act under Article 4(h).[360] The AU and its organs (e.g., Peace and Security Council) must develop the modalities to undertake its intervention duties when situations call upon them to do so. Additionally, they must develop the capacity to do so.

Moving forward, the AU must develop and adopt a framework that can enhance the ability of the organization to properly assess the need for and nature of intervention. In doing so, the AU can determine if the situation can be resolved without the need for military intervention. The Assembly of Heads of State and Government and the PSC must develop and adopt a common legal framework that can be used to analyze the various conflict situations that are likely to occur in Member States and determine the nature of intervention. Once such an analysis has determined that a situation warrants intervention and the appropriate method of intervention has been determined, the AU should proceed with the action. Such a disciplined approach could have avoided the AU's failures in Burundi, which were necessitated, *inter alia*, by the refusal by the government of Burundi to allow the peacekeepers to enter the country.

Although the PSC Protocol assigns "the primary responsibility for promoting peace, security and stability in Africa" to the AU PSC, it is important to note that the UN Charter, which is "hierarchically superior in international law and therefore controlling,"[361] assigns the power to authorize intervention to the UN Security Council ("UNSC").[362] The AU PSC Protocol is cognizant of the UNSC's authority as it relates to intervention for purposes of maintaining and promoting peace, security and stability in Africa. Thus, according to Article 17(1) of the PSC Protocol,

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359 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4 (in other words, none of the AU's interventions so far have been linked to Article 4(h)).

360 *See id.* at art. 4(h).

361 PSC Protocol, *supra* note 133; INTERNATIONAL REFUGEE RIGHTS INITIATIVE, *supra* note 167.

362 *See* U.N. Charter, at art. 53(1) ("no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council").

"[i]n the fulfillment of its mandate in the promotion and maintenance of peace, security and stability in Africa, the Peace and Security Council shall cooperate and work closely with *the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security.*"[363] Unfortunately, neither the PSC Protocol nor the AU's Constitutive Act offer clarification on what appears to be a conflict between the PSC's right to intervene and the UNSC's controlling power to authorize all intervention. In order for the PSC to function as an effective regional arbiter of peace, security and stability in Africa, this conflict between the UNSC's controlling power and the PSC's right to intervene must be fully resolved.

As aforementioned, the AU has addressed the inconsistency between the PSC's right to intervene and the UNSC's controlling power, in the report generally referred to as the Ezulwini Consensus.[364] In this report, the AU "agrees . . . that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted 'after the fact' in circumstances requiring urgent action."[365] There are many problems with this supposed resolution of the inconsistency. Questions arise regarding whether this approach will withstand legal scrutiny, and who will determine if a situation requires urgent action and what criteria will be used to do so.

Although both the UN and the AU have, in the past, indicated a willingness to cooperate on peace and security issues, cooperation agreements signed between the two organizations have reaffirmed the UNSC as the primary actor in all issues of international peace and security. That essentially forces the AU to remain subordinate, and to a certain extent, subservient to the UNSC when it comes to peace and security issues in the continent.

Even if the inconsistency between the UNSC's controlling power and the PSC's right to intervene is resolved, the African Union still faces financial problems regarding its ability to mount a quick and effective intervention program. In addition to securing financial resources to undertake military intervention, the AU must provide resources to fund other programs that can minimize sectarian conflicts or deal with them before it becomes necessary for the AU to intervene. These programs include: (1) education regarding ways to resolve conflict peacefully and prevent the abuse of human rights, especially those of vulnerable groups

363 PSC Protocol, *supra* note 133, at art. 17(1) (emphasis added).

364 *See generally* Ezulwini Consensus, *supra* note 144.

365 *Id.* at 6.

(e.g., women, infants, children, and ethnic and religious minorities); (2) the creation of opportunities for restorative justice; (3) training individuals at the country level who can serve as resources for conflict prevention and resolution; (4) making use of proven traditional methods of conflict resolution; and (5) making certain that there exists enough financial resources to effectively realize non-indifference in Africa.

Since the AU was founded in 2001 it has achieved a few successes. However, it has generally failed in most of its attempts to prevent or address the mass violation of human rights in Africa. Additionally, many of the AU's success stories have involved situations in which decisions made have favored opportunistic and autocratic national leaders, even when such leaders have been determined to have committed mass human rights violations.

The lack of political will to implement public policies that are necessary to guarantee peace and security, protect human rights, and generally advance human development, has been a major challenge to governance in Africa for many years. Despite the fact that the AU has existed for nearly two decades now, the organization's Assembly of Heads of State and Government has not been willing to deal fully and effectively with abusive and opportunistic leaders, including those who commit mass violations of human rights. Part of the problem lies in the fact that many of these Heads of State and Government are themselves opportunists and oppressors and hence, do not have the moral authority to call on other abusive leaders to step down or voluntarily contribute financial resources to a program that, once implemented, could threaten their own hegemony. It is important for African heads of state to recognize that their ability as leaders of the AU, to fully and effectively address issues of peace and security in the continent, is dependent on how well they function as political leaders in their own countries. Good governance, which is undergirded by the rule of law, can provide the necessary foundation for the political will that African leaders need to impose the collective will of the AU on countries that violate the rights of their citizens.

Through Article 4(h) of the Constitutive Act of the African Union, African States have granted the AU the legal authority to intervene in situations that involve genocide, war crimes, and crimes against humanity. Nevertheless, for the AU to actually intervene, a Member State must either make a request for intervention or the Assembly of Heads of State and Government must authorize the intervention. An institutional framework has been put in place to implement the AU's right to intervene or non-indifference, with the understanding that the AU Peace and Security Council has the primary responsibility for intervention. The Ezulwini Consensus has dealt, at least partly, with the conflict between the UNSC's

controlling power and the AU PSC's right to intervene. Nevertheless, lack of political will on the part of African leaders, especially when their own interests are at risk, as well as financial resource constraints, continue to hamper the ability of the AU to fully and effectively address issues of peace and security in the continent.

V. UNCONSTITUTIONAL REGIME CHANGE AS A MAJOR THREAT TO PEACE AND SECURITY IN AFRICA: THE CONSTITUTIONAL COUP

A. Introduction

Earlier, this article examined the military coup as a major source of unconstitutional regime change in Africa. In doing so, we explored how the military coup emerged in the immediate post-independence period amidst severe government dysfunction in many African countries. Although the OAU did not initially have a fully developed policy toward the military coup and other non-constitutional forms of regime change, it eventually developed such a policy. The OAU and AU policies on unconstitutional regime changes are found in three important instruments, namely: (1) the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government ("Lomé Declaration"),[366] (2) the African Charter on Democracy, Elections and Governance ("Democracy Charter"),[367] and (3) the Constitutive Act of African Union ("Constitutive Act").[368] It is notable that the AU, the successor to the OAU, considers unconstitutional regime changes "an unacceptable and anachronistic act, which is in contradiction of our commitment to promote democratic principles and conditions."[369]

The situations considered by the OAU/AU as constituting unconstitutional regime change do not, however, include "constitutional coups," which have risen to become an important and pervasive way to capture and/or retain power in many African countries over the past few decades. This section examines the constitutional coup, which has emerged in recent years as a major threat to peace and security in Africa.

B. What is a Constitutional Coup?

The constitutional coup involves the amending or revising of the constitution to eliminate presidential term limits, and allows the

366 Lomé Declaration, *supra* note 35.

367 Democracy Charter, *supra* note 36.

368 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

369 Lomé Declaration, *supra* note 35, at 1.

incumbent to extend his mandate. This paper expands that definition to include other constitutional changes, which have the effect of not only of extending the incumbent's mandate, but also the potential of: (1) eliminating opponents to the regime and their organizations; (2) silencing regime critics; (3) minimizing political competition; and (4) generally supporting regime impunity. For the purposes of this paper, a constitutional coup is evidenced by revision or amendment of the constitution to: (1) eliminate presidential term limits; (2) eliminate presidential age limits; (3) change citizenship requirements for candidates to the position of president—such a change is expected to invalidate the eligibility of opposition candidates; (4) change residency requirements for candidates to the position of president; and (5) grant the incumbent president immunity from prosecution for crimes committed while in power.

Constitutional coups also include: (1) manipulating the interpretation of constitutional provisions to postpone elections indefinitely and allow the incumbent whose mandate has expired to unconstitutionally stay in power; (2) manipulating electoral and other laws in order to disqualify political opponents and extend the incumbent's mandate or ensure an electoral win for the incumbent; and (3) changing the electoral laws to disqualify other candidates.

Abdelaziz Bouteflika ("Bouteflika") won the Algerian presidential election on April 15, 1999, where he replaced incumbent President Laimine Zéroual.[370] At the end of Bouteflika's first term, he won the presidential election of April 8, 2004[371] and went on to serve a second term, which ended in 2009. In 2008, Bouteflika had the country's constitution amended to remove the presidential term limit. Algeria's National Assembly voted in favor of removing the term limit on November 12, 2008.[372] Algeria held presidential elections on April 9, 2009 and Bouteflika won them by capturing 90.24% of the votes cast. The election was boycotted by several opposition parties.[373] On April 28, 2014, Bouteflika

370 *See* Dana Moss, *Elections in Algeria: Bouteflika Wins, Legitimacy Loses*, PolicyWatch 1503, THE WASHINGTON INSTITUTE FOR NEAR EAST POLICY (Apr. 3, 2009), http://www.washingtoninstitute.org/policy-analysis/view/elections-in-algeria-bouteflika-wins-legitimacy-loses.

371 *See* Craig S. Smith, *Algerian President Overwhelmingly Wins Re-election*, N.Y. TIMES (Apr. 10, 2004), https://www.nytimes.com/2004/04/10/world/algerian-president-overwhelmingly-wins-re-election.html.

372 *Algeria Deputies Scrap Term Limit*, BBC NEWS, http://news.bbc.co.uk/2/hi/africa/7724635.stm (last updated Nov. 12, 2008).

373 Alfred de Montesquiou, *Algerian Bouteflika Wins 3rd Presidential Term*, SAN DIEGO UNION-TRIB. (Apr. 10, 2009), http://www.sandiegouniontribune.com/sdut-af-algeria-election-041009-2009apr10-story.html.

was elected to serve a fourth term as president of Algeria.[374] Despite speculations that Bouteflika is ailing, it is rumored that he will run again in 2019 for a fifth term.[375]

In 2005, President Blaise Compaoré reached the end of his two seven-year terms in office in Burkina Faso. In 2000, the country's post-Cold War, 1991 constitution, was amended to impose a limit of two terms and reduce each term from seven to five years. Compaoré was supposed to leave office, but he argued that since he had been in office when the 2000 constitutional amendment took effect, it did not apply to him and he was thus qualified to run for a third term.[376] He subsequently appealed to the Constitutional Council which ruled in Compaoré's favor. He was re-elected on November 13, 2015 taking 80% of the votes cast.[377] This constitutional interpretation was undertaken with the help of a Constitutional Council controlled by Compaoré and his political party, the Congress for Democracy and Progress (*le Congrès pour la Démocratie et le Progrès*). The CC's decision represented a constitutional coup as defined in this paper. The next election, on November 21, 2010, was won by Compaoré with 80.2% of the votes cast.[378]

After Compaoré was nominated for his second term, he began publicly calling for an end to term limits.[379] In May 2013, Compaoré publicly announced plans to create a Senate, under conditions in which the president would be able to appoint as many as one third of the members of this legislative chamber.[380] Many Burkinabè saw this effort by Compaoré as an attempt to pave the way for him to revise the constitution and prolong

374 Yacine Boudhane, *Algeria's Presidential Elections Amid the Bickering of a Polarized Regime*, WASH. INST. (Feb. 288, 2014), http://www.washingtoninstitute.org/policy-analysis/view/algerias-presidential-elections-amid-the-bickering-of-a-polarized-regime.

375 *See* Lamine Chikhi, *Rare Appearance Fuels Speculation Algeria's Bouteflika will Run Again*, REUTERS (Apr. 10, 2018), https://www.reuters.com/article/us-algeria-politics/rare-appearance-fuels-speculation-algerias-bouteflika-will-run-again-idUSKBN1HH2FZ.

376 *See* John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, *supra* note 99.

377 *Landslide Win for Burkina Leader*, BBC NEWS (Nov. 18, 2005), http://news.bbc.co.uk/2/hi/africa/4450362.stm.

378 Anne Look, *Burkina's Compaoré Wins by Landslide*, VOA NEWS (Nov. 25, 2010), https://www.voanews.com/a/burkinas-compaore-wins-by-landslide—110841789/156921.html.

379 *See Le parti de Compaoré veut réviser le nombre de mandats présidentiels [Compaoré's Party Wants to Revise the Number of Presidential Terms]*, JEUNE AFRIQUE (Aug. 08, 2010, 1 :19 PM), http://www.jeuneafrique.com/155229/politique/le-parti-de-compaor-veut-r-viser-le-nombre-de-mandats-pr-sidentiels/.

380 *See* Molly Ariotti, *The Fall of the Hegemon in Burkina Faso*, WASH. POST (Nov. 4, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/11/04/the-fall-of-the-hegemon-in-burkina-faso/?utm_term=.aaab2f1f3cec.

his stay in power. Compaoré's announcement was met with mass protests that eventually led to his ouster.[381]

In 2005, Chadian voters approved changes to the country's constitution to allow President Idriss Déby to stand for a third term—the constitutional amendment was designed to remove a two-term constitutional limit.[382] Déby won the 2006 presidential election on May 3.[383] On April 25, 2011,[384] Déby won a fourth term in office. On April 21, 2016, he won a fifth term in office. As of this writing, he is still in office.[385]

Other African heads of state have changed their constitutions to prolong their presidential terms. These include: (1) Paul Biya (Cameroon); (2) Omar Bongo (Gabon); (3) Tandja Mamadou (Niger); (4) Gnassingbe Eyadéma (Togo); (5) Zine El Abidine Ben Ali (Tunisia); (6) Yoweri Museveni (Uganda); and (7) Frederick Chiluba (Zambia).[386] In 2000, Robert Guéï, president of Côte d'Ivoire, amended the constitution to disqualify the candidacy of his most important political rival, Alassane Ouattra. In the following sections, the paper takes a closer look at constitutional amendments in Cameroon and Côte d'Ivoire as a way to provide greater insight into constitutional coups in Africa and their impact on governance.

C. Constitutional Coups as a Constraint to Governance in Africa: Côte d'Ivoire

Côte d'Ivoire gained independence from France on August 7, 1960 with Félix Houphouët-Boigny as its first president. On November 3, 1960, the new country adopted its first constitution.[387] The modalities for electing a president are presented in Article 9,[388] which states as follows: "*Le président de la République est élu pour cinq ans au suffrage universel*

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381 *See* David Smith, *Power Struggle in Burkina Faso After Blaise Compaoré Resigns as President*, THE GUARDIAN (UK) (Nov. 1, 2014, 01:27 PM), https://www.theguardian.com/world/2014/oct/31/burkina-faso-president-blaise-compaore-ousted-says-army.

382 *See Chad Votes to End Two-Term Limit*, BBC NEWS (June 22, 2005, 9:10 AM), http://news.bbc.co.uk/2/hi/africa/4118482.stm.

383 *See Chad's Déby Wins Re-election in Boycotted Poll*, REUTERS (May 9, 2011, 8:58 PM), https://af.reuters.com/article/chadNews/idAFLDE7482A220110510.

384 *See Chad's President Idriss Déby Re-elected Amid Boycott*, BBC NEWS (May 10, 2011), http://www.bbc.com/news/world-africa-13342664.

385 *See Chad's President Idriss Déby Wins Fifth Term*, BBC NEWS (Apr. 22, 2016), http://www.bbc.com/news/world-africa-36110158.

386 France 24, *Changing the Constitution to Remain in Power*, FRANCE 24 NEWS (Oct. 23, 2009), http://www.france24.com/en/20091023-changing-constitution-remain-power. [hereinafter *Changing the Constitution to Remain in Power*].

387 *Id.*

388 *Id.*

direct. Il est rééligible."[389] ("The President of the Republic is elected for five years by direct universal suffrage. He is eligible for re-election."). The country's first constitution, the 1960 constitution, did not set any citizenship or nationality requirements for any individual running for the position of President of the Republic. In 1961, the country adopted a new Nationality Code which addressed issues of nationality.[390] Although Articles 6 and 7 of the Nationality Code provide modalities to determine who is an Ivorian national, the Code, however, does not address nationality or citizenship requirements for the presidency.

Houphouët-Boigny recognized that failure to effectively manage ethnic and religious conflict could destroy the country's potential for rapid economic growth and development. The country has more than 60 ethnocultural groups and there are several religions operating in the country. Cognizant of the potential for the type of sectarian violence that could hinder peaceful coexistence and development, Houphouët-Boigny made a concerted effort to ensure that all stakeholder groups were granted the opportunity to participate in both the government and the economy.[391] The country's cocoa industry, which had served as the backbone of the economy since the colonial period, was staffed primarily by immigrant labor from neighboring countries, including Ghana, Mali, and Burkina Faso. Upon its independence, Houphouët-Boigny encouraged all the immigrants and their offspring to remain within the country and become nationals. His policies, which encouraged and facilitated peaceful coexistence of subcultures, enhanced economic growth and development, and attracted many immigrants from West Africa and other parts of the world; notably, the Middle East.[392] By the time Houphouët-Boigny died in office in 1993, Côte d'Ivoire had emerged as the most politically stable and economically developed country in the West African region.[393]

After Houphouët-Boigny died in office, he was succeeded by Henri Konan Bédié, who was the President of the National Assembly. It was expected that Alassane Ouattara, the country's prime minister, would

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389 *Id.*

390 *Code de la Nationalité: Loi no 61–415 du 14 décembre 1961 portant code de la nationalité ivoirienne*, http://www.refworld.org/docid/524560854.html (last visited May 9, 2018).

391 CHIKU MALUNGA, ANIMAL FARM PROPHECY FULFILLED IN AFRICA: A CALL TO A VALUES AND SYSTEMS REVOLUTION 43-44 (2014) (discussing, inter alia, Houphouët-Boigny's policy of inclusion).

392 *See generally* Chris Bierwirth, *The Lebanese Communities of Côte d'Ivoire*, 98 AFR. AFF. 79 (1999) (discussing, inter alia, the participation of Lebanese settlers in the economy of the Côte d'Ivoire).

393 *See, e.g.*, GODFREY MWAKIKAGILE, MILITARY COUPS IN WEST AFRICA SINCE THE SIXTIES (2001) (examining, inter alia, the impact of military coups on governance in West African countries during the post-independence period).

succeed Houphouët-Boigny. The country's constitution stated that: "[i]n the event of a vacancy in the Presidency of the Republic by death, resignation or absolute impediment, the functions of the President of the Republic are provisionally exercised by a person chosen by the President of the National Assembly."[394] Bédié used that power to appoint himself as acting president.

Once in power, Bédié began to systematically dismantle the policies of inclusiveness put in place by his predecessor. He stirred up ethnic and religious mistrust through a type of nationalism which came to be known as *Ivoirité* or *Ivorianness*.[395] Bédié took office as the interim president in Côte d'Ivoire on December 7, 1993. A presidential election was scheduled for October 22, 1995 to select a permanent head of state. It was in anticipation of this election that Côte d'Ivoire experienced its first constitutional coup. The two most important candidates competing for the position of president were Bédié of the Democratic Party of Côte d'Ivoire-African Democratic Rally and Alassane Ouattara of the Rally of the Republicans.

In preparation for the constitutional coup, Bédié popularized the idea of what came to be known generally as "pure Ivorian heritage" and which was embodied in *Ivoirité*, to effectively demonize and destroy his political opponents.[396] A critical part of this doctrine was that an individual whose two parents were born in Côte d'Ivoire were "superior" and hence referred to as "pure Ivorians," while immigrants and their children were considered inferior or "circumstantial Ivorians."[397] In addition to making it virtually impossible for those designated "circumstantial Ivorians" to participate in the political system, including holding public office, the post-Houphouët-Boigny government enacted legislation that authorized the deportation of thousands of agrarian farmers who were descendants of immigrants from Burkina Faso.[398]

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394 *Côte d'Ivoire: Constitution du 3 novembre 1960* [Ivory Coast: Constitution of November 3, 1960], art. 11, *translated in* Digitheque de Materiaux Juridiques et Politiques, http://mjp.univ-perp.fr/constit/ci1960.htm#2 [hereinafter *Ivory Coast Constitution*].

395 *See* EDMOND J. KELLER, IDENTITY, CITIZENSHIP, AND POLITICAL CONFLICT IN AFRICA 87–93 (2014) (examining, inter alia, Côte d'Ivoire's doctrine of *Ivoirité*).

396 *See, e.g.*, BRIAN D. BEHNKEN & SIMON WENDT, CROSSING BOUNDARIES: ETHNICITY, RACE, AND NATIONAL BELONGING IN A TRANSNATIONAL WORLD 169 (2013) (discussing, inter alia, the political consequences of *Ivoirité*); BROWNEN MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA (2013) [hereinafter MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA] (discusses citizenship in Côte d'Ivoire and the doctrine of Ivoirité).

397 BEHNKEN & WENDT, *supra* note 397, at 170.

398 *See generally* CATHERINE BOONE, PROPERTY AND POLITICAL ORDER IN AFRICA: LAND RIGHTS AND THE STRUCTURE OF POLITICS 277 (2014).

In preparing for the October 22, 1995 presidential election, Bédié and his government changed the electoral law in December 1994. The new changes prohibited any person from standing for the position of President of the Republic unless both their father and mother were of "Ivorian origin."[399] This change in the electoral law was aimed specifically at Ouattara, the main opposition to Bédié, and whose father was said to be a Burkinabè, despite the fact that the origin of his parents was never fully investigated and proven. Additionally, the new electoral law also restricted the right to vote to citizens only. This effectively disenfranchised long-term migrants—most of whom were supporters of opposition candidate, Ouattara. As a result of the changes made to the electoral law by Bédié's government, Ouattara was disqualified as a candidate for the presidency. The only other opposition candidate was Francis Wodié, leader of the little-known Ivorian Workers Party.[400] In the 1995 presidential election, Bédié captured 96% of the votes cast and Wodié received 4% of the votes.[401]

Bédié's manipulation of the electoral law represented the country's first constitutional coup. On December 24, 1999, disgruntled soldiers rebelled and captured the government.[402] Shortly after the revolt Bédié was ousted. General Robert Guéï, Bédié's chief of staff, who was not known to have participated in the coup, emerged as the leader of the military junta that ruled the country in the interim. As interim ruler of Côte d'Ivoire, Guéï formed a relatively broad-based and inclusive government. He appeared to be distancing himself from the exclusionary policies of his predecessor and promised to provide the country with a new constitution. Nevertheless, in preparation for the October 22, 2000 presidential elections, Guéï adopted Bédié's Ivoirité's doctrine and proceeded to promote policies that appealed to ethnic and religious hatred, with specific emphasis on Muslims and immigrants, and their descendants. This was particularly directed at the Burkinabè, the majority of whom were supporters of the country's most important opposition leader, Alassane Ouattara, and his political party the *Rassemblement des Républicains* ("RDR").

In July 2000, an extremely flawed referendum was held to approve Guéï's new constitution, which included the citizenship requirements of

399 MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA *supra* note 397.

400 POLITICAL HANDBOOK OF THE WORLD 2012, 337 (Thomas C. Muller, Judith F. Isacoff & Tom Lansford eds., 2012).

401 *See id.*; *see generally* FRANCOPHONE STUDIES: DISCOURSE AND IDENTITY (Kamal Salhi ed., 2000) (discussing, inter alia, the 1995 elections in Côte d'Ivoire).

402 POLITICAL HANDBOOK OF THE WORLD, *supra* note 401, at 337.

Bédié's electoral laws. Many scholars have argued that "anchoring the right to run for elected office in a requirement to prove 'Ivorian-ness of origin' by both paternal and maternal lineage led to a popular acceptance that to be Ivorian required something deeper than birth in the territory of a citizen parent."[403] Manby argued that, "it confirmed the idea of a pure ancestry connected to Ivorian soil 'from time immemorial,'"[404] producing the concept of "sons of the soil," which has come to dominate politics in the country and, indeed, in other parts of Africa.[405] In fact, following the referendum on the constitution, Guéï's government initiated and carried out a so-called "identification campaign" which preyed on those identified as "foreigners" despite the fact that the constitution recently ratified prohibited discrimination based on the grounds of origin, race, ethnic group, sex or religion.[406]

The new constitution was expected to govern the presidential election scheduled for October 22, 2000. On October 6, 2000, the Supreme Court, which had been reconstituted by Guéï and packed with his supporters, disqualified fourteen of the nineteen presidential candidates on citizenship grounds.[407] Alassane Ouattara and Bédié were included in the list of the disqualified candidates. However, while Ouattara was disqualified on citizenship grounds as mandated by the new constitution,[408] Bédié was denied the right to participate in the presidential elections because he had failed to submit a proper medical certificate to the electoral commission.[409] The successful change of the constitution to disqualify the most important opposition leader from participating in the presidential election represented Côte d'Ivoire's second constitutional coup.

The candidates for the 2000 elections were Robert Guéï, head of the transitional military government; Laurent Gbagbo, leader of the *Front populaire ivoirien* ("FPI"); Francis Wodié of the *Parti ivoirien des*

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403 MANBY, STRUGGLES FOR CITIZENSHIP IN AFRICA *supra* note 397, at 86.

404 *Id.*

405 *See, e.g.*, MORTEN BØÅS & KEVIN DUNN, POLITICS OF ORIGIN IN AFRICA: AUTOCHTHONY, CITIZENSHIP AND CONFLICT (2013) (the son of the soil concept is directly linked to claims to autochthony in many African countries today. In countries, such as Rwanda, Democratic Republic of Congo, Kenya, and Côte d'Ivoire, "sons of the soil" have killed people that they believe are "invading aliens," "strangers," or "alien settlers" and who are seeking to deprive the "sons of the soil" of lands bequeathed to them by their ancestors).

406 *See* Art. 30, CONSTITUTION OF THE REPUBLIC OF CÔTE D'IVOIRE, 2000, https://www.constituteproject.org/constitution/Cote_DIvoire_2000.pdf?lang=en.

407 HUMAN RIGHTS WATCH, CÔTE D'IVOIRE: THE NEW RACISM: THE POLITICAL MANIPULATION OF ETHNICITY IN CÔTE D'IVOIRE 11 (2001), https://www.hrw.org/sites/default/files/reports/cotdiv0801_0.pdf.

408 CONSTITUTION OF CÔTE D'IVOIRE, 2000, art. 35.

409 HUMAN RIGHTS WATCH, *supra* note 408, at 11.

travailleurs ("PIT"); and Nicolas Dioulo. Once it became evident that Gbagbo was most likely to win the 2000 presidential elections, General Guéï summarily dissolved the country's Independent Electoral Commission and proclaimed himself the winner of the election.[410] Shortly afterward, thousands of people from various political parties took to the streets of Abidjan, the country's capital city, to protest Guéï's actions.[411] The government response to the protesters was extremely brutal: the elite Presidential Guard "indiscriminately opened fire on [the demonstrators] as they gathered in their neighborhoods or marched through the streets."[412] During October 24-25, 2000, "the elite Red Brigade within the Presidential Guard opened fire on thousands of demonstrators" who were on the streets demonstrating for the annulment of the elections.[413] On October 25, 2000, the military unexpectedly withdrew its support of General Guéï and shortly afterward, he fled Côte d'Ivoire and went into exile.[414] Laurent Gbagbo then declared himself winner of the presidential election and proceeded to prepare for his inauguration.[415]

The departure of Guéï, however, did not end the country's political upheaval. While Gbagbo's supporters were celebrating his elevation to the position of President-elect of the Republic, Ouattara's supporters, most of whom were northern Muslims and traced their ancestry to immigrants from Burkina Faso, took to the streets to demand that new elections be held and that those candidates who had been excluded, including Ouattara, should be allowed to compete.[416] Bloody sectarian violence soon erupted as the supporters of Gbagbo and Ouattara confronted each other.[417]

On October 26, 2000, Gbagbo was sworn in as the new president of the Republic of Côte d'Ivoire. Although Gbagbo promised to seek reconciliation, form a government of national unity, and work hard to restore peace and security, he rejected new elections, even as the violence escalated and many people, primarily supporters of the opposition leader, Ouattara, were being killed. As argued by Human Rights Watch, "the victims [of the post-election violence] were not only supporters of Alassane Ouattara's RDR party, but also foreigners, Muslims, and Ivorians

410 *Id.* at 3.

411 *Id.* at 6-7.

412 *Id.* at 6 (stating that the killings of FPI protesters, however, were carried out by the Red Brigade, an elite force within the Presidential Guard).

413 HUMAN RIGHTS WATCH, *supra* note 408, at 6.

414 *Id.* at 16-17.

415 *Id.* at 17.

416 *Id.* at 11.

417 *Id.* at 17.

from northern ethnic groups who were identified with the RDR but targeted explicitly on the basis of their ethnic group, religion, and/or foreign nationality."[418]

Under the government of Laurent Gbagbo, many Ivorians, the majority of whom were Muslims and children of immigrant parents like Alassane Ouattara, continued to suffer demonization at the hands of both state and non-state actors who considered themselves "pure Ivorians" or "sons of the soil."[419] As the targeted killings of Muslims, immigrants from Mali, Burkina Faso, and Guinea, as well as their offspring continued, northern soldiers in the armed forces of the Republic of Côte d'Ivoire became increasingly restless and frustrated at their inability to stop the killings. On September 19, 2002, a group of mostly Muslim northern soldiers, attempted to take control of the government.[420] Although the rebelling soldiers did not succeed in capturing the government, they were able to take control of the northern part of the country.[421] The impetus to the rebellion carried out by the northern soldiers was the constitutional coup that effectively redefined citizenship and declared many of them, including presidential candidate Alassane Ouattara, non-citizens for purposes of participation in public life.

On September 21, 2002, after Gbagbo returned to Côte d'Ivoire from a visit to Italy, he delivered a speech to the nation that fanned the flames of hatred, rebellion, and brutal retaliation, which eventually metamorphosed into a civil war.[422] Gbagbo told the nation that, "The hour of patriotism has struck, the hour of courage has struck, the hour of the battle has struck. They have imposed a battle on us and we will fight it."[423] Gbagbo's speech not only emboldened his supporters to continue their brutalization of the "others,"[424] it caused many of those groups who had been marginalized and brutalized since the death of Félix Houphouët-Boigny to lose their trust in the government. The soldiers who rebelled on September 22, 2002 called themselves the *Mouvement patriotique de*

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418 HUMAN RIGHTS WATCH, *supra* note 408, at 21.

419 *Id.* at 6–21.

420 BRONWEN MANBY, CÔTE D'IVOIRE: GOVERNMENT ABUSES IN RESPONSE TO ARMY REVOLT, HUMAN RIGHTS WATCH 1–4 (2002), https://www.hrw.org/reports/2002/cotedivoire/cotdiv1102.pdf. [hereinafter MANBY, CÔTE D'IVOIRE].

421 *Id.*

422 MANBY, CÔTE D'IVOIRE, *supra* note 421, at 2.

423 *Id.*

424 The others were the Muslims, immigrants, offspring of immigrants, and supporters of the opposition, RDR. *See* THE DEFINITIVE RESOURCE AND DOCUMENT COLLECTION: VOLUME 1: ARMENIAN GENOCIDE, BOSNIAN GENOCIDE, AND CAMBODIAN GENOCIDE 1937 (Paul R. Bartrop & Steven Leonard Jacobs eds., 2015) (arguing that under the leadership of Gbagbo, a lot of violence was directed at Muslims and immigrants).

Côte d'Ivoire ("MPCI"). Human Rights Watch ("HRW"), during its monitoring of the situation in Côte d'Ivoire, from October 6–16, 2002, found the indiscriminate massacre of civilians by state actors.[425] HRW witnessed "people dressed in military uniform" killing "several dozen civilians—Ivorian Muslims, Malians, and Burkinabès—in Dola, soon after the government regained control of the town" from the rebels. It was within this polarized environment, made possible by two constitutional coups, that Côte d'Ivoire descended into civil war.

D. Paul Biya's Constitutional Coup in Cameroon

What is now the *République du Cameroun* ("Republic of Cameroon") was colonized by Germany, France and Great Britain. The UN Trust Territory of Cameroons under French administration was the first of the French administered territories or colonies in sub-Saharan Africa to gain independence on January 1, 1960.[426] On October 1, 1961, the Republic of Cameroon united with the UN Trust Territory of Southern Cameroons under British administration to found the *République fédérale du Cameroun* ("Federal Republic of Cameroon")—a federation that consisted of two relatively autonomous Federated States and which adopted English and French as its official languages.[427] In the federation, the Federal Republic of Cameroon became the Federated State of East Cameroon[428] and the Southern Cameroons became the Federated State of West Cameroon.[429]

The constitution of the former UN Trust Territory of Cameroons under French administration was modeled after the Constitution of the

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425 MANBY, *supra* note 421, at 2–3.

426 *See, e.g.*, VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE (1964) (examining, inter alia, decolonization and independence in the UN Trust Territory of Cameroons under French administration). After gaining independence on January 1, 1960, the UN Trust Territory of Cameroons under French administration took the name, *République du Cameroun* (Republic of Cameroon).

427 *See, e.g.*, WILLARD R. JOHNSON, THE CAMEROON FEDERATION: POLITICAL INTEGRATION IN A FRAGMENTED SOCIETY (1970) (providing an analysis of the challenges in federation in Cameroon). The Federal Republic of Cameroon, which was the outcome of the union between the UN Trust Territory of Southern Cameroons under British administration and the *République du Cameroun*, was abrogated in 1972 by then President Ahmadou Ahidjo. The country then took the name United Republic of Cameroon. In 1984, Paul Biya, who had succeeded Ahidjo as president of the United Republic of Cameroon, changed the country's name to the Republic of Cameroon, which is the country's present name.

428 East Cameroon was the Francophone region of the country and West Cameroon was the Anglophone region.

429 *See* NDIVA KOFELE-KALE, AN AFRICAN EXPERIMENT IN NATION BUILDING: THE BILINGUAL CAMEROON REPUBLIC SINCE REUNIFICATION (1980) (examining the challenges of federalism and bilingualism in Cameroon).

French Fifth Republic. By adopting de Gaulle's constitution, Cameroonian leaders deprived their citizens of the opportunity to undertake robust constitutional discourse to: (1) develop appropriate constitutional principles on which their constitution would be based and which would bind the constitution-making committee and its work; and (2) design a constitution that reflected the values and interests of the new country's relevant stakeholder groups. Perhaps, more importantly, Cameroon, like many other former French colonies in sub-Saharan Africa that voted in favor of de Gaulle's constitution, was left with a constitution and a governing process that failed to adequately constrain the government and prevent those serving in it from acting with impunity.

The de Gaulle-inspired constitution created "a Gaullist system of government with an imperial presidency, with the latter having significant control of the other branches of government."[430] Speaking of the post-independence institutions of the *République du Cameroun* , LeVine argues that "[t]he resemblance to the French system was certainly more than nominal since the text of [Cameroon's constitution], especially in the sections dealing with the presidency, followed the French document[431] almost word for word."[432] LeVine has suggested that the decision of Cameroon's political elites to adopt the French constitutional model and give up inclusive, participatory and people-driven constitutional design, at least in the short run, may have been due to considerations of political exigency. He argues that "there is some question whether the [1960] constitution [of the *République du Cameroun*] was more the child of political exigency than of mature reflection."[433] As further argued by LeVine, several members of the Consultative Committee—that is the committee charged with producing a constitution for the new country—had stated that the "government was more interested in producing almost any document and having it adopted as soon as possible than encouraging wider discussion of its basic provisions—thus according to these critics, accounting largely for following the French model so closely."[434]

The architects of France's 1958 constitution were guided by: (1) a long history and culture of democratic practice that dated back to the French Revolution of 1789; and (2) by the "constitutional crisis that

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430 MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 40, at 32.

431 CONSTITUTION OF THE FRENCH FIFTH REPUBLIC (French Constitution of Oct. 4, 1958).

432 Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 184 (1997).

433 John Mukum Mbaku, *What Should Africans Expect from Their Constitutions?*, 41 DENV. J. INT'L L. POL'Y 2, n. 72 (2013).

434 LEVINE, *supra* note 433, at 227.

brought De Gaulle to power."[435] However, the *République du Cameroun* did not have any collective historical experience with democracy and the "circumstances surrounding the writing of the Cameroon constitution were not in any way analogous to those in existence in France in 1958."[436] The failure of Cameroon's political elites to engage in inclusive, participatory, and people-driven constitution making deprived the people of the opportunity to construct and adopt a constitution that would have adequately constrained the state and prevented impunity, especially by the executive.[437]

Governance in Cameroon has been marked by personal rule under the country's first and second presidents, Ahmadou Ahidjo and Paul Biya, respectively. This has been made possible by the imperial presidency established by the 1960 constitution of the *République du Cameroun*, which served as the foundation for the federal constitution at unification in 1961. Cameroon has been led by one political party, the Cameroon National Union ("CNU"), whose name was changed to the Cameroon People's Democratic Movement ("CPDM") by Paul Biya after he assumed the presidency in 1982.[438]

The 1996 constitution, which was part of the institutional changes that had been undertaken in Cameroon to transition the country to democracy, introduced the principle of separation of powers with checks and balances into the country's governing process. However, it remained essentially a constitutional construct with virtually no real effect in Cameroon. The 1996 constitution set new criteria for an individual to qualify to run for the position of President of the Republic and in doing so, it lengthened the president's term of office to seven years. According to Article 6(2), "The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once."[439] Biya assumed the position of President of the Republic in 1982 after Ahidjo retired.[440] By the time of the constitution's revision in 1996, Biya was still the country's president. Anglophone activists demanded that the president should be limited to two terms in office. Thus, when the 1996 constitution limited the president to only two terms of seven years each,

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435 *Id.*

436 *Id.*

437 *See* John Mukum Mbaku, *The State and Cameroon's Stalled Transition to Democratic Governance, in* RECONSTRUCTING THE AUTHORITARIAN STATE IN AFRICA 18 (George Klay Kieh, Jr. & Pita Ogaba Agbese eds., 2014).

438 *See, e.g., id.*

439 CONSTITUTION OF THE REPUBLIC OF CAMEROON, 1996, art. 6(2).

440 *See generally* Victor T. LeVine, *Review: Cameroonian Politics: Scholarship and Partisanship*, 29 AFRICA TODAY 57 (1982).

most Cameroonians believed that Biya would leave the office as soon as those mandates were completed.[441]

Many Cameroonians were of the understanding that if Biya participated in presidential election scheduled for October 12, 1997 he would be serving a fourth term in office.[442] If Biya had been a true constitutionalist, he would have declined to participate in the 1997 presidential elections since he had already served three terms in office. Nevertheless, he participated in those elections and was re-elected to serve a 7-year term. There was a widespread belief that at the end of the 7-year mandate, which began in 1997, Biya would leave office and not participate in the presidential elections scheduled for October 11, 2004. Instead, Biya and his supporters argued that since the constitutional changes made in 1996 were undertaken while he was in office, they could not apply to him retroactively and that he was legally eligible to compete for two 7-year terms beginning in 1997. Biya's supporters argued that his presidential candidacies in the 1997 and 2004 elections were legally sound.

Biya won the presidency in 1997 and 2004 despite protests from many Cameroonians, especially from opposing parties. Most Cameroonians believed that by the end of his 29-year mandate in 2011, Biya would retire and go on to serve as a senior statesman. After all, the 1996 constitution, which was designed by his handpicked committee, had limited him to two 7-year terms, which were expected to end in 2011. Nevertheless, in 2008, in anticipation of the October 2011 presidential election, Biya surprised the nation by announcing his intention to remove the constitutional prohibition against a post-2011 term for him.[443]

Biya's decision to stage a constitutional coup d'état was made public during his 2008 New Year speech to the nation. The announcement sparked nation-wide protests. It was reported that "the protests then grew and fused with unrest over rising food prices, which reached their high point in late February and led to the deaths of between 40 and 100 people."[444] The Special Rapporteur of the African Commission on Human

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441 *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON, at art. 6(2) (there were some questions about whether those two terms had to be consecutive. That issue was never resolved and the final text of the constitution only stated that the president "shall be eligible for re-election once.").

442 BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CAMEROON, 1999, (2000), https://www.state.gov/j/drl/rls/hrrpt/1999/231.htm.

443 *See* Press Release, African Commission ón Human and Peoples' Rights, Press Release on the Situation in Cameroon (Apr. 7, 2008), http://www.achpr.org/press/2008/04/d38/; *see also Constitution Amended to Open Door for Biya's Third Term*, RFI English. (Apr. 10, 2008), http://www1.rfi.fr/actuen/articles/100/article_53.asp (last visited May 14, 2018).

444 *Constitution Amended to Open Door for Biya's Third Term*, RFI English. (Apr. 10, 2008), http://www1.rfi.fr/actuen/articles/100/article_53.asp (last visited May 14, 2018).

and Peoples' Rights on Human Rights Defenders in Africa, Reine Alapini-Gansou, expressed concern about the deteriorating human rights situation in Cameroon following Biya's announcement to have the constitution changed so that he could extend his stay in power.[445] She was especially concerned about the "disproportionate use of force by government officials, the wide range of arbitrary arrests and the treatment of people arrested."[446]

In addition to the rough handling of human rights defenders by the government, the Special Rapporteur also found that Cameroonian authorities had destroyed or closed independent media houses that had refused to relay government (or official) information. Civil society organizations that had attempted to organize forums in which Cameroonians could discuss the implications of the impending constitutional changes were shut down, and their leaders were arrested. Some human rights defenders, such as Mrs. Madeleine Afité, president of *la Maison des droits de l'Homme du Cameroun*,[447] were threatened with death and their properties were destroyed.

The bill to amend the constitution was submitted only seven days before the vote on it was taken on April 10, 2008. The people of Cameroon were not granted enough time to engage in any reasonable discussions about this monumental change to their basic law. Members of the Social Democratic Front ("SDF"), the country's main opposition party, argued that it was wholly inappropriate for the government to try to make such a major institutional change–one that could potentially negatively impact the country's embryonic democracy–through a legislative chamber that was controlled by the party in power.[448]

Given that the constitutional amendment was designed to radically transform the country's political system and most likely create a president-for-life, the Cameroonian people, not the Parliament, should have been allowed to decide its fate. The ruling party's chief whip, Jean Bernard Ndongo Essomba, argued that the constitutional change would "enhance democracy, maintain political stability, national unity and

445 Press Release, African Commission on Human and Peoples' Rights, Press Release on the Situation in Cameroon, April 7, 2008, http://www.achpr.org/press/2008/04/d38/.http://www.achpr.org/press/2008/04/d38/.

446 *Id.* (many of the people that were killed were actually members of the opposition).

447 a *Maison des Droits de l'Homme du Cameroun*, ESCR-Net, https://www.escr-net.org/member/maison-droits-lhomme-du-cameroun (last visited May 15, 2018) (*La Maison des droits de l'homme du Cameroun* (The House of Human Rights of Cameroon) is a civil society organization dedicated to the protection of human rights in Cameroon).

448 *See Changing the Constitution to Remain in Power*, *supra* note 387.

territorial integrity" in Cameroon.[449] He went on to say that the new bill is "in tune with international[ly] accepted standards as practiced in old democracies such as France and the United Kingdom. It therefore warrants the enthusiastic support of all Cameroonians of good faith."[450]

It is difficult to see how a constitutional change that enables one person to remain in office indefinitely can be said to promote and enhance democracy. How could Essomba have believed that the constitutional change would promote national unity, given that the country was pervaded by violent protests against its passage? Perhaps, more importantly, is the fact that the government was against any attempts by civil society organizations to engage in robust discussions of the pending bill and used brutal force to prevent any such dialogue. Any comparison to France and the UK appear to be out of place, because neither of these democracies has governing processes in which politicians can stay in power indefinitely or are granted immunity for crimes that they commit while in power.[451]

The bill was approved by a Parliament controlled by Biya and his Cameroon People's Democratic Movement ("CPDM") party after the Parliament's Constitutional Law Committee threw out 20 amendments suggested by the opposition.[452] The bill to change the constitution was approved by 157 votes for and 5 votes against. Fifteen opposition parliamentarians walked out in protest of what they argued was a "constitutional coup d'état."[453] The new law was officially known as Law No. 2008–1 of 14 April 2008 to Amend and Supplement some Provisions of Law No. 96–6 of 18 January 1996 to amend the Constitution of 2 June 1972.

What exactly were the revisions that constituted Biya's constitutional coup? First, the 1996 provisions of Article 6(2) of the constitution stated "The President of the Republic shall be elected for a term of office of 7 (seven) years. *He shall be eligible for re-election once.*"[454] The amended 2008 version states "The President of the Republic shall be elected for a term of office of 7 (seven) years. *He shall be eligible for re-*

449 *Id.*

450 *Id.*

451 *Id.*

452 *Id.* (at the time of the vote, President Paul Biya's CPDM controlled one hundred and fifty-three seats of the one hundred and eighty-seat chamber).

453 *Cameroon Parliament Extends Biya's Term Limit*, FRANCE 24, https://www.france24.com/en/20080411-cameroon-parliament-paul-biya-term-limit-extension (last updated Apr. 11, 2008).

454 CONSTITUTION OF 2 JUNE 1972, as amended by Law No. 96/06 of 18 Jan. 1996 (emphasis added).

election."[455] This amendment simply removed the word "once" to make it possible for an individual, in this case, Biya, to have unlimited presidential mandates.[456]

Another revision to the constitution as part of Biya's constitutional coup d'état was made to Article 53, which was reorganized and had two more paragraphs added. Paragraph 3 states, "Acts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions."[457] This amendment effectively allows Biya to act with impunity and engage in other criminal activities without fear of prosecution.

Biya went on to win the 2011 presidential election and retain his position as President of the Republic. Cameroon's presidential election is scheduled to take place in October 2018. He also won the presidential election that was conducted on October 7, 2018 and will remain the president of the Republic of Cameroon for at least another seven years. [458]

VI. THE AFRICAN UNION AND THE CONSTITUTIONAL COUP

A. Introduction

Beginning in the early-1990s, there was a constitutional revival in many African countries. Part of the process involved many countries moving away from one-party authoritarian systems to the practices of constitutionalism. Many of these countries' new constitutions imposed limits on presidential terms. The two-term limit was the preferred option of the constitutions of many of these countries. Nevertheless, limitations on presidential terms did not eliminate the belief among some African presidents that they were entitled to rule their countries for life.

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455 CONSTITUTION OF 2 JUNE 1972, as amended by Law No. 2008/001 of 14 Apr. 2008 (emphasis added).

456 *See Changing the Constitution to Remain in Power*, *supra* note 387 (during the deliberations in Parliament, before the vote on the amendment was taken, opposition members were so angry and frustrated that they stormed out of the chamber and did not participate in the vote); *see id* (many of these opposition leaders argued that the constitutional amendment was a significant setback for democracy in the country).

457 CONSTITUTION OF THE REPUBLIC OF CAMEROON art. 53(3) (amended 1996).

458 *See* Brenda Kevin, Sam Stone & Ruth Maclean, *Biya Wins Again in Cameroon as Crackdown Disrupts Anglophone Vote*, The Guardian (UK) (Oct. 22, 2018), https://www.theguardian.com/world/2018/oct/22/paul-biya-cameroon-85-year-old-president-wins-re-election-landslide; The Cameroon Episcopal Conference, however, stated that the election was marred by fraud. *See* Moki Edwin Kindzeka, *Cameroon Episcopal Conference: Election Marred by Fraud*, VOA NEWS (Oct. 28, 2018), https://www.voanews.com/a/episcopal-conference-presidential-election-was-marred-by-fraud/4632348.html.

Well-governed and progressive societies are built on principles of constitutional government and constitutionalism. Adherence or fidelity to the rule of law is central to good governance. The problem in many African countries today is not the absence of constitutions, but rather that many of these constitutions can easily be changed or manipulated by political leaders to their advantage.[459]

Some scholars have argued that the constitutional coup has replaced the military coup d'état as the primary mechanism used by opportunistic African presidents to cling to power.[460] This is due, in part, to the fact that the African Union has vowed not to recognize any government that comes into being through unconstitutional means. African presidents who are not in favor of term limits, as well as "unfavorable election results,"[461] have preferred to change the laws that prevent them from staying in power indefinitely.[462] Thus, it has become common practice for presidents whose mandates are about to expire to get rid of term limits by revising their constitutions.[463]

Some of these presidents have correctly argued that the question of presidential term limits should be decided by the people through nationwide referendum.[464] However, the latter are typically conducted through opportunistic or non-democratic processes.[465] Consequently, the people do not actually have the wherewithal to decide the question of term limits. The decision is actually made by the president and his supporters. In fact, many of these constitutional changes are often preceded by extreme violence and harassment against the oppression, virtually all of which is inspired by the incumbent government. If the bill to change the constitution is submitted directly to parliament for approval, the chamber is often dominated by the incumbent president's party.[466] In addition,

459 *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 47.

460 *See, e.g.*, Anneke van Woudenberg & Ida Sawyer, *Africa's Softer, Gentler Coup d'État*, FOREIGN POLICY (Nov. 3, 2015, 2:04 PM), http://foreignpolicy.com/2015/11/03/africas-softer-gentler-coups-detat.

461 *See id.*

462 *See, e.g.*, John Mukum Mbaku, *The Postponed DRC Elections: Behind the Tumultuous Politics*, The Brookings Institution (Nov. 18, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/11/18/the-postponed-drc-elections-behind-the-tumultuous-politics (in some situations, presidents have determined that interpreting the rules to allow the president to remain in power indefinitely might be easier than changing the constitution); *see id.* (this is the case with Joseph Kabila in the Democratic Republic of Congo); *see id.* (unable to change the constitution to allow him to stand for a third term, he has used the electoral commission and other institutions to interpret the electoral law in ways that allow him to postpone the presidential election indefinitely).

463 *See* Van Woudenberg & Sawyer, *supra* note 461.

464 *See id.*

465 *See id.*

466 *See id.*

parliamentary discussion of the bill is limited to a few days, with civil society having virtually no opportunity to provide input.[467] In the case of constitutional changes in Cameroon and the Republic of Congo, government security forces fired indiscriminately at people who were protesting the opacity of the process, killing several of them; demonstrations, even peaceful ones, were banned.[468] Many people who were protesting against the proposed constitutional changes, including leaders of the opposition, were arrested and detained.[469] In all these countries, the process through which the constitution was changed to allow incumbent presidents to remain in power indefinitely was not undertaken democratically. Once the constitution is altered, the president can then claim that the regime is actually constitutional.

B. The African Union and the Constitutional Coup

This paper has examined the various "illegal means of accessing or maintaining power" that the AU considers as constituting "an unconstitutional change of government."[470] Both the Lomé Declaration[471] and the Democracy Charter[472] enumerate four illegal behaviors that constitute an unconstitutional change of government. The Democracy Charter, however, provides for a fifth behavior, which deals specifically with changes to the constitution and hence, speaks directly to the "constitutional coup."[473] Article 23(5) of the Democracy Charter states:

> State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconditional change of government and shall draw appropriate sanctions by the Union: . . . 5. *Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.*[474]

Both the Lomé Declaration and the Democracy Charter emphasize the centrality of the rule of law in any effort to achieve peace and security and the protection of human rights in Africa. According to the Constitutive Act of the African Union, all Member States are required to have "respect for democratic principles, human rights, the rule of law and good

467 *See id.*

468 *See id.*

469 *See id.*

470 Democracy Charter, *supra* note 36, at art. 23(5).

471 Lomé Declaration, *supra* note 35.

472 Democracy Charter, *supra* note 36.

473 *See id.* at art. 23(5).

474 *Id.* (emphasis added).

governance."[475] In carrying out its duties, the AU is required by its principles to condemn and reject "unconstitutional changes of government."[476] Governments that come to power through unconstitutional means can be suspended from participating in AU activities.[477]

Since its inception, the AU has systematically condemned military coups and has imposed sanctions on offending parties, or suspended them from participating in AU activities.[478] It has been argued that the swift condemnation of the 2015 military coup in Burkina Faso by the AU's Peace and Security Council ("PSC") and the threat to impose sanctions on the coup leaders made certain that the military action was short lived.[479]

Often referenced is the need to distinguish between "bad" and "good" unconstitutional changes of government. What happens when a politician refuses to leave office when he or she is required to do so by the law? For example, what happens if a politician who has completed his constitutional mandates, refuses to leave office? Suppose citizens rise up and force such a recalcitrant politician out of power, would that constitute an unconstitutional change of government? In the case of Egypt in 2011, for example, the AU was unequivocal—the popular uprising which resulted in the ouster of the regime of Hosni Mubarak was not condemned by the AU as acts of unconstitutional regime change.[480] Instead, the AU asserted the right of the people to seek democratic change.[481] Nevertheless, the military coup in Burkina Faso in 2014 was considered an unconstitutional change of government even though it followed waves of popular protests. In view of these developments, there has arisen the need for the AU to clarify issues and define what constitutes legitimate popular uprisings.

In June 2014, the AU High Panel on Egypt released a report in which it elaborated conditions that make unconstitutional changes of government legitimate:

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475 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(m).

476 *Id.* at art. 4(p).

477 *See id.* at art. 30.

478 *See* IONEL ZAMFIR, ACTIONS OF THE AFRICAN UNION AGAINST COUPS D'ÉTAT 1-2 (2016), http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/580878/EPRS_ATA(2016)580878_EN.pdf.

479 *See id.* at 2.

480 *See* KATHRYN STURMAN, UNCONSTITUTIONAL CHANGES OF GOVERNMENT: THE DEMOCRAT'S DILEMMA IN AFRICA 1, 3 (2011), http://www.saiia.org.za/wp-content/uploads/2013/06/saia_spb_30_sturman_20110322.pdf (citations omitted).

481 *See id.*

> (a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy; (b) the absence or total ineffectiveness of constitutional processes for effecting change of government; (c) popularity of the uprisings in the sense of attracting significant portion of the population and involving people from all walks of life and ideological persuasions; (d) the absence of involvement of the military in removing the government; (e) peacefulness of the popular protests.[482]

In 2013, when the military overthrew the government of Mohammed Morsi in Egypt, the AU failed to apply a consistent policy to the situation.[483] Although the AU initially condemned the coup as an unconstitutional change of government and subsequently suspended Egypt's participation in AU activities, the suspension was lifted after elections had been conducted and a new government chosen.[484] However, the AU failed to apply Article 25(4) of the Democracy Charter, which states, "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."[485] Egypt's newly elected president, Abdel Fattah al-Sisi, had been involved in the military coup that ousted the civilian government of Mohammed Morsi. Under AU principles, Abdel Fattah al-Sisi should have been sanctioned for participating in the post-coup elections.[486] The decision by the AU to recognize al-Sisi's government and lift Egypt's suspension significantly undermined the AU's legitimacy and ability to consistently deal with unconstitutional changes of government.[487]

Despite the double standard applied with respect to the Egyptian situation of 2013, the AU's policy against military coups d'état is well defined and appears to be working.[488] Nevertheless, the AU has not yet been able to develop and implement a policy on constitutional coups. The latter

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482 Final Report of the African Union High-Level Panel for Egypt, June 17, 2014, A.U. Doc. PSC/AHG/4 (CDXVI) (the AU, however, has not fully addressed this issue and has yet to provide a proper definition for what it considers to be "legitimate unconstitutional change of government.").

483 *See Far-Reaching Implications of the PSC's Decision on Egypt*, PEACE & SECURITY REP. (July 3, 2014), https://issafrica.org/pscreport/on-the-agenda/far-reaching-implications-of-the-pscs-decision-on-egypt.

484 *Far-Reaching Implications of the PSC's Decision on Egypt*, PEACE & SECURITY REP. (July 3, 2014), https://issafrica.org/pscreport/on-the-agenda/far-reaching-implications-of-the-pscs-decision-on-egypt.

485 Democracy Charter, *supra* note 36, at art. 25(4).

486 *See Far-Reaching Implications of the PSC's Decision on Egypt*, PEACE & SECURITY REP. (July 3, 2014), https://issafrica.org/pscreport/on-the-agenda/far-reaching-implications-of-the-pscs-decision-on-egypt.

487 *See* ZAMFIR, *supra* note 479, at 2.

488 *See id.*

was defined earlier to include eliminating presidential term and age limits, changing citizenship requirements for presidential candidates, and manipulating electoral and other laws to disqualify political opponents and enhance electoral success for the incumbent. Except for undemocratic revisions of national constitutions, the activities listed above are not included in the African Union's definition of unconstitutional change of government and hence, are not subject to sanctions and condemnation.[489]

Revising the constitution through undemocratic means is relatively difficult to prove in reality "because [such revisions] always have a semblance of legality."[490] In fact, many of the African presidents that have engaged in undemocratic constitutional changes have given the process a semblance of legality by involving the legislature and the people. Unfortunately, in virtually all these cases, the process has not been democratic. First, as was the case in Cameroon's 2008 constitutional amendments, the bill to amend the constitution was only submitted to parliament and the latter was dominated by the president's political party.[491] Second, the opposition is usually not allowed to participate fully and effectively the process. In fact, Cameroon's National Assembly's constitutional law committee, which was dominated by the ruling CPDM party, summarily dismissed more than 20 amendments to the bill that were offered by the opposition.[492] Third, the amendment process usually takes place in an institutional environment characterized by significant levels of press restrictions, death threats on opposition members, and denial of access to the public media to opposition political parties, making it virtually impossible for the opposition to inform the people about its opposition to the scheduled constitutional amendment.[493] Fourth, not enough time is provided to allow for robust national dialogue on the proposed amendments. For example, the bill to amend the Cameroon constitution in 2008 was submitted just seven days before the vote on it was taken officially on April 10, 2008.[494] As a consequence, Cameroonians did not have the opportunity to examine and fully understand and appreciate what turned out to be significant modifications to their basic law.

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489 Democracy Charter, *supra* note 6, at arts. 4, 23, 30.

490 ZAMFIR, *supra* note 479, at 2.

491 *See Changing the Constitution to Remain in Power*, *supra* note 387 (of the one hundred and eighty seats in the Cameroon Parliament at the time of the amendment in 2008, the president's CPDM party held one hundred and fifty-three of them); *see id.* (the main opposition, the SDF, held only fifteen seats).

492 *See id.*

493 *See id.*

494 *See id.*

Finally, the president's supporters usually engage in a campaign of obfuscation in which they distort the true (or democratic) nature and consequences of the constitutional amendments.[495] For example, during the campaign for the 2008 constitutional amendments in Cameroon, the ruling party's chief whip, Jean Bernard Ndongo Essomba, told Cameroonians that the revisions to the constitution would actually improve the country's democratic system, enhance political stability, and advance national unity.[496] It is difficult to see how a constitutional amendment that potentially creates a president-for-life position enhances democracy. How can a law that allows the president to act above the law be considered democracy enhancing?[497]

1. Dealing with Constitutional Coups in Africa: AU Practice

On March 29, 2008, the people of Zimbabwe held general elections to elect the President of the Republic and members of their national parliament.[498] When the Zimbabwe Electoral Commission ("ZEC") finally released the presidential election results on May 2, 2008, they showed that opposition leader Morgan Tsvangirai of the Movement for Democratic Change ("MDC-T")[499] had received 48% of the votes cast to incumbent President Robert Gabriel Mugabe's 43%.[500] In order to be declared the winner, a candidate was expected to capture at least 50% of the votes, and since no candidate had achieved that goal, the law required that a run-off be held.[501] The run-off election was scheduled for June 27, 2008.[502]

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495 *See id.*

496 *See id.*

497 *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON art. 53 (the 2008 constitutional amendments in Cameroon also granted Paul Biya immunity from prosecution for any crimes committed while in office).

498 Owen Gagare, *Zim 2008 Election: 'Taken by a Gun, Not a Pen,'* MAIL & GUARDIAN (Aug. 10, 2012, 3:00 AM), https://mg.co.za/article/2012-08-10-00-zim-2008-election-taken-by-a-gun-not-a-pen.

499 *See id.*

500 *See id.*; *see also* Mark Tran, *Zimbabwe Opposition: Tsvangirai has Won Presidency*, THE GUARDIAN (Apr. 2, 2008, 1:57 PM), https://www.theguardian.com/world/2008/apr/02/zimbabwe1.

501 Allegra Stratton, *Tsvangirai takes 47% of Presidential Vote, Says Government Source*, THE GUARDIAN (Apr. 30, 2008, 2:30 PM), https://www.theguardian.com/world/2008/apr/30/zimbabwe.

502 *See* Sebastien Berger, *Zimbabwe: Robert Mugabe Announces Date of Presidential Run-off With Morgan Tsvangirai*, THE TELEGRAPH (May 16, 2008, 2:15 PM), https://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/1966997/Zimbabwe-Robert-Mugabe-announces-date-of-presidential-run-off-with-Morgan-Tsvangirai.html.

While the country waited for the results of the presidential elections, the MDC-T, the main opposition party, claimed that its supporters were being systematically abused by state actors, including the Zimbabwe military.[503] MDC-T's Tsvangirai, who had insisted that he had emerged victorious in the first round, nevertheless, announced his intention to participate in the run-off election.[504] However, Tsvangirai indicated that he only would participate in the runoff elections if: (1) the Southern African Development Community ("SADC") was allowed to oversee the election; (2) international observers were permitted to monitor the elections; and (3) the elections were conducted through a transparent, free, and fair manner.[505]

Just a few days before the scheduled runoff elections, opposition leader Tsvangirai sent a letter to the ZEC in which he indicated his intention not to participate in the election.[506] He stated that he had decided to withdraw from the run-off election due to the failure of the ZEC to ensure free, fair and credible elections; continuing violence perpetrated by state actors and the incumbent government's supporters against supporters of the MDC-T; denial of access to media for this party; and the banning by the government of rallies and meetings by his party.[507]

If the allegations made by Tsvangirai and the MDC-T were proven true, they would constitute breaches of the democratic principles enshrined in the Democracy Charter and could trigger sanctions against the Zimbabwe government.[508] Leaders of regional organizations (e.g., the SADC), African presidents (e.g., President Umaru Musa Yar'Adua of Nigeria), and the African Union, asked President Mugabe to postpone the runoff election, engage in robust dialogue with the opposition and agree on modalities for conducting a fair, free and credible election. However,

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503 *See* Barry Bearak & Celia W. Dugger, *Mugabe's Opponent Says He'll Return for Runoff*, N.Y. TIMES (May 11, 2008), https://www.nytimes.com/2008/05/11/world/africa/11zimbabwe.html (while the MDC–T argued that the violence was perpetuated by the ruling party, the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), which was trying to cling on to power at all costs, ZANU-PF leaders claimed that the MDC–T was actually responsible for most of the post-election related violence).

504 *Id.*

505 MacDonald Dzirutwe, *Zimbabwe Opposition Mulls Conditions for Run-off*, REUTERS (May 4, 2008, 11:46 AM), https://www.reuters.com/article/idUSL04488862._CH_.2400.

506 *See Tsvangirai Quits Zimbabwe Run-off*, AL JAZEERA (June 22, 2008), https://www.aljazeera.com/news/africa/2008/06/200862213818963262.html.

507 *See id.*

508 *See* Democracy Charter, *supra* note 36, at art. 17.

Mugabe ignored these pleas and proceeded with the run-off election as scheduled.[509]

The run-off presidential elections took place on June 27, 2008, as scheduled. Mugabe captured 85.5% of the votes—essentially, Mugabe was the only candidate in the runoff election.[510] The international community condemned the run-off election and declared it a "sham."[511] In a press release from the United Nations, the Deputy Secretary-General stated that "[w]hen an election is conducted in an atmosphere of fear and violence, its outcome cannot have a legitimacy that is built on the will of the people."[512] Marwick T. Khumalo, the leader of the Pan-African Parliament's observer mission to the run-off elections concluded that "the current atmosphere prevailing in the country did not give rise to the conduct of free, fair and credible elections."[513] The Pan-African Parliament, however, did not impose sanctions on the regime in Zimbabwe; instead, it called on the Mugabe government to hold new elections, which, hopefully would be free and credible.[514] At the 11th Ordinary Session of the African Union Assembly meeting in Sharm El Sheikh, Egypt, the AU took no punitive action against the Zimbabwe regime.[515] Instead, the AU urged the government of Zimbabwe to work together with the opposition to restore peace.[516]

The AU observer delegation to the run-off elections declared them undemocratic. As the AU prepared for its summit in Egypt, several African political leaders, including Kenyan Prime Minister Raila Odinga, called "for the suspension of Mr. Mugabe from the African Union until

509 *See Mugabe Rejects Calls to Postpone Run-off*, RTÉ NEWS (June 26, 2008, 8:42 PM), https://www.rte.ie/news/2008/0626/105008-zimbabwe.

510 *See* Celia W. Dugger & Barry Bearak, *Mugabe Is Sworn in to Sixth Term After Victory in One-Candidate Runoff*, N.Y. TIMES (June 30, 2008), https://www.nytimes.com/2008/06/30/world/africa/30zimbabwe.html.

511 *See World Condemnation of Zimbabwe Grows*, NBC NEWS (June 25, 2008, 7:08 PM), http://www.nbcnews.com/id/25361747/ns/world_news-africa/t/world-condemnation-zimbabwe-grows.

512 Press Release, Deputy Secretary-General, Principle of Democracy at Stake, Results of Flawed Zimbabwe Election Illegitimate, Deputy Secretary-General Says in Briefing to Security Council, U.N. Press Release SC/9390 (July 8, 2008).

513 Interim Statement from Marwick T. Khumalo, Mission Leader, on the Pan-African Parliament Election Observer Mission to the Presidential Runoff and Parliamentary By-Elections in Zimbabwe (July 1, 2008), http://archive.kubatana.net/docs/elec/pap_statement_on_run-off_080629.pdf.

514 *See id.*

515 *See* Resolution on Zimbabwe, July 1, 2008, A.U. Doc. Assembly/AU/Res.1 (XI).

516 *See id.*

he allows a free and fair election."[517] Nevertheless, the AU did not consider the electoral manipulations that occurred in Zimbabwe in 2008 as an unconstitutional change of government; as a consequence, there was (1) no condemnation forthcoming; (2) no directive for the country to make a speedy return to constitutional government; (3) no warning to the government that such actions would not be tolerated; and (4) no threat of suspension or imposition of sanctions. In fact, Mugabe was allowed to participate in the AU Summit that took place just a few days after the disputed runoff elections.[518]

The AU currently does not have any rules that prescribe an effective response to situations such as what occurred in Zimbabwe. Virtually all observers, including observer missions from the AU, SADC, and several international organizations, concluded that the elections were neither fair nor free and that Mugabe had retained his position as President of the Republic through a non-democratic process. Yet, the AU's response was that the election-related activities in Zimbabwe did not constitute an unconstitutional change of government and hence, no punitive action was taken against the Mugabe regime.

If the behaviors that constitute unconstitutional change of government ("UCG") are separated into two categories, such that Category 1 consists of the four behaviors listed in the Lomé Declaration[519] and the first four behaviors listed in the Democracy Charter.[520] Category 2 consists of the fifth behavior, found in the Democracy Charter, and the aforementioned behaviors which collectively constitute the constitutional coup d'état.[521] The activities described as making up Category 2 are "[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government."[522]

Although the AU has developed a relatively effective response system to Category 1 activities, it has yet to develop necessary rules to deal with constitutional coups—that is, Category 2 activities. This is evident by the AU's inconsistency in responding to the cases in Zimbabwe and

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517 *AU Declares Mugabe's Election Undemocratic*, RTÉ NEWS (July 1, 2008), https://www.rte.ie/news/2008/0630/105130-zimbabwe.

518 *See* MacDonald Dzirutwe, *Mugabe to Confront Critics at African Union Summit*, REUTERS (June 28, 2008, 11:49 PM), https://www.reuters.com/article/us-zimbabwe-election/mugabe-to-confront-critics-at-african-union-summit-idUSL2850696820080629.

519 Lomé Declaration, *supra* note 35.

520 Democracy Charter, *supra* note 36, at art. 23.

521 *See id.* at art. 23(5).

522 *Id.*

The Gambia. Below, this paper examines the AU response to the 2016 presidential elections in The Gambia.

2. The 2016 Presidential Election in The Gambia and the AU Response

Yahya Jammeh, President of The Gambia, came to power in 1994 through a military coup.[523] The coup took place on July 22, 1994 and was led by Lt. Yahya Jammeh.[524] Four days after the coup, the Armed Forces Provisional Ruling Council (AFPRC) was founded with Jammeh as its Chairman. Jammeh promised to quickly return the country to civilian rule.[525] The international community, including leaders of the European Union and the United States, condemned the coup and withheld development assistance to the country.[526] The African Commission on Human and Peoples' Rights condemned the coup and stated that it had deprived the Gambian people of their right to freely choose their own leaders and demanded that the AFPRC transfer power to a freely elected government with immediate effect.[527] However, the OAU maintained its policy of non-interference in the internal affairs of Member States and did not condemn or impose sanctions on the military government.[528]

Jammeh's coup was not in line with developments in the region's political economy. Since the early-1990s, there had been a trend away from unconstitutional forms of regime change, such as the military coup. Since gaining independence from Great Britain on February 18, 1965, The Gambia had existed as one of only a few countries in the West African region that had a functioning democratic political system prior to 1989.[529] The coup shattered the dreams of many Gambians for deepening and institutionalizing their democracy.[530]

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523 *See* Howard W. French, *In Gambia, New Coup Follows Old Pattern*, N.Y. TIMES (Aug. 28, 1994), https://www.nytimes.com/1994/08/28/world/in-gambia-new-coup-follows-old-pattern.html.

524 *See generally* Howard W. French, *supra* note 524.

525 *Id.*

526 *Id.*

527 *See* DOCUMENTS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 405 (Rachel Murray & Malcolm Evans eds., 2001) (analyzing the March 22, 1995 resolution by the African Commission on Human and Peoples' Rights to condemn the military coup in The Gambia).

528 *See, e.g.*, Kofi Oteng Kufuor, *The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future*, 17 AM. U. INT'L L. REV. 369, 398 (2002).

529 *See generally* Abdoulaye S. Saine, *The Military and "Democratization" in The Gambia: 1994-2002*, *in* POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES 179 (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003).

530 *See generally id.*

The AFPRC eventually announced a transition plan to return the country to democracy and civilian government. Under the plan, the Provisional Independent Electoral Commission ("PIEC") was established to oversee national elections[531] The PIEC was eventually transformed into the Independent Electoral Commission ("IEC") in 1997. In 2001 and 2002 the country organized and held presidential, legislative, and local elections. Foreign observers adjudged the elections to ensure that they were free, fair and transparent. Nevertheless, Jammeh participated in the 2001 presidential elections and took 52.84% of the votes. He went on to become a "civilian" president. Jammeh stood for the same position in 2006 and 2011—he won in both cases.

Presidential elections were held in The Gambia on December 1, 2016. The main candidates were incumbent President Yahya Jammeh of the Alliance for Patriotic Reorientation and Construction (APRC),[532] Adama Barrow of the Coalition 2016,[533] and Mama Kandeh of the Gambian Democratic Congress (GDC). On December 2, 2016, preliminary results showed that Jammeh had lost to his opponent, Barrow. In his statement on national television that day, Jammeh indicated that the December 1, 2016, electoral exercise had been "the most transparent election in the whole world" and indicated that he would not contest the results.[534] Jammeh went on to congratulate the winner: "I take this opportunity to congratulate Mr[.] Adama for his victory. It's a clear victory. I wish him all the best and I wish all Gambians the best. As a true Muslim who believes in the Almighty Allah I will never question Allah's decision. You Gambians have decided."[535] The final official results showed that Barrow

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531 *See generally id.*

532 *See generally id.* (the Alliance for Patriotic Reorientation and Construction (APRC) is a Gambian political party that was founded by military officers who staged a military coup d'état in 1994 against the then democratically elected government of Sir Dawda Jawara. The coup, which took place on July 22, 1994, was led by then 29-year old Lt. Yahya Jammeh).

533 The Coalition 2016 was a coalition of seven Gambian political parties and one independent candidate that was created to help the opposition present one single candidate in the December 2016 presidential election. The coalition chose Adama Barrow of the United Democratic Party (UDP) as their candidate. *See* SEEDY DRAMMEH, PERSPECTIVES ON NEW GAMBIA 235 (2018) (examining, inter alia, the role of Coalition 2016 in the presidential election in The Gambia in 2016).

534 *See, e.g.*, Ruth Maclean & Emma Graham-Harrison, *The Gambia's President Jammeh Concedes Defeat in Election*, THE GUARDIAN (UK) (Dec. 2, 2016, 2:27 PM), https://www.theguardian.com/world/2016/dec/02/the-gambia-president-jammeh-concede-defeat-in-election (explaining that the election took place on December 1, 2016 and President Jammeh had acknowledged his defeat on December 2, 2016 in a broadcast to the nation).

535 *Id.*; *see also* Jaime Yaya Barry & Dionne Searcey, *Gambia's President, in Power 22 Years, Loses Election*, N.Y. TIMES (Dec. 2, 2016), https://www.nytimes.com/2016/12/02/world/africa/gambia-election.html.

had won by 43.3% of the votes against Jammeh's 39.6% and Kandeh's 17.1%.[536]

However, on December 9, 2016, Jammeh went on television and announced to the nation that he had changed his mind and had decided to reject the results of the December 1, 2016, presidential elections. He claimed that there were "abnormalities" and called for new elections.[537] Many domestic and international actors condemned Jammeh's reversal—in addition to many civil society organizations in The Gambia, the Economic Community of West African States (ECOWAS), and the African Union.[538] The United Nations Security Council (UNSC) also condemned Jammeh's decision to call for a new election. Despite extensive diplomatic efforts including the personal involvement of several African Heads of State, Jammeh refused to leave office.[539]

The U.S. State Department, in speaking for the U.S. government, decried what it referred to as Jammeh's "reprehensible and unacceptable breach of faith with the people of [The] Gambia."[540] The U.S. State Department then called upon President Jammeh, who had previously accepted the election results and had conceded defeat,[541] "to carry out an orderly transition of power to President-elect Barrow in accordance with the Gambian Constitution."[542]

At the 647th Meeting of the Peace and Security Council of the African Union in Addis Ababa on January 13, 2017, the PSC commended "ECOWAS for its principled stand with regard to the situation in The Gambia, and reaffirm[ed] its full support to the decisions adopted by the 50th Ordinary Summit of the ECOWAS[543] Authority, . . . including the consideration to use all necessary means to ensure the respect of the will

536 *See Gambia Leader Yahya Jammeh Rejects Election Result*, BBC NEWS (Dec. 10, 2016), http://www.bbc.com/news/world-africa-38271480.

537 *Id.*

538 These included The Gambia Press Union, The University of The Gambia, The Gambia Medical Association, and The Gambia Teachers' Union. *See, e.g.*, *The Gambia: Fragility Risk and Resilience Assessment*, A Joint African Development Bank-World Bank Report No. 117432-GM, June 9, 2017,*available at* http://documents.worldbank.org/curated/en/516021501649448939/pdf/117432-WP-P163176-OUO-9-Patricia-Geli-authorThe-Gambia-Fragility-Risk-and-Resilience-Assessment-FINAL-2017-06-27.pdf (last visited on October 29, 2018) (detailing, inter alia, civil society groups that participated in the ouster of dictator Yahya Jammeh).

539 *Id.* (for example, President Muhammadu Buhari of Nigeria).

540 Madison Park & Stephanie Busari, *Gambian President Yahya Jammeh Rejects Election Defeat*, CNN (Dec. 10, 2016, 12:06 PM), https://www.cnn.com/2016/12/10/africa/gambia-yahya-jammeh-election/index.html.

541 *See, e.g.*, Maclean & Graham-Harrison, *supra* note 532.

542 Park & Busari, *supra* note 541.

543 ECOWAS is the acronym for the Economic Community of West African States.

of the people of The Gambia."[544] Referring to Jammeh as the "outgoing President," the PSC called upon him "to respect the Constitution of [T]he Gambia, the ECOWAS and AU instruments, in particular the AU Constitutive Act and the African Charter on Democracy, Elections and Governance, by handing over power, on 19 January 2017, as stated in the Constitution, to the newly-elected President of The Gambia, Adama Barrow, as decided by the people of the country."[545]

Taking into consideration Articles 24 and 25 of the Democracy Charter, and Article 7(m) of the PSC Protocol, the PSC announced that it would take certain steps regarding the situation in The Gambia:

- Solemnly declares the inviolable nature of the outcome of the presidential elections held on 1 December 2016 in The Gambia. In this respect, Council strongly reaffirms the AU's zero-tolerance policy with regard to coup d'état and unconstitutional changes of government;
- Further declares that, as of 19 January 2017, outgoing President Yahya Jammeh will cease to be recognized by the AU as legitimate President of the Republic of The Gambia;
- Warns outgoing President Yahya Jammeh of serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian and human rights disaster, including loss of innocent lives and destruction of properties.[546]

The PSC then asked the outgoing President Jammeh and his Government, "to refrain from any action that could undermine the process leading up to the swearing in of the president-elect, on 19 January 2017."[547] The PSC warned all "Gambian stakeholders, including the defense and security forces, to exercise utmost restraint and to strictly abide by the Constitution and uphold the rule of law, including the respect for the freedom of speech."[548]

Through its PSC, the AU told President Jammeh that the organization would no longer recognize Jammeh as the president of the Republic of The Gambia as of January 19, 2017, the date of expiry of his constitutional mandate.[549] The AU warned Jammeh of "serious consequences" if his actions led to the "loss of innocent lives."[550]

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544 Communiqué, Jan. 13, 2017, A.U. Doc. PSC/PR/COMM. (DCXLVII) [hereinafter PSC Communiqué].

545 *Id.* at para. 4.

546 *Id.* at para. 5.

547 *Id.* at para. 6.

548 *Id.*

549 *Id.* at para. 5(ii).

550 *Id.* at para. 5(iii).

At the 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government ("ECOWAS Authority") at Abuja, Nigeria, on December 17, 2016, the ECOWAS Authority stated that it would "respect the will of the Gambian people as expressed by the Presidential election results of 1st December 2016."[551] The ECOWAS Authority also appointed President Muhammadu Buhari (Nigeria) as the Mediator for the Gambia crisis and President John Dramani Mahama (Ghana) as co-chair.[552] Finally, the ECOWAS Authority stated that it "shall take all necessary measures to strictly enforce the results of the 1st December 2016 elections."[553]

The negotiations between outgoing President Jammeh and the ECOWAS delegation, led by Nigerian President Buhari, were a "last ditch attempt to persuade President Jammeh, who once said he would rule the country for a billion years, to step down."[554] It was notable that in previous situations where African heads of state took actions that threatened peace, security, and human rights, the AU had usually talked tough but ultimately backed away from taking concrete punitive action. This time, however, it appeared that the AU was more resolute. Jammeh's actions were in violation of Article 23(4) of the AU's Democracy Charter.[555]

The president-elect, Adama Barrow, was expected to be inaugurated on January 19, 2017 as stipulated in the constitution. After declaring that it would cease to recognize Jammeh as The Gambia's legitimate president as of January 19, 2017, the AU gave Jammeh an ultimatum to leave by midnight on January 19, 2017 or be forced out.[556] The dateline was later extended to mid-day and then 4:00 p.m.[557]

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551 Final Communiqué of the Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States para. 38(e), U.N. Doc. S/2016/1074 (Dec. 17, 2016).

552 *Id.* para. 38(f).

553 *Id.* para. 38(h).

554 *Gambia Dispute: African Union 'Will Not Recognise' President Jammeh*, BBC NEWS (Jan. 13, 2017), http://www.bbc.com/news/world-africa-38614234 (explaining that the diplomatic initiative to resolve the constitutional crisis in The Gambia was led by Nigerian President Buhari and included the presidents of Liberia, Ghana and later, Guinea and Mauritania).

555 Democracy Charter, *supra* note 36, at art. 23(4).

556 Paul Obi & Alex Enumah, *Jammeh Gets ECOWAS Deadline: Step Down Midnight Tomorrow or Face Forceful Ejection*, THISDAYLIVE.COM (Jan. 17, 2017, 7:40 AM), https://www.thisdaylive.com/index.php/2017/01/17/supreme-court-refuses-to-hear-jammeh.

557 Ruth Maclean, *The Gambia: Jammeh Ignores Two More Deadlines to Quit*, THE GUARDIAN (UK) (Jan. 20, 2017, 9:35 AM), https://www.theguardian.com/world/2017/jan/20/gambia-yahya-jammeh-midday-deadline-troops.

Adama Barrow's swearing-in ceremony took place in Dakar (Senegal) at 4:00 p.m. GMT on January 19, 2017.[558] Two hours later, at 6:00 p.m. GMT, the UN Security Council passed Resolution 2337, and shortly after that ECOMIG forces entered The Gambia.[559] On January 21, 2017, Jammeh finally gave up his efforts to remain in power, signed a political agreement, which set out the terms of his exit,[560] and left the country for an ECOWAS-arranged exile to Guinea.[561] As explained by President Nana Akufo-Addo of Ghana, ECOMIG was in The Gambia "to create an enabling environment for the effective enforcement of the rule of law, and, in accordance with the Constitution of The Gambia, facilitate the inauguration of the President-Elect, Adama Barrow, on Thursday, January 19, 2017."[562]

Amidst the situation in The Gambia, the AU and ECOWAS threatened to use force against President Jammeh if he did not allow the transition of power to proceed peacefully. Neither the AU nor ECOWAS provided any details about what would eventually become ECOMIG. Nevertheless, they stated that they would use "all necessary measures" to ensure that the results of the December 1, 2016 election were upheld. Since there is no right in international law giving rise to intervention for the purpose of restoring a democracy, the threats from the AU and ECOWAS could be considered illegal actions against The Gambia and its government. Nevertheless, these proclamations were later endorsed by the UN Security Council.[563]

One could argue that the legal basis for ECOMIG can be found in: (1) Article 4(j) of the Constitutive Act of the African Union,[564] (2) Articles 3(h), 10(c), and 25 of the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping

558 *See* Paul D. Williams, *A New African Model of Coercion? Assessing the ECOWAS Mission in The Gambia,* INT'L PEACE INST. GLOBAL OBSERVATORY (Mar. 16, 2017), https://theglobalobservatory.org/2017/03/ecowas-gambia-barrow-jammeh-african-union.

559 *See id.*

560 Press Release, U.N. Secretary-General, *Joint Declaration by the Economic Community of West African States, the African Union and the United Nations on the Political Situation of the Islamic Republic of The Gambia* (Jan. 21, 2017), https://www.un.org/sg/en/content/note-correspondents/2017-01-21/note-correspondents-joint-declaration-political-situation.

561 Matina Stevis & Gabriele Steinhauser, *Gambian Longtime Leader Jammeh Leaves Capital on Guinea President's Plane*, WALL ST. J. (Jan. 22, 2017, 5:22 AM), https://www.wsj.com/articles/gambias-president-yahya-jammeh-steps-down-1484981837.

562 Williams, *supra* note 559.

563 *See* S.C. Res. 2337 (Jan. 19, 2017).

564 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3.

and Security,[565] (3) Article 7(m) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union,[566] and (4) Articles 24 and 25(7) of the African Charter on Democracy, Elections and Governance.[567] While these legal instruments could have provided the AU and ECOWAS with the legal basis for ECOMIG, the critical question is whether any of these instruments are capable of overriding the prohibition on the use of force and threat of force by regional organizations specified in Article 53(1) of the UN Charter.[568]

As the ECOWAS team worked to peacefully resolve the conflict in The Gambia, they received full support from the AU, EU, UN, the United States, and others.[569] In fact, the UN Security Council passed a resolution unanimously backing ECOWAS military intervention in The Gambia to make certain that Yayha Jammeh handed over power as prescribed by the Constitution of the Republic of The Gambia.[570]

Although the government of Jammeh had effectively stifled the ability of the press to report on the elections, such as by cutting off Internet service on the day of the polls, Gambians were able to keep the world apprised or seized of the situation regarding the elections through social media, especially Facebook and Twitter.[571] Despite government's efforts to close its communication channels, the opposition nonetheless managed to inform the world about the situation in The Gambia. Effective opposition communication with the world significantly increased the pressure put on Jammeh to exit the political scene and allow for peaceful regime change.

The ECOWAS military intervention in The Gambia (also called the ECOWAS Mission in The Gambia (ECOMIG)), was part of an international effort to prevent unconstitutional change of government and restore The Gambia's democracy. Although unconstitutional change of government has not yet been recognized as a discrete crime in international law,

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565 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10. 1999, ECOWAS Doc. A/P10/12/99.

566 PSC Protocol, *supra* note 133.

567 Democracy Charter, *supra* note 36.

568 *See* U.N. Charter art. 53, ¶ 1.

569 *See, e.g.*, UN, *Gambia: Security Council Backs Regional Efforts to Ensure Peaceful Transfer of Power to Barrow,* UN NEWS, January 19, 2017, *available at* https://news.un.org/en/story/2017/01/549832-gambia-security-council-backs-regional-efforts-ensure-peaceful-transfer-power (last visited on October 29, 2018); *UN Security Council Unanimously Backs ECOWAS Action in The Gambia*, NEWS24 (South Africa), January 19, 2017, *available at* https://www.news24.com/Africa/News/un-security-council-unanimously-backs-ecowas-action-in-the-gambia-20170119 (last visited on October 29, 2018).

570 S.C. Res. 2337, *supra* note 564.

571 Williams, *supra* note 559.

the OAU and the AU, "have taken a normative and political stand by declaring unconstitutional changes of government illegitimate."[572] ECOMIG and "the coercive diplomacy conducted by ECOWAS, the AU, and the UN appear to have successfully averted a potential unconstitutional change of government threatened by forces loyal to Jammeh."[573]

ECOMIG is "a successful case of coercion engineered through the coordinated activities of ECOWAS, the AU, and the UN Security Council."[574] Furthermore, "[i]t might . . . create a new precedent in international legal terms related to whether the concept of 'intervention by invitation' can be triggered by a 'president-in-exile.'"[575] ECOMIG can be seen as arising from two important trends sweeping through the continent: (1) the AU's determination to prevent "unconstitutional changes of government"; and (2) the AU's "willingness to authorize peace enforcement operations as part of its conflict management strategies." [576]

In the future, it is important that both the AU and the continent's regional organizations make sure that (1) there is "a clear and realistic mandate" for any mission; (2) the process of identifying countries to contribute troops is effective and timely; (3) the "command and control structures" are well-defined and made clear (i.e., whether the mission is led by the AU, a coalition, and what role the UN will play in such an effort); (4) each mission's "support structures and logistics" must be fully established; and (5) each mission's finances must be well-settled.[577]

3. What Does the Gambia Case Teach Us About the AU's Response to Unconstitutional Change of Government?

The AU and ECOWAS were quick to condemn Jammeh's threat of not stepping down from the presidency. In the last several years, many African heads-of-state have engaged in undemocratic behaviors without being condemned by the AU. The AU did not condemn Burundi President Pierre Nkurunziza's undemocratic behavior as they did Jammeh's. Burundi voted to change the country's constitution to allow President Nkurunziza to secure a third term in 2020, potentially granting him the power

572 *Id.*
573 *Id.*
574 *Id.*
575 *Id.*
576 *Id.*
577 *Id.*

to remain in office until 2034.[578] In 2015, Rwandans approved a constitutional amendment that could give President Paul Kagame the right to rule the country until 2034.[579] Joseph Kabila, whose term as President of the Democratic Republic of Congo ended in December 2016, nevertheless remains in office; he has been able to unconstitutionally extend his mandate by refusing to carry out elections to select his successor.[580]

These three leaders have engaged in behaviors that can be considered undemocratic, and which seriously undermine their countries' democratic systems. Yet, neither the African Union nor any of the several regional organizations have come forward to condemn such behavior as was done with respect to Jammeh's actions in The Gambia.

Africa's regional organizations are managed and controlled by summits of heads of state and government. Only a few of these leaders can be considered democrats or individuals who believe in or practice constitutionalism. Unfortunately for Jammeh, he was not able to rely on any of these heads-of-state to protect him from ECOWAS' military actions. Although the AU displayed dissatisfaction against Robert Gabriel Mugabe's actions regarding the presidential elections in Zimbabwe in 2008, it took no punitive action against the regime, nor did the AU work with regional organizations to restore democracy as it did in The Gambia. When Abdel Fattah al-Sisi, decided to participate in post-coup elections, the AU should have condemned such actions and refused to recognize al-Sisi's government. Such action on the part of the AU would have been in line with Article 25(4) of the Democracy Charter.[581] The article prohibits individuals from participating in unconstitutional changes of government and prevents such individuals from seeking candidacy in elections "held to restore democratic order or hold any position of responsibility in political institutions of their State."[582] Not only did the AU fail to condemn al-Sisi's government, but it also lifted Egypt's suspension.[583]

Perhaps the attitude of the AU and ECOWAS toward Jammeh was based on the fact that The Gambia is an extremely small and poor country

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578 *See, e.g., Burundi Approves New Constitution, Nkurunziza Could Stay Till 2034*, AFRICANEWS.COM (May 21, 2018, 6:25 PM), http://www.africanews.com/2018/05/21/burundi-approves-new-constitution-nkurunziza-could-stay-till-2034.

579 McVeigh, *supra* note 10.

580 Kimiko de Freytas-Tamura, *When Will Kabila Go? Congolese Leader Long Overstays His Welcome*, N.Y. TIMES (July 23, 2017), https://www.nytimes.com/2017/07/23/world/africa/congo-joseph-kabila-elections.html.

581 *See* Democracy Charter, *supra* note 36, at art. 25(4).

582 *Id.*

583 *See* European Parliament Think Tank, *Actions of the African Union Against Coups d'État*, April 4, 2016, *available at* http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA(2016)580878 (last visited on October 29, 2018).

with no resources to court the type of friends that would have defended its interests at these organizations. Why was the treatment that Jammeh received from the AU so different from that of al-Sisi or Mugabe? Did The Gambia's relatively small and ill-equipped army factor in the AU's and ECOWAS' decision to bully Jammeh and intervene in the country? There was a consensus that ECOWAS forces could have easily dealt with the relatively small Gambian army. Perhaps more importantly, is the fact that Jammeh was not able to "rely on friends among his regional peers or some powerful ally from outside Africa" to assist him in his efforts to cling to power and in addition, "regional leaders such as Nigeria and Senegal made a credible commitment to the regional intervention" and "to the restoration of democracy in The Gambia."[584]

It has been argued that regional organizations, including ECOWAS, desire peace and stability and usually do not favor governments that are likely to threaten regional peace. A Jammeh government was likely considered to be too much of a risk for peace and security in the region. Hence, ECOWAS' decision to intervene in The Gambia may have been out of concern for regional stability and not purely for democratic reasons.[585]

Regional organizations such as the European Union ("EU") subject prospective members to a set of conditions for membership. With respect to the EU, the conditions for membership are called the Copenhagen criteria, which include the requirements that the prospective member have a free market economy, a stable democracy and the rule of law, and accept all EU legislation.[586] Democracy and adherence to the rule of law, as well as the protection of human rights, are not requirements for any country that seeks membership in the African Union. As a consequence, the AU consists of several regime types, including fully functioning democracies, democracies in their embryonic stages, absolute monarchies, authoritarian regimes, and dictatorships.[587] Some African heads of state have been in power for more than twenty years.[588] Given the fact that democracy and fidelity to the rule of law are not requirements or

584 *See* Christof Hartmann, *ECOWAS and the Restoration of Democracy in The Gambia*, 1 AFR. SPECTRUM 85, 94 (2017).

585 *See* Williams, *supra* note 559.

586 *See Conditions for Membership,* EUR. COMM'N, https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en (last updated June 12, 2016).

587 *See* Williams, *supra* note 559.

588 *See id.* (these include Paul Biya of Cameroon, Idriss Déby of Chad, Teodoro Obiang Nguema Mbasogo of Equatorial Guinea, Denis Sassou Ngueso of Republic of Congo, Yoweri Museveni of Uganda, Isaias Afwerki of Eritrea, and until recently, Robert Gabriel Mugabe of Zimbabwe and José Eduardo dos Santos of Angola. Mugabe and dos Santos left office in 2017).

preconditions for membership in the AU and the fact that many heads of state have managed to remain in power for many years, it is no wonder that many of these leaders continue to act with impunity and do not fear condemnation and sanctions from the African Union.

The AU's recent interest in fostering democracy in the continent and its frowning upon unconstitutional changes of government evolve around the forceful removal or replacement of democratically-elected governments. It appears that the AU will only act when the government removed is one that came to power through free and fair elections. This approach to the maintenance of peace and stability in the continent leaves undisturbed countries that are governed by "non-democratic constitutions or political practices."[589] Despite the AU's renewed interest in fighting unconstitutional changes of government, it has essentially left out countries that have significant democratic deficits and which regularly conduct elections that are neither fair, credible, nor free, as well as manipulate their constitutions to create presidents-for-life positions. As a consequence, politicians such as Paul Biya (Cameroon), Pierre Nkurunziza (Burundi), Paul Kagame (Rwanda), and Yoweri Museveni (Uganda) have been able to successfully extend their mandates through constitutional coups without any sanctions from the African Union. In addition, Joseph Kabila, whose mandate expired in December 2016, has been able to manipulate his country's laws to postpone presidential elections indefinitely and continue to unconstitutionally remain in office.

An important question that arises out of the Gambian situation is: Who should save African democracy? The African Union and regional organizations, such as the ECOWAS, are expected to defend democratic regimes and enhance the rule of law in the continent. But, is maintaining democracy in Africa the job of intergovernmental organizations, such as the AU, or that of the citizens of each country? The success of ECOWAS and the African Union in "restoring democracy" in The Gambia appears to place these institutions at the center of the struggle to fight impunity, maintain peace and stability, enhance the protection of human rights, and promote democracy in the continent. Some scholars have argued that the conditions that made it possible for ECOWAS and the AU to resolve the situation in The Gambia without any violence may not exist in other regions of the continent and hence, the Gambian model may not be applicable to other parts of Africa.

In many African countries, incumbent leaders have developed strong patronage networks and ethnic-based organizations that support and safeguard the president and help them oppress the opposition, stifle

589 *See id.*

the latter's voices, and prevent the deepening and institutionalization of democracy. In countries with relatively strong and powerful militaries such as Egypt, Algeria, and Nigeria, a regional intervention force may face significant resistance should it become necessary that a leader of one of these countries be chased out of office.[590] In some other African countries, incumbent presidents are supported by relatively strong and powerful ethnic groups that may not respond positively to any attempts by regional forces to oust one of their "sons" from office.[591] It is unlikely that the Gambian model can be applied to many other countries or regions in Africa. In fact, ECOWAS has already failed in its attempts to address and restore democracy in the Member States of Togo and Guinea-Bissau.[592]

While the AU and various regional organizations[593] have an important role to play in the restoration of democracy in Africa, it is notable that the citizens of each country must be the drivers of political change. ECOWAS and the AU could not have succeeded in The Gambia had it not been for the cooperation of the Gambian people, the majority of whom rallied behind President-elect Adama Barrow and marched on the streets in opposition of efforts by Jammeh to stay in power. Thus, the key to the restoration, deepening and institutionalization of democracy in Africa is civil society and its organizations.[594]

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590 In these countries, the resistance to a regional force may not only come from each country's relatively large and strong army but also from the president's ethnic and religious supporters. In Cameroon, for example, President Paul Biya's ethnic group, the Beti, have fought any opposition against the president and have been willing to use force to prevent any change in government. In 1992, for example, in the struggle between the opposition Social Democratic Front (SDF) and the government to democratize the country's politics, members of the president's Beti ethnic group initiated and carried out attacks against opposition groups, who were primarily Anglophones and Bamilékés. The Betis were enraged at the prospect that the democratization movement would remove President Paul Biya from office and hence, deprive them of the economic and political privileges that they have enjoyed since Biya became president in 1982. *See, e.g.*, PETERKINS MANYONG, GOD THE POLITICIAN 49 (2008).

591 In many of these countries, an attack on a president is considered an attack on the ethnic group that he hails from. In Cameroon, the Betis have considered any attack on President Biya as an attack on them. *See* Manyong, *supra* note 591.

592 *See, e.g.*, Dwayne Wong, *Togo and the Sad State of ECOWAS*, HUFFINGTON POST (Dec. 16, 2017, 6:33 PM), https://www.huffingtonpost.com/entry/togo-and-the-sad-state-of-ecowas_us_5a359b7ce4b0e1b4472ae6ed.

593 *See, e.g.*, ECOWAS, Southern African Development Community (SADC), and the East African Community (EAC).

594 *See, e.g.*, NELSON KASFIR, CIVIL SOCIETY AND DEMOCRACY IN AFRICA: CRITICAL PERSPECTIVES (Nelson Kasfir ed., 1998) (examining, inter alia, the role of civil society in promoting democracy in Africa).

VII. SUMMARY AND CONCLUSION

This paper has examined the response of the Organization of African Unity and its successor organization, the African Union (AU), to unconstitutional change of government in the continent. While the African Union is gradually developing an effective mechanism to deal with a military coups d'état, it is yet to recognize constitutional coups and provide itself with the legal tools that can be used to respond to this important method of unconstitutional regime change.

Case studies of the situations in Côte d'Ivoire, Cameroon, Zimbabwe, and The Gambia illustrate the extent to which the AU has been able to handle this emerging form of unconstitutional change of government in Africa. While the AU successfully overcame efforts by The Gambia's president to retain power through a constitutional coup, it has been unable to take effective actions to stop other African leaders from extending their mandates through constitutional coups.

The unique conditions that led to successful intervention in The Gambia are unlikely to be replicated in other countries. As a consequence, the Gambian model probably will not be available to other countries and regions in the continent. Since their success in The Gambia, the AU and ECOWAS have faced only failures in Togo and Guinea-Bissau. Thus, it is necessary for the AU and the continent's various regional organizations to recognize the constitutional coup as a real and important contributor to democratic dysfunction in the continent, and then develop legal mechanisms to deal with it. In doing so, the AU must recognize that the constitutional coup is a violation of many legal principles that are explained in the organization's various legal instruments, including the Constitutive Act of the African Union,[595] Lomé Declaration,[596] Democracy Charter,[597] and the African Charter on Human and Peoples' Rights.[598] The AU must include the constitutional coup in its list of unconstitutional changes of government and provide an effective and consistent mechanism to deal with it. African presidents must not be allowed to manipulate their constitutions to frustrate the deepening and institutionalization of democracy in their countries.

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595 Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 3., at art. 4(m) ("[r]espect for democratic principles, human rights, the rule of law and good governance.").

596 *See* Lomé Declaration, *supra* note 35 ("[t]he refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.").

597 *See* Democracy Charter, *supra* note 36, at art. 3-4 ("respect for human rights and democratic principles," and "promotion of democracy, the principle of the rule of law and human rights.").

598 *See* Banjul Charter, *supra* note 232.

The struggle to deepen democracy and institutionalize constitutional governments in each African country is the purview of the country's citizens. Thus, civil society and its organizations have an important role to play in ensuring that political elites accept and respect the law and do not place themselves above it. While the AU and regional organizations have a role to play in restoring democracy to African countries, it is the civil society that must shoulder the fight to ensure that the rule of law reigns supreme.

Constitutional design is the key in dealing with constitutional coups. Of particular interest to constitutional designers are procedures for amending the constitution.[599] Practices of constitutionalism and constitutional government require that constitutional designers provide appropriate mechanisms for amending or revising the constitution. Such procedures or mechanisms must not be those that can be easily manipulated by opportunistic political elites to extend their mandates and stay in power indefinitely. As Elster has argued, a balance must be struck between "rigidity and flexibility" and such equilibrium can be achieved if the drafters or designers utilize various devices, either "singly or in combination."[600] First, the country's constitutional designers can mandate that the constitution can only be changed or revised by a given qualified majority—one that would reflect the country's diversity. For example, the Constitution of the Republic of South Africa mandates that a bill designed to amend the constitution must be supported by at least 75 percent of the National Assembly and at least six of the country's nine provinces.[601]

One reason Paul Biya was able to easily amend Cameroon's constitution in 2008 to extend his mandate indefinitely, was that the constitution allows amendments to be undertaken by the Parliament alone. Even if the constitution-amending process in Cameroon had required the participation and approval of the country's subnational units before constitutional amendments could be valid, Biya nonetheless would have been able to succeed, since he has the power to appoint the governors of all the regions, as well as leaders of other political jurisdictions. Hence, Cameroonian constitutional designers must make certain that the amendment process is robust enough to prevent or minimize manipulation by the executive.[602]

Second, the constitutional designers can impose what Elster calls a "cooling device"— a period that will require that two successive

599 *See, e.g.*, MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTIRES, *supra* note 47.

600 Elster, *supra* note 47, at 472.

601 S. AFR. CONST., 1996 § 74(1)(a).

602 MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 48, at 93.

legislatures or parliaments approve the amendments or revisions before they become effective.[603] Elster argued further that, "delays protect society against itself, by forcing passionate majorities, whether simple or qualified, to cool down and reconsider."[604]

Third, bills to revise or amend the constitution should be considered successful only if they have been approved by the National Assembly and by the assemblies of the country's subnational units (in the case of Cameroon and other Francophone countries, the regions).[605] Combining this provision with the "cooling device" requirement could significantly enhance the ability of the people to prevent or minimize constitutional coups.[606]

Fourth, constitutional designers may place the responsibility of amending the constitution in the hands of specially constituted or convened assemblies,[607] such as the Sovereign National Conference (SNC) that was common in Africa during the prodemocracy uprisings of the early 1990s.[608] Of course, the job of amending the constitution can be left to the people to undertake through a nation-wide referendum. Given that nation-wide referendums can be manipulated by incumbent governments through the control of the media, suppression of dissenters, and other forms of impunity, constitutional designers must make certain that the people are provided with the tools to adequately check on the exercise of government power in order to prevent or minimize impunity.

Finally, the governing process should be based on the separation of powers with effective checks and balances. In addition to judicial independence, constitutional designers should make certain that there exists a strong bicameral legislature, which can properly check on the executive and minimize the chances that it would engage in opportunistic behaviors, including, for example, constitutional coups. A robust civil society is critical for the maintenance of an institutional system that minimizes government impunity. Not only do civil society organizations provide the arena within which citizens can come together to "examine their preferences, freely engage with their neighbors in robust debate and peacefully resolve any conflicts, and participate effectively in the design and implementation of public policies affecting their lives," but they can also serve

603 *See* Elster, *supra* note 47, at 470.

604 *Id.*

605 *See id.* at 471.

606 *See id.* at 471-72.

607 *See id.* at 471.

608 *See generally* Clark, *supra* note 84, at 141; JOHN CLARK, *The National Conference as an Instrument of Democratization in Francophone Africa*, 11 J. THIRD WORLD STUDIES 304 (1994).

as important instruments for checking on the government.[609] The independent press, for example, can investigate and expose incidents of impunity and corruption and provide the information necessary for the independent judiciary to bring those involved in criminal activities to justice. Perhaps, more importantly, the independent press can provide significant help to citizens during debates on revisions to the constitution.

609 MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES, *supra* note 48, at 149.