
The African Union's Struggle Against 'Unconstitutional Change of Government': From a Moral Prescription to a Requirement under International Law?

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Abstract

In 1992 Thomas Franck proclaimed an emerging right to democratic governance in international law. With reference to developments in the Organization of American States (OAS) and the Commission on Security and Cooperation in Europe, he identified free and fair elections as the core benchmark of this right, possessing significant legitimacy in terms of its pedigree, determinacy, coherence and adherence. The current contribution examines Franck's understanding of the right to democratic governance within the African context, notably in relation to those institutional developments that have occurred since the adoption of the Constitutive Act of the African Union (AU) in 2000. Specifically, the article assesses the benchmarks of the notion of 'unconstitutional changes of government' in Article 4(p) of the AU Constitutive Act and their inter-linkage with free and fair elections. In so doing, it critically questions the response of the AU to unconstitutional changes of government and its implications for the normative maturity of the benchmark in question. It places the analysis in a broader context by drawing some parallels with the current back-sliding in democratic governance that is occurring also within the Council of Europe (CoE) and the European Union.

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This research was supported by the South African Research Chairs Initiative of the Department of Science and Technology and National Research Foundation of South Africa (Grant No 98338).

1 Introduction

In his seminal 1992 article in the *American Journal of International Law*, Thomas Franck asserted that the notion of democratic governance had evolved from a moral prescription to a requirement under international law, containing global standards that were being implemented through international (including regional) organizations.¹ At the core of these standards were free and fair elections, which constituted the minimum requirement for the legal validation of the exercise of governmental power.² Franck further claimed that the political legitimacy of any rule under international law could be measured by four indicators.³ These included its pedigree (which speaks to the historical reach of the process); its determinacy (which concerns the clarity of the rule's content);⁴ its coherence (which relates to the consistency with which the violation of the rule triggers a larger regulatory framework);⁵ and its adherence (which is reflected by the rule's position within a normative hierarchy).⁶

Moreover, based on an analysis of institutional developments at the time, in particular within the Organization of American States (OAS) and the Commission on Security and Cooperation in Europe (CSCE), Franck suggested that the emerging customary right to free and fair elections already enjoyed significant legitimacy in line with these criteria.⁷ Salient examples of institutional developments within the OAS that buttress this claim included, notably, the 1991 Santiago Commitment to Democracy and the Renewal of the Inter-American System, in which the OAS General Assembly attributed special priority to representative democracy as an expression of the legitimate and free manifestation of the will of the people.⁸ In addition, Resolution 1080 was adopted in an attempt to curb future military coups in the region. It allowed the OAS General Assembly to call an ad hoc meeting of the Ministers of Foreign Affairs or special session of the General Assembly to take appropriate decisions, 'in the event of an irregular interruption of the democratic political institutional process by the democratically elected government in any of the Organizations' member states'.⁹ The CSCE for its part adopted the Charter of Paris for a New Europe of 1990, which required its signatories 'to build, consolidate and strengthen democracy as the only system of government of our nations'.¹⁰ It further determined that 'democratic government is based on the will of the people, expressed regularly through free and fair elections'.¹¹

¹ Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law (AJIL)* (1992) 46.

² *Ibid.*, at 49–50, 90.

³ *Ibid.*, at 51.

⁴ *Ibid.*, at 51, 56.

⁵ *Ibid.*, at 51.

⁶ *Ibid.*

⁷ *Ibid.*, at 90.

⁸ Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS Doc OEA/SerP/AG Doc 2734/91, 4 June 1991, Preamble para. 4.

⁹ OAS GA Res. 1080 (XXI-0/91), Representative Democracy (5 June 1991).

¹⁰ Organization for Security and Co-operation in Europe, Charter of Paris for a New Europe, 19–21 November 1990, 30 ILM 190 (1991).

¹¹ *Ibid.*

Franck's understanding of a right to democratic governance that turns on free and fair elections has subsequently been described as focussing on the democratic legitimacy of origin of governmental power.¹² It is a narrow, procedural understanding of democratic legitimacy which can be distinguished from more expansive definitions that also embrace substantive qualities such as human rights standards and elementary aspects of the rule of law.¹³ These broader definitions centre on what has been described as the democratic legitimacy of exercise of governmental power.¹⁴ The current contribution applies Franck's understanding of the right to democratic governance to the African context, where most institutional developments relating to democratic governance occurred only after the replacement of the Organisation of African Unity (OAU) with the African Union (AU) in 2000.¹⁵ This reconfiguration was, to a large extent, itself induced by the end of the Cold War, in the wake of which apartheid in South Africa was dismantled and the old bloc alliances on the continent re-aligned.¹⁶ In addition, the inability of the OAU to respond to a series of atrocities in the 1990s, among others, in the Democratic Republic of Congo (DRC), Liberia, Rwanda and Sierra Leone, prompted calls for institutional reform.¹⁷

Specifically, the subsequent analysis assesses the emergence of a right to democratic governance within the AU by examining the notion of unconstitutional change of government, which, inter alia, found its way into Article 4(p) of the Constitutive Act of the African Union of 2000 ('AU Constitutive Act')¹⁸ and Article 23 of the African Charter on Democracy, Elections and Governance of 2007 ('African Democracy Charter').¹⁹ The analysis first illuminates the notion of unconstitutional change of government with reference to the various institutional measures adopted to counter such conduct. In so doing, it identifies five benchmarks for an unconstitutional change of government with the AU context, which are all closely intertwined with free and fair elections in accordance with a country's national (constitutional) law. Next the analysis critically assesses the responses of the AU to unconstitutional changes of government in order to determine whether any of these benchmarks constitute a

¹² d'Aspremont, 'Legitimacy of Governments in The Age of Democracy', 38 *New York University Journal of International Law and Politics* (2006) 877, at 881.

¹³ See generally S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2003).

¹⁴ *Ibid.*, at 880, 881, 899.

¹⁵ Bamidele and Ayodele, 'In the Service of Democratic Governance: The African Union Normative Framework on Unconstitutional Change of Government and ECOWAS Protocol on Good Governance and Democracy in the Post-Arab Spring', 53 *Journal of Asian and Africa Studies* (2018) 132, at 134.

¹⁶ Bamidele and Ayodele, *supra* note 15, at 134.

¹⁷ Amvane, 'Intervention Pursuant to Article 4(h) of the Constitutive Act of the African Union Without United Nations Security Council Authorisation', 15 *African Human Rights Law Journal* (2015) 282, at 294–295.

¹⁸ Constitutive Act of the African Union, 11 July 2000, in force 26 May 2001, 2158 UNTS 3, Art. 4(p) (hereinafter 'AU Constitutive Act').

¹⁹ African Charter on Democracy, Elections and Governance, 30 January 2007, in force 14 February 2012, Art. 23, available at <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (hereinafter 'African Democracy Charter').

legal requirement with distinct normative maturity in terms of pedigree, determinacy, adherence and coherence. The final section places this assessment in a broader context by drawing parallels with the backsliding in democratic governance that is currently ongoing within certain member states of the Council of Europe (CoE) and the European Union (EU).

2 Institutional Measures Proscribing Unconstitutional Change of Government within the OAU/AU

While institutional attempts to strengthen democratic governance in Africa gained momentum after the establishment of the AU, the groundwork was laid during the final years of existence of the OAU. Between 1997 and 2000, the OAU adopted three declarations that signalled an attempt to move away from the ‘might is right’ approach that had plagued the continent in the post-independence period and towards democratic governance. The first was the Harare Declaration of 1997 in which the OAU Council of Ministers condemned the military coup in Sierra Leone and called for the restoration of the constitutional order.²⁰ Two years later, in Algiers, the OAU reiterated its decision that ‘[m]ember states whose governments came to power through unconstitutional means after the Harare Summit, should restore constitutional legality before the next Summit’.²¹ In the Lomé Declaration of 2000, the OAU defined the notion of unconstitutional change of government with reference to four types of situations.²² These included military coups against a democratically elected government; interventions by mercenaries to replace a democratically elected government; the replacement of democratically elected governments by armed dissident groups and rebel movements; and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.²³

These measures were subsequently consolidated with the inclusion of Article 4(p) in the AU Constitutive Act of 2000, the founding treaty of the AU that entered into force on 26 May 2001.²⁴ This article elevated the condemnation and rejection of an unconstitutional change of government to one of the principles in accordance with

²⁰ Organization of African Unity (Council of Ministers), Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, CM/Dec.330–363 (LXVI)-C, Harare, 28–31 May 1997, para. (a) (hereinafter ‘Harare Declaration’). The African Commission on Human and Peoples’ Rights (ACHPR) has, since 1994, consistently condemned coups and the seizure of power by undemocratic means. See, e.g., ACHPR, Resolution on the Situation of Human Rights in Africa, ACHPR/Res.14(XVI)94, Banjul, 25 October–3 November 1994, para. 1.

²¹ Organization of African Unity (OAU AHG), Declarations and Decisions Adopted at the Thirty-Fifth Assembly of the Heads of State and Government (AHG), AHG/Dec. 142 (XXXV), Algiers, 12–14 June 1999, para. 1.

²² OAU AHG, The Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, Lomé, 10–12 July 2000, AHG/Decl.5 (XXXVI) (hereinafter ‘Lomé Declaration’).

²³ The Lomé Declaration (*ibid.*) also suggested procedures for suspension of ‘unconstitutional governments’ from participation in OAU organs, combined with economic sanctions.

²⁴ AU Constitutive Act, *supra* note 18, Art. 4(p).

which the AU would function.²⁵ While Article 4(p) did not define 'unconstitutional change of government', the AU's understanding of this concept is informed by the Lomé Declaration and Article 23 of the African Democracy Charter. The latter was adopted by the AU in 2007,²⁶ entered into force in 2012 and has since been ratified by 34 of the 55 AU member states.²⁷

Article 23(1)–(4) of the African Democracy Charter incorporated the Lomé Declaration's definition of unconstitutional change of government, and also added one new benchmark in Article 23(5). This concerned '[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'.²⁸ The *travaux préparatoires* indicate that the drafters initially considered referring to the '[a]mendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the State Party concerned, to prolong the tenure of office for the incumbent government'.²⁹ However, this very specific wording was ultimately watered down, due to different positions amongst African states. Some delegations regarded explicit reference to language that curbed the prolongation of office of the incumbent government as necessary to ensure the prevention of indefinite presidencies that undermined democratic renewal.³⁰ Others, however, underscored that such a prolongation was an internal matter that depended on the will of the people of a state in accordance with its own constitutional procedures.³¹ Even so, Article 23(5) was introduced as an attempt to oppose unconstitutional retention of power through constitutional or other legislative amendments that facilitate indefinite presidencies and remains open to such an interpretation.³²

As far as the consequences of an unconstitutional change of government are concerned, Article 30 of the AU Constitutive Act determines that '[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.³³ This suspension clause is also informed by the African Democracy Charter which, in Article 25, similarly provides for governmental suspension in case diplomatic initiatives have failed.³⁴ This article further provides for the possibility of imposing economic sanctions in reaction to an unconstitutional change of government,³⁵ as well as the non-participation of the perpetrators

²⁵ However, Article 4(p) does not provide a separate ground for military intervention in an AU member state.

²⁶ African Democracy Charter, *supra* note 19, Art. 23.

²⁷ For the most updated list of ratifications, see *ibid.*, Status List, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (last visited 1 August 2020).

²⁸ African Democracy Charter, *supra* note 19, art 23(5). See also Wiebusch and Murray, 'Presidential Term Limits and the African Union', 63 *Journal of African Law (J. Afr. L.)* (2019) 131, at 149–150.

²⁹ Wiebusch and Murray, *supra* note 28, 149; Ben Kioko, 'The African Charter on Democracy, Elections and Governance as a Justiciable Instrument', 63 *J. Afr. L.* (2019) 39, at 46.

³⁰ Kioko, *supra* note 29, 46; Wiebusch and Murray, *supra* note 28, 149.

³¹ Kioko, *supra* note 29, at 46; Wiebusch and Murray, *supra* note 28, at 149.

³² Wiebusch and Murray, *supra* note 28, at 149. See also Dersso, 'Unconstitutional Changes of Government and Unconstitutional Practices in Africa' (African Politics, African Peace, Summary Paper from the Program on African Peace Missions No. 2, June 2016), at 2, available at <https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf>.

³³ AU Constitutive Act, *supra* note 18, Art. 30.

³⁴ African Democracy Charter, *supra* note 19, Art. 25(1).

³⁵ *Ibid.*, Art. 25(7).

of unconstitutional change of government in elections held to restore the democratic order.³⁶ It is worth noting that the principle that ‘perpetrators of coups d’état shall not stand for elections conducted for return to constitutional order’ was reaffirmed by the AU Peace and Security Council (AUPSC) in 2009 and the AU Assembly of Heads of State and Government in 2010.³⁷ It thereby became applicable to all AU member states including those which have not yet ratified the African Democracy Charter. The 2010 Assembly decision further enabled punitive economic sanctions by the AU Assembly against the perpetrators,³⁸ and called on member states not to recognize de facto authorities on the occurrence of an unconstitutional change of government.³⁹

Unlike the Assembly of Heads of State and Government (OAU AHG), the AUPSC was not explicitly foreseen in the AU Constitutive Act, but established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union of 2002 which entered into force on 26 December 2003.⁴⁰ This body, which has since been ratified or acceded to by 52 of the 55 member states, is composed of 15 states that are elected on the basis of regional representation for terms of two to three years.⁴¹ It has become the standing decision-making organ of the AU for the prevention, management and resolution of conflicts. This includes decisions responding to unconstitutional changes of government.⁴²

If one measures these institutional developments against the legitimacy indicators identified by Franck, one can describe the historic pedigree of the right to democratic governance within the AU as relatively recent to very recent. While the four manifestations of unconstitutional change of government stemming from the Lomé Declaration reach back 20 years, the criterion in Article 23(5) of the African Democracy Charter pertaining to ‘an infringement on the principles of democratic change of government’⁴³ only became operational in 2012. Moreover, an analysis of the AU’s responses to unconstitutional changes of government reflects that this criterion in particular lacks legitimacy in terms of determinacy, coherence and adherence. The AU has persistently refrained from invoking Article 23(5) of the African Democracy Charter when addressing unconstitutional change of government.⁴⁴

³⁶ *Ibid.*, Art. 25(4). This article also determines that such perpetrators may not hold any position of responsibility in the political institutions of their states.

³⁷ African Union Peace and Security Council (AUPSC), *Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in situations of Unconstitutional Changes of Government in Africa*, Ezulwini, 17–19 December 2009, para. 4 (iv). See also African Union (Assembly), *Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage such Situations*, Assembly/AU/Dec.269(XIV) Rev.1, 2 February 2010, para. 6(i)(b)a (hereinafter ‘AU, Decision on Unconstitutional Changes’).

³⁸ AU, *Decision on Unconstitutional Changes*, *supra* note 37, para. 6(i)(b)c.

³⁹ *Ibid.*, para. 6(i)(c).

⁴⁰ African Union (Assembly), *The Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, Durban, 9 July 2002, Art. 2(1) (hereinafter ‘AU Peace and Security Protocol’). The establishment of additional AU organs is foreseen in *ibid.*, Art. 5(2).

⁴¹ See *ibid.*, Art. 5. In accordance with Article 8(2), it can meet at the level of permanent representatives, ministers or heads of state.

⁴² *Ibid.*, Art. 7(g).

⁴³ African Democracy Charter, *supra* note 19, Art. 25(5).

⁴⁴ See Section 3.D below.

The manifestations of unconstitutional change of government stemming from the Lomé Declaration on the other hand display more legitimacy in relation to determinacy. Even so, the subsequent analysis will reveal that they have not consistently triggered suspension of coup or rebel governments. This in spite of the fact that the verb 'shall' in Article 30 of the AU Constitutive Act suggests that suspension in case of an unconstitutional change of government is mandatory. As does the AU Peace and Security Protocol in determining that the AUPSC 'shall [. . .] institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration'.⁴⁵ Similarly, the AU has not consistently prevented coup perpetrators from standing in subsequent elections, as provided for in the 2009 decision of the AUPSC, as well as the 2010 decision of the AU Assembly of Heads of State and Government.⁴⁶

3 AU Responses to Unconstitutional Change of Government

A Military Coups

The AU's ambivalent relationship with military coup regimes is reflected in the fact that at the time of its creation in 2000, several member states were represented by governments that had previously come to power through coups. Two poignant examples at the time included Libya and Sudan. Furthermore, a review of the military coups conducted since the creation of the AU indicates that swift suspension followed on nine occasions, while in five instances it either imposed suspension in a delayed fashion or not at all. The instances in which the AU responded with swift suspension include Togo (2005);⁴⁷ Guinea (2008);⁴⁸ Mauritania (2005 and 2008);⁴⁹ Madagascar (2009);⁵⁰ Niger (2010);⁵¹ Guinea-Bissau (2012);⁵² Mali (2012);⁵³ and Egypt (2013).⁵⁴

⁴⁵ AU Peace and Security Protocol, *supra* note 40, Art. 7(g).

⁴⁶ See AU, Decision on Unconstitutional Changes, *supra* note 37.

⁴⁷ AUPSC, Communiqué of the 25th Meeting, PSC/PR/Comm (XXV), Addis Ababa, 25 February 2005, paras. 3, 4.

⁴⁸ AUPSC, Press Statement of the 206th Meeting, PSC/PR/BR.1 (CCVI), Addis Ababa, 15 October 2009; AUPSC, Communiqué of the 164th Meeting, PSC/PR/Comm(CLXIV), Addis Ababa, 24 December 2008, para 2; Associated Press, 'Guinea: Sanctions From African Union', *New York Times* (29 December 2008), available at <https://nyti.ms/3rcrvHZ>.

⁴⁹ See AUPSC, Statement of the 36th Meeting, PSC/PR/Stat.(XXXVI)-(ii), Addis Ababa, 4 August 2005; AUPSC, Communiqué of the 163rd Meeting, PSC/MIN/Comm.3 (CLXIII), Addis Ababa, 22 December 2008, para. 9.

⁵⁰ AUPSC, Communiqué of the 181st Meeting, PSC/PR/COMM.(CLXXXI), Addis Ababa, 20 March 2009, para. 4.

⁵¹ AUPSC, Communiqué of the 216th Meeting, PSC/PR/COMM.2 (CCXVI), Addis Ababa, 19 February 2010, para. 5.

⁵² AUPSC, Communiqué of the 318th Meeting, PSC/PR/COMM (CCCXVIII), Addis Ababa, 17 April 2012, para. 6.

⁵³ AUPSC, Communiqué of 315th Meeting, PSC/PR/COMM (CCCXV), Addis Ababa, 23 March 2012, para. 9.

⁵⁴ AUPSC, Communiqué of the 384th Meeting, PSC/PR/COMM (CCCLXXXIV), Addis Ababa, 5 July 2013, para. 6.

However, in the cases of both Mali and Egypt, the duration of the suspension was limited. The AU suspended Mali from AU activities after the military coup in March 2012 against President Amadou Touré.⁵⁵ The junta responsible for the military coup was nonetheless subsequently accommodated in the transitional government that took office in August 2012.⁵⁶ This government was swiftly recognized by the AU and remained in power until presidential elections were held a year later.⁵⁷ As far as Egypt was concerned, the AU permitted the military leader Sisi – who ousted President Morsi – to stand for presidential elections in 2014. When Sisi subsequently won the elections (with a voter turn-out below 50 per cent),⁵⁸ the AU lifted Egypt's suspension.⁵⁹ In so doing, the AU acted contrary to its own guiding principles as it condoned the participation of a coup perpetrator in elections conducted to return to constitutional order. The AU essentially conceded as much by justifying Egypt's readmission with the need to remain engaged with the country.⁶⁰ Simultaneously it noted that this should not set a precedent for the participation of coup perpetrators in such elections in future.⁶¹

Coups that provoked delayed responses from the AU included Burkina Faso in 2014 (a party to the African Democracy Charter) and Sudan in 2019. In the case of Burkina Faso, the suspension only occurred after a second military takeover in September 2015.⁶² The first military coup in late October 2014 coincided with the resignation of President Compaore, following widespread protests at his attempt to facilitate a third term by amending the constitution. On his resignation, the military took power, instead of allowing the head of the National Assembly to do so, as was constitutionally required.⁶³ The AU gave the coup regime two weeks to transfer power to a transitional, civilian-led government. As this deadline was honoured, no suspension followed until the military exercised its second coup (vis-à-vis the transitional

⁵⁵ AUPSC, Communiqué of 315th Meeting, *supra* note 52, para 9.

⁵⁶ Ouedraogo, President of the Economic Community of West African States (ECOWAS) Commission, ECOWAS Statement on the Formation of Government of National Unity in Mali, *Reliefweb* (21 August 2012), available at <https://reliefweb.int/report/mali/ecowas-statement-formation-government-national-unity-mali>; Institute for Security Studies, 'Mali: Making Peace While Preparing for War', *ECOWAS Peace and Security Report* (1 October 2012), at 2, available at <https://issafrica.s3.amazonaws.com/site/uploads/ECOWAS1-ENG.pdf>.

⁵⁷ See AUPSC, Communiqué of the 332nd Meeting, PSC/PR/COMM (CCCXXXII), Addis Ababa, 4 September 2012, para. 3. See Reuters Staff, Mali Dismisses Candidates for Fraud in Elections, *Reuters* (1 January 2014), <https://reut.rs/3uY6nHY>.

⁵⁸ Kingsley, 'Abdel Fatah al-Sisi Sweeps to Victory in Egyptian Presidential Election', *The Guardian* (29 May 2014), available at www.theguardian.com/world/2014/may/29/abdel-fatah-al-sisi-sweeps-victory-egyptian-election.

⁵⁹ AUPSC, Communiqué of the 442th Meeting, PSC/PR/COMM.2 (CDXLII), Addis Ababa, 17 June 2014, para. 8.

⁶⁰ *Ibid.*, para. 7(ii).

⁶¹ *Ibid.*, para. 8.

⁶² AUPSC, Communiqué of the 554th Meeting, PSC/PR/COMM/3.(DXLIV), Addis Ababa, 18 September 2015, paras. 11, 12.

⁶³ Bonkougou and Penny, 'Protests Force out Burkina President, Soldiers Vie for Power', *Reuters* (31 October 2014), available at <https://reut.rs/3uNDqhG>.

government) in September 2015.⁶⁴ This coup only lasted a week and democratic presidential elections were held at the end of November 2015.⁶⁵

In the case of Sudan the Defence Minister took control in April 2019, establishing a two-year transitional military government and suspending the country's Constitution.⁶⁶ At the time, thousands of civilians had been protesting against the regime of President Bashir for three months, demanding his removal.⁶⁷ On 15 April 2019, the AUPSC demanded the handing over of power to a transitional, civilian-led government within 15 days, or else face automatic suspension from participation in AU activities.⁶⁸ When this demand had not been fulfilled by 30 April 2019, Sudan was initially given an extension of 60 days, in acknowledgment of 'gradual progress' made towards an agreement in this regard.⁶⁹ These concessions resulted in strong criticism from civil society, which preferred an immediate transfer to a civilian government.⁷⁰ However, it was only after a paramilitary crackdown on protests in Khartoum in early June 2019 that left more than 120 people dead that the AU suspended Sudan from participating in its activities 'until the effective establishment of a civilian-led Transitional Authority'.⁷¹ In August 2019, negotiations were concluded regarding the establishment of a three-year transitional government which, although civilian-led, would also include military leaders. Shortly thereafter, the AU's suspension of Sudan was lifted.⁷²

⁶⁴ AUPSC, Communiqué of the 465th Meeting, PSC/PR/COMM.(CDLXV), Addis Ababa, 3 November 2014, paras 11, 14; AUPSC, Communiqué of the 468th Meeting, PSC/PR/COMM.(CDLXVIII), Addis Ababa, 18 November 2014, para. 6. ECOWAS for its part remained reluctant throughout to impose sanctions. It, instead, supported a process of cooperation with the coup government aimed at restoring democracy. See, e.g., Extraordinary Summit of the Authority of the ECOWAS Heads of State and Government, Final Communiqué (6 November 2014), para 6, available at <https://reliefweb.int/report/liberia/final-communique-extraordinary-session-authority-ecowas-heads-state-and-government>.

⁶⁵ 'Burkina Faso Elections: Roch Marc Kabore Named New President', *The Guardian* (1 December 2015), available at www.theguardian.com/world/2015/dec/01/burkina-faso-elections-roch-marc-kabore-named-new-president.

⁶⁶ Osman and Bearak, 'Sudan's Omar Hassan al-Bashir Is Ousted by Military After 30 Years in Power', *Washington Post* (11 April 2019), available at <https://wapo.st/2NV18KR>.

⁶⁷ Bremmer, 'The Fight to Save Sudan from the Counterrevolution', *Time* (20 June 2019), available at <https://issafrika.org/research/east-africa-report/sudan-after-bashir-regional-opportunities-and-challenges>.

⁶⁸ AUPSC, Communiqué of the 804th Meeting, PSC/PR/COMM.(DCCCXL), Addis Ababa 15 April 2019, paras. 5(a), 5(c).

⁶⁹ AUPSC, Communiqué of the 846th Meeting, PSC/PR/COMM.(DCCCXLVI), Tunis, 30 April 2019, paras 4, 5.

⁷⁰ Hursh, 'Ouster of Sudan's Bashir Is Only the Beginning', *Just Security* (12 April 2019), available at www.justsecurity.org/63601/ouster-of-sudans-bashir-is-only-the-beginning/.

⁷¹ AUPSC, Communiqué of the 854th Meeting, PSC/PR/COMM.(DCCCXLIV), Addis Ababa, 6 June 2019, para. 12; Burke, 'African Union Suspends Sudan Over Violence Against Protesters', *Guardian* (6 June 2019), available at www.theguardian.com/world/2019/jun/06/sudan-african-union-suspension-military-rulers.

⁷² AUPSC, Communiqué of the 875th Meeting, PSC/PR/COMM.(DCCCCLXXV), Addis Ababa, 6 September 2019, para. 4. See also 'Sudan Crisis: Military and Opposition Agree Power-Sharing Deal', *BBC News* (5 July 2019), available at www.bbc.com/news/world-africa-48878009; Agency Staff, 'African Union Lifts Suspension of Sudan after Announcement of New Cabinet', *Business Day* (7 September 2019), available at www.businesslive.co.za/bd/world/africa/2019-09-07-african-union-lifts-suspension-of-sudan-after-announcement-of-new-cabinet/.

Finally, there were instances in which the AU did not sanction countries for an unconstitutional change of government. When the democratically elected government in São Tomé and Príncipe was toppled during a military coup in July 2003, the AU did not suspend the country from AU activities. However, the constitutional order was restored through mediation within a few weeks, including the return of the elected President.⁷³ At the time the coup occurred, the AU was still in its fledgling stages and the AU Peace and Security Protocol, which established the AU Peace and Security Council,⁷⁴ was not yet in force. As a result, any suspension would have had to be undertaken by the AU Assembly of Heads of State and Government on the basis of its competence to ensure compliance with AU policies and decisions.⁷⁵

The AUPSC was, however, well established by the time the military coup, resulting in the resignation of President Robert Mugabe, took place in Zimbabwe in November 2017.⁷⁶ The military takeover was sparked on 14 November 2017 by the firing of the Vice-President, after which the military placed President Mugabe under house arrest. Widespread protests followed, demanding Mugabe's resignation. This occurred only on 21 November 2017, when he was faced with the choice of resignation or impeachment by Parliament.⁷⁷ On 24 November 2017, Emmerson Mnangagwa (a former Vice-President to Mugabe) was sworn in as President and gave assurances that elections planned for 2018 would proceed.⁷⁸

The AU did not condemn the coup; nor in fact did any member state seem eager to refer to the military takeover as a coup. The AU instead chose to praise President Mugabe for stepping down, recognizing that the Zimbabwean people had expressed their will that there should be a peaceful transfer of power in a manner that secured the democratic future of their country.⁷⁹ The AU thereby chose to ignore the fact that the will of the people was not expressed by means of elections and that the threat of impeachment by Parliament was facilitated (or rather coerced) by the unconstitutional use of force.⁸⁰

⁷³ See African Union (Central Organ), Communiqué of the 93rd Ordinary Session at Ambassadorial Level of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, Central Organ/MEC/AMB/COMM.(XCIII), Addis Ababa, 24 July 2003, paras 1ff.

⁷⁴ See AU Peace and Security Protocol, *supra* note 40.

⁷⁵ AU Constitutive Act, *supra* note 18, Art 9(1)(e).

⁷⁶ Agence France Press (AFP), 'Timeline: How Zimbabwe's "Coup" Unfolded', *Mail & Guardian* (21 November 2017), available at <https://mg.co.za/article/2017-11-21-timeline-how-zimbabwes-coup-unfolded>. Similarly, Southern African Development Community, 'Statement by the Executive Secretary of SADC Following the Resignation of President Robert Mugabe' (24 November 2017), available at www.sadc.int/news-events/news/statement-executive-secretary-sadc-following-resignation-president-robert-mugabe/.

⁷⁷ AFP, *supra* note 76.

⁷⁸ African France Press (AFP), 'From Exile to Election: Emmerson Mnangagwa's Timeline to Victory', *Guardian* (3 August 2018), available at www.theguardian.com/world/2018/aug/03/emmerson-mnangagwa-zimbabwe-timeline-to-victory.

⁷⁹ AU, Statement of the Chairperson of the Commission of the African Union on the Situation in Zimbabwe, Addis Ababa, 21 November 2017.

⁸⁰ Roessler, 'How AU Got It Wrong on Zimbabwe', *Al Jazeera* (8 December 2017), available at www.aljazeera.com/indepth/opinion/african-union-wrong-zimbabwe-171204125847859.html.

The lack of consistency ('coherence') in the AU's reactions to military coups could, to some extent, be explained by the lack of determinacy of the concept. Specifically, it remains debatable whether all such military overthrows necessarily qualify as an unconstitutional change of government, or whether there are 'good coups' that do not fall within this category. For example, could a military coup qualify as good where it enjoys extensive popular support,⁸¹ especially in situations where the incumbent government has forfeited its legitimacy of exercise of governmental power by engaging in wide-spread and systematic human rights abuses? In such an instance, a military coup could be perceived as the only means possible to pave the way for elections and the transfer of power to a new, democratically legitimated government.⁸²

In line with this reasoning, the broad popular support that the coup perpetrators in Egypt enjoyed at the time of the coup in 2013 may be one explanation as to why the AU allowed Sisi to stand for elections in 2014 and thereafter lifted the suspension of the country.⁸³ Similarly, it is a likely explanation for why the AU did not even refer to the ousting of President Mugabe as a coup (thereby not placing itself in a situation in which it had to find a way around suspension),⁸⁴ Also in the case of Sudan, the initial leniency towards the coup perpetrators may have been influenced by the demand by thousands of civilians for his removal from office.⁸⁵ However, there was little support within the population for an extended military government and the situation reached a tipping point within the AU with the military crack-down on civilian protesters in June 2019.⁸⁶

Any lack of conceptual determinacy is also likely to be aggravated when powerful external actors seem to adhere to a different definition of 'unconstitutional change of government'. In the case of Egypt, the United States, as well as the EU and Western leaders, expressed concern about the situation and the need to strengthen democracy, but refrained from referring to it as a coup.⁸⁷ In so doing, they gave the distinct

⁸¹ Obse and Pippan, 'Collectively Protecting Constitutionalism and Democratic Governance in Africa: A Tale of High Hopes and Low Expectations?', 4 *Cambridge Journal of International and Comparative Law* (2015) 344, at 363.

⁸² Gopaldas 'Good Coup, Bad Coup?', *Institute for Security Studies* (17 November 2019), available at <https://issafrica.org/iss-today/good-coup-bad-coup>. See also van der Wilt, 'Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court', 30 *Leiden Journal of International Law* (2017) 979. Van der Wilt notes that the prohibition of an unconstitutional change of governments is based on the assumption that there are alternative democratic means for bringing about governmental change. However, where no such means would exist, the prohibition would not apply.

⁸³ In April 2014, the AUPSC formally acknowledged that factors such as mismanagement, systematic violations of human rights and manipulation of the constitution can result in popular uprisings. However, it simultaneously underscored that the people had to express its will against oppressive regimes peacefully and condemned any attempt to seize power by force. See AUPSC, Press Statement of the 432nd Meeting, PSC/PR/BR.(CDXXXII), Addis Ababa, 29 April 2014.

⁸⁴ See also Gopaldas, *supra* note 82.

⁸⁵ Bremmer, *supra* note 67.

⁸⁶ *Ibid.*

⁸⁷ See 'World Reaction to the Ousting of Egypt's Mohammed Morsi', *BBC News* (4 July 2013), available at www.bbc.com/news/world-middle-east-23175379; see also Obse and Pippan, *supra* note 79, at 364–365.

impression that they did not regard it as such. Given the military, logistical and economic importance of the United States and Western European countries for the AU, among others, in matters such as peace-keeping and fighting Islamic extremism on the continent, their reluctance to label the military overthrow as a coup was likely to have contributed to the AU's accommodation of the Sisi government.⁸⁸

Furthermore, there may at times also be differences amongst AU member states or between the AU and regional organizations as to whether suspension of coup perpetrators and/or other sanctions are required under the circumstances. The AU's responses to the coups in Mali and Burkina Faso were significantly influenced by the Economic Community of West African States (ECOWAS), which supported the accommodation of the coup perpetrators in the Malian transitional government and also opposed sanctions against Burkina Faso.⁸⁹ In the case of Sudan, Egyptian President Sisi supported the military junta and played a significant role in delaying AU suspension.⁹⁰ In other words, even if there were agreement within the AU that an unconstitutional change of government has taken place, the obligation to suspend the perpetrators may be outweighed by economic or security interests, and/or geopolitical power relationships that may involve other regional or external actors.⁹¹ This in turn contributes to the weakening of the normative hierarchy of the obligation to sanction perpetrators of military coups within the AU legal framework, as well as to its 'adherence legitimacy'.

B Governmental Overthrows by Rebel Groups

Since its inception, the AU has been confronted with governmental overthrows by rebel groups in the Central African Republic (CAR) in 2003 and again in 2013, as well as in Libya in 2011. In the case of the CAR, the rebel leader François Bozize ousted the then President Ange-Felix Patassé in March 2003. At the time, the AU Executive Council did recommend to the AU Assembly of Heads of State and Government to suspend the CAR from participating in AU Activities, but the Assembly refrained from doing so.⁹² Bozize also subsequently participated in and won the presidential elections

⁸⁸ See also Obse and Pippan, *supra* note 81) 363.

⁸⁹ Butty, 'ECOWAS Seeks Broad-Based Malian Interim Government', *Reliefweb* (6 July 2012), available at <https://reliefweb.int/report/mali/ecowas-seeks-broad-based-malian-interim-government>; Obse and Pippan, *supra* note 81, at 365.

⁹⁰ The Sudanese military regime also received financial backing from Arab countries in the Gulf region, notably Saudi Arabia and the United Arab Emirates. See Fabricius, 'What Is Driving Egypt's More Assertive Role in Africa?', *Institute for Security Studies* (21 June 2019), available at <https://issafrica.org/iss-today/what-is-driving-egypts-more-assertive-role-in-africa>; Hursh, 'After Sudan's Attack on Protestors, Crucial Next Steps for the U.S.', *Just Security* (28 June 2019), available at www.justsecurity.org/64733/after-sudans-attacks-on-protesters-crucial-next-steps-for-the-u-s/; Tisdall, 'Sudan: How Arab Autocrats Conspired to Thwart Reformists' Hopes', *Guardian* (3 June 2019), available at www.theguardian.com/world/2019/jun/03/sudanese-crackdown-comes-after-talks-with-egypt-and-saudis.

⁹¹ See Institute for Security Studies, 'The Way the PSC Dealt with the Recent Crisis in Burkina Faso Once Again Put the AU's Notion of Subsidiarity of Sub-Regional Bodies to the Test', *PSC Report* (2 November 2015), available at <https://issafrica.org/pscreport/psc-insights/burkina-faso-a-test-for-the-aus-impact-on-crises>.

⁹² African Union (Executive Council), 3rd Ordinary Session – Decision on the Situation in the Central African Republic (CAR), EX/CL/Dec.42(III)g, Maputo, 4–8 July 2003, para. 3. At the time, the AU Peace and Security Protocol was not yet in force and the AU Peace and Security Council did not yet exist. See

in 2005.⁹³ The AU's response was, however, more forceful when President Bozize was in turn overthrown by Seleka rebels in 2013. The AU suspended the rebel government from participating in its activities, and imposed targeted sanctions on the rebel leaders.⁹⁴ The CAR remained suspended from all AU activities until the presidential elections of March 2016, when Faustin-Archange Touadéra was elected President.⁹⁵

In the case of Libya, the AU was confronted with the replacement of a recognized government by rebel groups, after the popular revolt against the Gaddafi regime had culminated in United Nations Security Council (UNSC) Resolution 1973 of 17 March 2011 and a North Atlantic Treaty Organization (NATO) military intervention. The AU subsequently did recognize the National Transitional Council of Libya (NTC) as the legitimate government of Libya. In a statement on 20 October 2011, the AU – while underscoring the uniqueness of the situation in Libya and the exceptional circumstances surrounding it – authorized the NTC to occupy the seat of Libya in the AU and its organs.⁹⁶

Subsequent to its recognition, the NTC announced the formation of an interim government headed by Prime Minister El-Keib on 22 November 2011.⁹⁷ Following elections on 7 June 2012, with a 62 per cent turnout, the NTC handed over its functions to the democratically elected General National Congress on 8 August 2012, after which the NTC was dissolved.⁹⁸ Unfortunately, the hold of the elected government over the capital and large parts of the country rapidly deteriorated. In 2014, the General National Congress was replaced by a new Parliament, following elections in June 2014, which elected Mr Abdullah al-Thinni as Prime Minister in September of that year.⁹⁹ However, this government's hold on power was also short-lived and on 17 December 2015 it was replaced by a nine-member Presidency Council of the Government of National Accord, which was the product of a negotiated settlement spearheaded by the United Nations.¹⁰⁰

also Magliveras, 'The Sanctioning System of the African Union: Part Success, Part Failure' (2011, unpublished manuscript, on file with author), at 16. For a similar recommendation, see Organisation of African Unity (Central Organ) [which still existed at the time], Communiqué of the 90th Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, Central Organ/MEC/AMB/Comm.(XC), Addis Ababa, 17 March 2003, para. 4.

⁹³ 'Central African Republic Profile – Timeline', *BBC News* (1 August 2018), available at www.bbc.com/news/world-africa-13150044.

⁹⁴ See AUPSC, Communiqué of the 363rd meeting, PSC/PR/COMM.(CCCLXIII), Addis Ababa, 25 March 2013, paras. 6ff.; UNSC Res. 2149, 10 April 2014, para. 1.

⁹⁵ AUPSC, Press Statement of the 586th Meeting, PSC/PR/BR.(DLXXXVI), Addis Ababa, 31 March 2016, paras 3, 6.

⁹⁶ AUPSC, Communiqué of the 297th Meeting, PSC/PR/COMM/2.(CCXCVII), Addis Ababa, 20 October 2011, para. 4.

⁹⁷ UNSC, 'Report of the Secretary-General on the United Nations Support Mission in Libya', UN Doc S/2012/129, 1 March 2012, para. 5.

⁹⁸ UNSC, Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc S/2012/675, 30 August 2012, paras 2, 3, 9.

⁹⁹ UNSC, 'Report of the Secretary-General on the United Nations Support Mission in Libya', UN Doc S/2015/144, 26 February 2015, para. 7.

¹⁰⁰ The Libyan Political Agreement of 17 December 2015 in Skhirat, Morocco was endorsed in UNSC Res. 2259, 23 December 2015, paras 1, 2. In para. 3 it also expressed political support for the Government of National Accord as the sole legitimate government of Libya.

The ‘uniqueness of the situation’ and ‘exceptional circumstances’ in Libya related to the fact that the overthrow of the Gaddafi regime was interlinked with UNSC Resolution 1973 (2011).¹⁰¹ This resolution authorized the use of force ‘to protect civilians and civilian populated areas under threat of attack’, resulting in an extensive aerial campaign by France, the United Kingdom and the United States, which facilitated the Gaddafi regime’s overthrow by the rebel groups. The extent to which regime change was actually foreseen by resolution 1973 (2011) was highly contested within the AU.¹⁰² Nonetheless, it is arguable that violent governmental overthrows that result from a UNSC authorization under Chapter VII of the UN Charter would not qualify as an unconstitutional change of government in terms of the Lomé Declaration. First, it is unlikely that the drafters of the Lomé Declaration even contemplated such situations when carving out the benchmarks of an unconstitutional change of government. It is therefore unlikely that they intended the concept to encompass UNSC endorsed governmental overthrows by armed (rebel) groups. Second, any obligation for AU member states stemming from the Lomé Declaration (or any other treaty) would be overridden by any conflicting UNSC obligation in terms of Article 103 of the UN Charter.¹⁰³ Therefore, to the extent that regime change was foreseen by Resolution 1973 (2011), the AU member states could invoke this resolution for not classifying the rebel overthrow as an unconstitutional change of government and recognizing the NTC.

The unfolding of events in Libya in 2011 illustrates that unconstitutional change of government in the form of rebel overthrows suffers from a lack of determinacy. As in the case of military coups, not all rebellious overthrows would necessarily qualify as such, although there does not seem to be any clear criterion for distinguishing between permissible and impermissible overthrows. For example, as Article 23 of the African Democracy Charter specifically aims at protecting democratically elected governments, it is not clear whether rebellious overthrows of a government that was never legitimated through free and fair elections (as was the case in Libya) would amount to an unconstitutional change of government.

Moreover, the lack of determinacy was once again aggravated by the involvement of powerful external actors which supported an interpretation of UNSC Resolution 1973 (2011), which authorized regime change through the use of force. This is illustrated by the fact that the NTC was already recognized as the legitimate governing authority by 32 countries (including the United Kingdom, the United States and

¹⁰¹ UNSC Res. 1973, 17 March 2011, para. 4.

¹⁰² See South Africa’s criticism of NATO’s interpretation of its mandate in Ulfstein and Christiansen, ‘The Legality of the NATO Bombing in Libya’, 62 *International and Comparative Law Quarterly* (2013) 159, at 167; see also Obse and Pippan, *supra* note 81, at 363.

¹⁰³ See Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 UNTS 16, Art. 103 (determining that ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail’).

members of the Arab League) on 15 July 2011.¹⁰⁴ The United Nations for its part accepted the credentials of the NTC on 16 September 2011,¹⁰⁵ which is an indicator that the international community at large had by then accepted the NTC as Libya's governing authority. Therefore, by the time the AU recognized the rebel government, it was already a *fait accompli*.¹⁰⁶

It is noteworthy that the only rebel overthrow classified by the AU as an unconstitutional change of government (and sanctioned accordingly) was the one in the CAR in 2013, which was in the aftermath of Libya. At the time that the 2003 overthrow in the CAR took place, the AU was only two years old and its organs still in a fledgling stage. Also, Mr Bozize's participation in the 2005 elections could be explained by the fact that the 2010 decision of the AU Assembly of Heads of State and Government was not yet in place.¹⁰⁷ Interestingly, the 2013 suspension (and 2016 lifting of the suspension) by the AUPSC occurred at a time when the AU Peace and Security Protocol had not yet entered into force for the CAR.¹⁰⁸ One can therefore question whether the AUPSC had any competencies vis-à-vis the CAR at the time. From the perspective of legal certainty, any decision concerning (the lifting of) the suspension under these circumstances should rather have been taken by the AU Assembly of Heads of State and Government. On the whole, however, the legitimacy of this manifestation of unconstitutional change of government in accordance with the Lomé Declaration remains underdeveloped in terms of determinacy, coherence and adherence.

C Rejection of Election Results by Incumbent Leaders

The AU has also sanctioned incumbent leaders who refused to relinquish power after electoral defeat. In the Comoros, Côte d'Ivoire and The Gambia, these ranged from targeted sanctions of the recalcitrant incumbents to their suspension and de-recognition, as well as military intervention. The first sanctioning of an incumbent who refused to concede electoral loss occurred in the Comoros in 2007, when Abdallah Sambi won

¹⁰⁴ See the joint statement on behalf of the United States, Britain and France by Barack Obama, David Cameron and Nicolas Sarkozy, 'Libya's Pathway to Peace', *New York Times* (14 April 2011), available at <https://nyti.ms/3sRnklz>. For an overview of the different opinions of states, see Ulfstein and Christiansen, *supra* note 102, at 165 ff. See Libya Contact Group (LCG), Fourth Meeting of the Libya Contact Group Chair's Statement, Istanbul, 15 July 2011, para. 4, available at www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa. But see Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', 12 *Chinese Journal of International Law* (2013) 219, at 233. He argued that this recognition of the NTC was premature due to insufficient effective control by the NTC at the time. The recognition constituted an illegal interference in the affairs of another state.

¹⁰⁵ UNGA Res. 66/1, 16 September 2011.

¹⁰⁶ See also Bamidele and Ayodele, *supra* note 15, at 144, who note that the involvement of western states and the Arab League marginalized the AU.

¹⁰⁷ See AU, Decision on Unconstitutional Changes, *supra* note 37, para. 6(i)(b)a. Similarly, the African Charter on Democracy, *supra* note 19, was not yet in force.

¹⁰⁸ This occurred only on 24 June 2016, see African Union, List of Countries which have signed, ratified/acceded to the Protocol relating to the Establishment of the Peace and Security Council of the African Union, Addis Ababa, 15 December 2017.

the presidential election. However, Mohammed Bacar, who had since 2001 ruled the island of Anjouan, refused to relinquish power. Subsequent to organizing an illegal election of which he declared himself the winner, Bacar announced the independence of Anjouan from the Union of the Comoros.¹⁰⁹ The AU responded by adopting a range of targeted sanctions against the Anjouanese leaders.¹¹⁰

In Côte d'Ivoire in 2010, the AU resorted to suspension and de-recognition of the incumbent President Laurent Gbagbo, after he refused to accept electoral defeat at the hands of Alassane Ouattara. Mr Ouattara won the UN-monitored presidential elections on 28 November 2010. When the incumbent President Gbagbo nonetheless refused to leave office, the AU recognized Mr Ouattara as the President-elect and suspended Côte d'Ivoire from AU activities in December 2010.¹¹¹

In The Gambia, the country's Independent Electoral Commission on 2 December 2016 declared Mr Adama Barrow the winner of the elections held on the previous day. This result was rather ironic, as there were concerns about the extent to which free and fair elections would be possible, in light of the incumbent President's control over the media and the intimidation of voters.¹¹² The somewhat unexpected results were nonetheless initially accepted by outgoing President Jammeh. However, a week later, he withdrew his recognition after the Independent Electoral Commission had announced corrections to the initial results, although also indicating that these had no effect on the outcome.¹¹³

Subsequently, on 13 December 2016, the Independent Electoral Commission was taken over by the Gambian armed forces, and on 18 January 2017 the Parliament (in which Mr Jammeh still had a majority) extended his term for three months beyond its formal mandate. This ostensibly was meant to give the country's Constitutional Court the opportunity to decide on the consequences of the irregularities in the electoral process.¹¹⁴ However, domestic contestation of the constitutionality of the Gambian election results did not prevent the AU from recognizing Mr Barrow as the head of state.

¹⁰⁹ Williams, 'The African Union's Peace Operations: A Comparative Analysis', in F. Söderbaum and R. Tavares (eds), *Regional Organizations in African Security* (2011) 38.

¹¹⁰ AUPSC, Communiqué of the 95th Meeting, PSC/PR/Comm(XCV), Addis Ababa, 10 October 2007, paras 5ff.

¹¹¹ AUPSC, Communiqué of the 252nd Meeting, PSC/PR/COMM.1 (CCLII), Addis Ababa, 9 December 2010, paras 3, 4.

¹¹² As a consequence, ECOWAS was unwilling to participate in election monitoring, while EU election observers were not allowed to enter the country. The impartial election monitoring was conducted only by a small AU contingent. See African News Agency, 'ECOWAS to Boycott Gambia's Presidential Elections', *The Citizen* (30 November 2016), available at <https://citizen.co.za/news/news-africa/1361893/ecowas-to-boycott-gambias-presidential-elections/>. See also Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', *Max Planck Trialogues on the Law of Peace and War* (unpublished manuscript of April 2019, on file with author) 53.

¹¹³ ECOWAS, Final Communiqué, 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government', Abuja, 17 December 2016, para. 34.

¹¹⁴ Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017', 4 *Journal on the Use of Force and International Law* (2017) 239, at 240.

On 13 January 2017, the AU underscored its support for the outcome of the presidential elections and declared that as of 19 January 2017, outgoing President Yahya Jammeh would cease to be recognized by it as The Gambia's legitimate President.¹¹⁵ On 19 January 2016, Mr Adama Barrow was sworn in as President in the Gambian embassy in Senegal.¹¹⁶

In all three of the above instances, the enforcement of the election results involved some form of military intervention, although on a very different scale. In the case of the Comoros, the 2008 intervention of the island of Anjouan did not include any formal involvement of sub-regional organizations or the United Nations. Instead, the intervention, which was requested by the recognized Comorian government, was spearheaded by Tanzania and Sudan and received logistical support from Libya and France.¹¹⁷ It facilitated an interim leader for the island and a rerun of its presidential elections.¹¹⁸ From a military perspective, the operation was an easy target, as the island of Anjouan was small and weak. Politically, the operation was controversial within the region, due to the involvement of Sudan in a military operation apparently directed at restoring democracy.¹¹⁹ Even so, there was sufficient consensus within the AU that the unconstitutional change of government in the form of a refusal to relinquish power to the winning party after free, fair and regular elections could not be condoned.¹²⁰

In the case of Côte d'Ivoire and The Gambia, there was extensive formal involvement in the decision-making processes leading to the military interventions by both ECOWAS and the United Nations. In Côte d'Ivoire, ECOWAS already de-recognized Mr Gbagbo in favour of the newly elected President Ouattara a few days before the AU.¹²¹ The UNSC for its part recognized President Ouattara under Chapter VII of the UN Charter shortly after the AU.¹²² As far as The Gambia is concerned, ECOWAS once again indicated its intention to recognize Mr Barrow before the AU. Already on 17 December 2016, the ECOWAS Heads of State and Government had adopted a Communiqué in which they decided to uphold the results of the elections of 1 December 2016.¹²³

¹¹⁵ AUPSC, Communiqué, 647th Meeting, PSC/PR/COMM.(DCXLVII), Addis Ababa, 13 January 2017, paras 3, 5.

¹¹⁶ 'Inaugural Address of Adama Barrow, President of the Republic of The Gambia', *The Fatu Network* (20 January 2017), available at <http://fatunetwork.net/inaugural-address-adama-barrow-president-republic-gambia/>.

¹¹⁷ AU, Report of the Chairperson of the Commission on the Situation in the Comoros Since the 10th Ordinary Session of the Assembly of the African Union held in Addis Ababa from 31 January to 2 February 2008, PSC/PR/2 (CXXIV), Addis Ababa, 30 April 2008, paras 13, 15–21; AUPSC, Communiqué of the 124th Meeting, PSC/PR/Comm(CXXIV), Addis Ababa, 30 April 2008, paras 3, 17.

¹¹⁸ AUPSC, Communiqué of the 124th Meeting, *supra* note 115, para. 4; Williams, *supra* note 109.

¹¹⁹ Williams, *supra* note 109, at 39.

¹²⁰ The Lomé Declaration, *supra* note 22, also suggested procedures for suspension of 'unconstitutional governments' from participation in OAU organs, combined with economic sanctions.

¹²¹ ECOWAS, Final Communiqué of the Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire, ECW/CEG/ABJ/EXT/FR./Rev.2, Abuja, 7 December 2010, paras 7ff.

¹²² UNSC Res. 1962, 20 December 2010, para 1.

¹²³ During this period, ECOWAS undertook various high-level delegations to The Gambia aimed at ensuring a peaceful transfer of power to President-elect Barrow. ECOWAS, Final Communiqué, 50th Ordinary Session, *supra* note 111, paras 36, 38(a), 38(h).

The UNSC recognized Mr Barrow as President on 19 January 2017 (a few hours after he had been sworn in), which was also the date chosen by the AU.¹²⁴

The chronological order of these decisions reflects that there was close cooperation between the AU, ECOWAS and the UNSC. In fact, had it not been for the high level of consensus amongst and within these organizations that the incumbent presidents were no longer tenable, it would not have been possible to mobilize the military support necessary to enforce the election results. In the case of Côte d'Ivoire, violence escalated in the months after the elections as President Gbagbo refused to step down and remained unresponsive to mediation talks by the AU.¹²⁵ This led to the adoption of UNSC Resolution 1975 of 30 March 2011, which expanded the mandates of the United Nations Operation in Côte d'Ivoire (UNOCI) and of the supporting French forces which had already been based in the country for some time. Specifically, the resolution authorized the use of all necessary means to protect civilians under imminent threat of physical violence under Chapter VII of the UN Charter.¹²⁶ Subsequently, UNOCI and French forces struck Gbagbo's compound which facilitated his capture by the forces of President Ouattara in April 2011.¹²⁷ This coordinated effort enabled Mr Ouattara to take control of the state institutions, after which he was sworn in as President in May 2011.¹²⁸

In the case of The Gambia, President Barrow was recognized while outside the country and was reliant on the political and military support of key regional and international actors for the purpose of taking control of the state institutions. In his inaugural address from the Gambian Embassy in Senegal on 19 January 2017, President Barrow made a special appeal to ECOWAS, the AU and in particular the UNSC to 'support the government and peoples of The Gambia in enforcing their will, restore their sovereignty and constitutional legitimacy'.¹²⁹ The UNSC responded by recognizing Mr Barrow as President a few hours after having been sworn in and expressed support for ECOWAS in its 'commitment to ensure, by political means first, the respect of the will of the people of The Gambia'.¹³⁰ On the one hand, this resolution was not adopted under Chapter VII of the United Nations Charter. The legal basis for the ECOWAS military troops that subsequently entered The Gambia therefore rather seemed to be the military support expressed by President Barrow in his inaugural speech.¹³¹ On the

¹²⁴ See UNSC Res. 2337, 19 January 2017, paras 1, 5.

¹²⁵ UNSC Res. 1975, 30 March 2011, Preamble; Göbel and Casagrande, 'Violence in Ivory Coast Spirals as Mediation Talks Fail', *Deutsche Welle* (10 March 2011), available at www.dw.com/en/violence-in-ivory-coast-spirals-as-mediation-talks-fail/a-14898958.

¹²⁶ UNSC Res. 1975, *supra* note 125, paras 6, 7.

¹²⁷ See Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire', 37 *South African Yearbook of International Law* (2012) 22, 41ff.

¹²⁸ 'Ivory Coast: Alassane Ouattara Sworn in as President', *BBC News* (6 May 2011), available at www.bbc.com/news/world-africa-13306858.

¹²⁹ 'Inaugural Address of Adama Barrow, President of the Republic of The Gambia', *supra* note 116. See also Maclean, 'Troops Enter The Gambia after Adama Barrow Is Inaugurated in Senegal', *Guardian* (19 January 2017), available at www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal.

¹³⁰ UNSC Res. 2337, *supra* note 124, para. 8.

¹³¹ Kreß and Nußberger, *supra* note 114, at 243; Christine Gray, *International Law and the Use of Force* (4th edn, 2018), at 67.

other hand, the UNSC resolution does confirm a strong political consensus amongst key regional and international actors about the need for Mr Jammeh to relinquish power, if need be with the use of force.

This consensus was not affected by the fact that incumbent President Jammeh was contesting the validity of the elections before the country's Constitutional Court, or by the question of whether the inaugural ceremony at the Gambian embassy in Senegal was in accordance with the Gambian Constitution.¹³² A day after the ECOWAS troops had entered The Gambia on 19 January 2017, the military operations were halted in order to attempt final mediation efforts by regional leaders. On 21 January 2017, Mr Jammeh conceded defeat and left The Gambia, allowing a peaceful transfer of power to President Barrow.¹³³

From the perspective of legitimacy, the above analysis suggests that an unconstitutional change of government in the form of a 'refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections'¹³⁴ possesses determinacy, coherence and adherence. In the instances where the AU has been confronted with such conduct, it has applied its regulatory framework quite consistently in order to enforce the election results. That being said, there had only been three such instances, two of which were relatively easy military targets due to their small size and geographic location.¹³⁵ Moreover, the criterion in question is of a very narrow nature and is only triggered once it has been established that incumbents have actually lost free and fair elections. It does not (yet) apply to situations where incumbent governments undermine the electoral process through conduct such as vote tampering, coercion and/or intimidation.¹³⁶

A very illustrative example in this regard is Zimbabwe, where, throughout President Mugabe's long reign, the AU not once sanctioned electoral irregularities, such as the large-scale violence and intimidation in 2002.¹³⁷ This reluctance also continued subsequent to the coup-induced regime change in 2017. The subsequent presidential elections held on 30 July 2018 were marred by claims of fraud and intimidation of voters by the opposition and EU election observers.¹³⁸ Yet, the election results declaring Mr

¹³² See also Kreß and Nußberger, *supra* note 114, 240, 248.

¹³³ 'Krise entschärft: Ex-Präsident Jammeh hat Gambia verlassen', *Frankfurter Allgemeine Zeitung* (21 January 2017), available at www.faz.net/aktuell/politik/ausland/krise-entschaerft-ex-praesident-jammeh-hat-gambia-verlassen-14720114.html; Maclean, *supra* note 129.

¹³⁴ Lomé Declaration, *supra* note 22.

¹³⁵ The Comoros consisting of small islands, The Gambia being effectively surrounded by Senegal.

¹³⁶ See also Wiebusch and Murray, *supra* note 28, at 145.

¹³⁷ A similar reluctance was present within the Southern African Development Community (SADC). See Parliamentary Forum Election Observation Mission, Zimbabwe Presidential Elections 9–10 March 2002 Statement (13 March 2002), available at http://archive.kubatana.net/docs/demgg/crisis_cwealth_apr_030410_appdx.pdf. However, at the time, Zimbabwe had been suspended by the Commonwealth. See 'Zimbabwe is Suspended From the Councils of the Commonwealth', *The Commonwealth* (2002), available at <http://thecommonwealth.org/history-of-the-commonwealth/zimbabwe-suspended-councils-commonwealth>.

¹³⁸ Mohamed, 'Zimbabwe Election: Emmerson Mnangagwa Declared Winner', *Al Jazeera* (3 August 2018), available at www.aljazeera.com/news/2018/08/zimbabwe-election-emmerson-mnangagwa-declared-winner-180802214534796.html.

Emmerson Mnangagwa as winner were endorsed by the AU.¹³⁹ It has since also called on western countries to lift economic sanctions which had been in place against the Zimbabwean government since the Mugabe regime.¹⁴⁰

Other prominent examples of unfree and unfair elections that went unsanctioned include Egypt in 2019 where incumbent President Sisi won 97 per cent of the vote, after security forces had detained political opponents.¹⁴¹ In Rwanda in 2015 opposition members were arrested, while also the elections in Burundi were marked by large-scale violence intimidation.¹⁴² Bribery and intimidation of various stake-holders were also recorded in Equatorial Guinea in 2011, Nigeria in 2005 and Gabon in 2003, to name but a few examples dating back to the earlier years of the AU.¹⁴³

Finally, it is worth noting that the AU political organs are also yet to invoke this criterion in relation to incumbent governments that win elections by formally remaining within the national rules applicable to elections, but without any substantive adherence thereto. This would typically include the adoption of laws that severely circumscribe the freedom of expression, the pool of candidates allowed to participate in the elections and/or the composition of electoral oversight bodies.¹⁴⁴ For example, in the Republic of Congo, in 2015, political protests as well as electronic communication were restricted.¹⁴⁵

The African Court on Human and Peoples' Rights (the African Court)¹⁴⁶ has on occasion declared such conduct to be in violation of human rights standards. However, its opportunity to do so remain very limited, despite its broad substantive jurisdiction that allows it to interpret and apply the African Charter of Human and Peoples Rights of 1 June 1981¹⁴⁷ and 'any other relevant Human Rights instrument ratified

¹³⁹ Andersen, 'SADC and AU endorse Zimbabwe Election as Military Battles Protesters', *The South African* (1 August 2018), available at www.thesouthafrican.com/news/sadc-au-endorse-zimbabwe-election/.

¹⁴⁰ Faki Mahamat, Chairperson of the Commission of the AU, Press Release, 'The Chairperson of the African Union Commission calls for the lifting of economic sanctions imposed on Zimbabwe' (25 October 2019) <https://au.int/en/pressreleases/20191025/chairperson-calls-lifting-economic-sanctions-imposed-zimbabwe>.

¹⁴¹ Freedom in the World 2019 Report: Democracy in Retreat, *Freedom House* (2019), available at <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat>.

¹⁴² Wiebusch and Murray, *supra* note 28, at 145. See also Hatcher, 'Burundi's President Pierre Nkurunziza Wins Third Term in Disputed Election', *Guardian* (24 July 2015), available at www.theguardian.com/world/2015/jul/24/burundi-pierre-nkurunziza-wins-third-term-disputed-election.

¹⁴³ Wiebusch and Murray, *supra* note 28, at 145. According to Freedom House, the number of 'free' countries in Africa persistently remains at or below 10 (out of a total of 55). Freedom in the World Map 2019, *Freedom House*, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2019/map> (last visited 1 August 2020).

¹⁴⁴ See also Tull and Simons, 'The Institutionalization of Power Revisited: Presidential Term Limits in Africa', 52 *Africa Spectrum* (2017) 79, at 88, 94; Wiebusch and Murray, *supra* note 28, at 145.

¹⁴⁵ Wiebusch and Murray, *supra* note 28, at 145.

¹⁴⁶ The African Court was established through the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Doc. OAU/LEG/EXP/AFCHPR/PROT (III), 10 June 1998, in force 25 January 2004, available at <http://hrlibrary.umn.edu/africa/courtprotocol2004.html> (hereinafter 'Protocol to the African Charter').

¹⁴⁷ African Charter on Human and Peoples Rights, 27 June 1981, in force 21 October 1986, 21 ILM 58 (1982).

by the States concerned'.¹⁴⁸ One such 'other instrument' is the African Democracy Charter.¹⁴⁹ Thus far, only 10 of the African Court's 30 member states have at some point chosen to make the special declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('Protocol to the African Charter'), which allows individuals and non-governmental organizations (NGOs) to submit cases to the African Court.¹⁵⁰ While the African Commission on Human and Peoples' Rights and the members states can also submit cases to the African Court, they have thus far not been keen to do so.¹⁵¹ The extent to which the African Court can deal with human rights violations (including those pertaining to free and fair elections) therefore depends on whether individuals and/or NGOs can submit cases to it.¹⁵²

Two countries which have initially made a special declaration in accordance with Article 34(6) of the Protocol to the African Charter are Tanzania and Côte d'Ivoire. Both were subsequently faced with cases that had bearing on the right to free and fair elections. The case against Tanzania turned on a provision in the country's constitution that banned independent candidates from participating in elections at all levels. According to the African Court, this clause violated amongst others the right to political participation enshrined in Article 13 African Charter on Human and Peoples' Rights.¹⁵³ In relation to Côte d'Ivoire, the African Court determined that the composition of the country's electoral commission *inter alia* violated Article 17 of the African Democracy Charter, which provides for independent and impartial election management.¹⁵⁴ The African Court determined that the large-scale outnumbering of the opposition groups on the electoral commission by the representatives of the President and the government undermined the body's independence and impartiality.¹⁵⁵

At first sight, these judicial decisions at the continental level seem to strengthen the determinacy of the notion of free and fair elections and contribute to adherence

¹⁴⁸ Protocol to the African Charter, *supra* note 146, at Art. 3(1).

¹⁴⁹ See Abebe, 'Taming Regressive Constitutional Amendments: The African Court as a Continental (Super) Constitutional Court', 17 *International Journal of Constitutional Law (IJCL)* (2019) 89, at 92ff.

¹⁵⁰ These included Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda, Tanzania, the Gambia and Tunisia. See De Silva and Plagis, 'A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court', *Opinio Juris* (19 May 2020), available at <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/>.

¹⁵¹ Protocol to the African Charter, *supra* note 146, Art. 5. The African Commission on Human and Peoples' Rights has thus far only referred three cases to the African Court, while member states have not yet submitted cases to it. See Davi, 'Another one Bites the Dust: Côte d'Ivoire to End Individual and NGO Access to the African Court', *EJIL:Talk!* (19 May 2020), available at www.ejiltalk.org/another-one-bites-the-dust-cote-divoire-to-end-individual-and-ngo-access-to-the-african-court/.

¹⁵² Davi, *supra* note 151.

¹⁵³ African Court on Human and Peoples' Rights, *Christopher R. Mtkila and Others v. Republic of Tanzania*, App. Nos 009/2011 and 011/2011, Judgment, 14 June 2013, para. 111, available at <https://bit.ly/3bhKbBH>; see also Abebe, *supra* note 149, at 106.

¹⁵⁴ African Court on Human and Peoples' Rights, *Action pour la Protection des Droits de l'Homme (APDH) v. The Republic of Côte d'Ivoire*, App. No. 001/2014, Judgment, 18 November 2016, available at <https://bit.ly/3e5jJzr>.

¹⁵⁵ *Ibid.*, para. 153; Abebe, *supra* note 149, at 107–108.

thereto within the respective member states.¹⁵⁶ However, Tanzania and Côte d'Ivoire withdrew their special declarations allowing for individual access to the African Court in November 2019 and April 2020, respectively.¹⁵⁷ While the exact reasons for doing so remain debatable, the withdrawal does reveal a general reluctance to accept judicial constraints over executive power.¹⁵⁸ This in turn implies a reluctance also to accept a role for the African Court in strengthening the determinacy of and adherence to democratic governance.

D *Manipulation of Presidential Term Limits*

The final benchmark for unconstitutional government relates to a very specific manifestation of conduct that undermines the substance of democracy, while remaining within the formal limits of the law. It concerns Article 23(5) of the African Democracy Charter, which refers to '[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government'.¹⁵⁹ As already noted in Section 2 above, the vague wording was a result of differences amongst African states whether an amendment to the constitution in order to prolong the office of the incumbent President is indeed a matter with which the AU should concern itself.¹⁶⁰ The practice of the AU since the entering into force of the African Democracy Charter indicates that consensus amongst states in the region has not necessarily grown in this respect. There are recurring (successful) attempts by incumbent presidents to extend their term in office by either extending the length of term as such or the number of term limits applicable, or both.¹⁶¹ In so doing, these amendments tend to follow the formal procedural requirements for amending the constitution,¹⁶² while in substance they are aimed at preventing any democratic regime change.¹⁶³ However, the AU is yet to sanction any such conduct on the basis of Article 23(5) African Democracy Charter – whether by directly invoking it against a state party to the African Democracy Charter, or by interpreting Article 4(p) of the AU Constitutive Act in light of this article.¹⁶⁴

This can be exemplified by President Pierre Nkurunziza of Burundi who won re-election for a third term, despite a constitutional two-term limit. When seized with the matter in 2015, the Burundian Constitutional Court concluded that the President

¹⁵⁶ See also Abebe, *supra* note 149, at 109.

¹⁵⁷ As Rwanda and Benin have also withdrawn their declarations, only six countries currently allow for direct access to the African Court by individuals and NGOs. See De Silva and Plagis, *supra* note 150; Davi, *supra* note 151.

¹⁵⁸ See De Silva and Plagis, *supra* note 150.

¹⁵⁹ African Democracy Charter, *supra* note 19, Art. 23(5). See also Wiebusch and Murray, *supra* note 28, at 149–150.

¹⁶⁰ See also Kioko, *supra* note 29, at 46.

¹⁶¹ Wiebusch and Murray, *supra* note 28, at 140–141.

¹⁶² These can range from obtaining the required (qualified) majorities in parliament or referenda, to interpretations of loopholes that are subsequently endorsed by the courts. See Tull and Simons, *supra* note 144, at 85, 87–88; Wiebusch and Murray, *supra* note 28, at 144.

¹⁶³ Tull and Simons, *supra* note 144, at 94.

¹⁶⁴ *Ibid.*, at 95. See also Wiebusch and Murray, *supra* note 28, at 149–150.

could seek a third term. It was argued that the first term should not be taken into calculation, as he was elected by popular vote but appointed by Parliament.¹⁶⁵ This interpretation, which was allegedly induced through coercion,¹⁶⁶ contradicted the Arusha accords of 2000 on which the Burundian Constitution was based. In line with the Arusha agreement, President Nkurunziza's first term should have counted as the first of his two permissible terms.¹⁶⁷

The decision to run for a third term sparked political violence and a failed coup attempt in May 2015.¹⁶⁸ The run-up to the 2015 election was also marred by intimidation, and the elections were boycotted by several opposition parties.¹⁶⁹ The AU criticized the violence and climate of fear and called for a postponement of the presidential elections in order to facilitate dialogue between rivaling parties.¹⁷⁰ However, at no point did it denounce the fact that President Nkurunziza ran for a third term. The AU Peace and Security Council merely 'took note of the recent parliamentary and presidential elections', while calling for an inclusive dialogue that would lead to the formation of a government of national unity.¹⁷¹ Moreover, in May 2018, Burundians adopted a new constitution which extended the presidential term of office from five to seven years, while also allowing the incumbent president to be elected for another two terms thereafter.¹⁷²

While not all attempts at relaxing term limits have met with success, the Burundian example was no isolated incident and the resistance against term limits remains strong among AU member states.¹⁷³ Examples of other recent successful extensions of term limits include Egypt where constitutional amendments in 2019 extended President

¹⁶⁵ Wiebusch and Murray, *supra* note 28, at 141.

¹⁶⁶ The Vice-President of the Constitutional Court subsequently claimed that the judges had been pressured to come to this decision. See 'Burundi Court Backs President Nkurunziza on Third Term', *BBC News* (5 May 2015), www.bbc.com/news/world-africa-32588658. See also Alusala and Bedzigiu, 'The AU and the ICGLR in Burundi', 9 *Central African Report* (September 2016), at 2, available at <https://issafrica.s3.amazonaws.com/site/uploads/car9-1.pdf>.

¹⁶⁷ Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000, Protocol II, Chapter 1, Art. 7(3) (determining that '... No one may serve more than two presidential terms'), available at <https://bit.ly/3sJWZWm>. See also Wiebusch and Murray, *supra* note 28, at 141.

¹⁶⁸ See Bedzigiu and Alusala, *supra* note 166, at 2 ff.

¹⁶⁹ Hatcher, *supra* note 142.

¹⁷⁰ AUPSC, Communiqué of the 523rd Meeting, PSC/PR/COMM.(DXXIII), Addis Ababa, 9 July 2015, para. 5(a); AUPSC, Report of the Chairperson of the Commission on the Situation in Burundi, PSC/AHG/3(DXV), Johannesburg, 4 June 2015, paras 3ff.

¹⁷¹ AUPSC, Press Statement, PSC/BR/COMM.(DXXXI), Addis Ababa, 6 August 2015. See also Bedzigiu and Alusala, *supra* note 166, at 4.

¹⁷² Burke, 'Violence Ahead of Burundi Vote to Extend President's Term to 2034', *Guardian* (14 May 2018), available at www.theguardian.com/world/2018/may/14/burundi-to-vote-in-referendum-to-extend-presidents-term.

¹⁷³ According to Wiebusch and Murray, *supra* note 28, at 136ff., term limits of incumbent presidents were changed 47 times in 28 African countries between 2000 and 2018. In 24 of these instances in 18 countries, the time limits on incumbent presidents were relaxed. In the remaining 23 instances spread over 19 countries, term limits were tightened in one form or another. See also Tull and Simons, *supra* note 144, at 85.

Sisi's current term from four to six years, as well as allowing him to run for an additional (third) term.¹⁷⁴ Chad in 2018 extended the length of a term of office from five to six years. While it also introduced a two-term limitation to the presidency, this would be effective only as of the next presidential election.¹⁷⁵ In practice, this means that the current incumbent President Deby (who came into power through a rebellion in 1990) may be able to remain in power until 2033. In the case of the Republic of Congo and Rwanda in 2015, as well as Zimbabwe in 2013, incumbent presidents who had reached their term limits oversaw revisions of the constitution that facilitated fresh mandates that were not constrained by prior constitutional limits.¹⁷⁶ It is further noteworthy that in 2015 a sub-regional attempt (within ECOWAS) to ban constitutional amendments aimed at removing presidential term limits failed,¹⁷⁷ due to resistance among states in the region.¹⁷⁸

In essence, therefore, it is clear that unconstitutional change of government in the form of an 'amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government', lacks determinacy. Without any clarity of content, this benchmark for unconstitutional change of government is highly unlikely to trigger the AU regulatory framework aimed at sanctioning such conduct, nor to acquire any normative hierarchical position within such framework. It is therefore still entirely devoid of any political legitimacy in terms of determinacy, coherence or adherence.

4 Conclusion: An Assessment from a European Perspective

The foregoing analysis has revealed that within the African context, democratic governance is yet to evolve from a moral prescription to a requirement under international law. The AU legal framework currently formally recognizes five concretizations of unconstitutional change of government, which all concern conduct that undermines the outcomes of free and fair elections. Yet, all of these benchmarks to some extent suffer from a lack of determinacy due to conceptual disagreement within the AU, as

¹⁷⁴ Michaelson, 'Egypt Holds Snap Vote on Extending President's Term Limit', *Guardian* (19 April 2019), available at www.theguardian.com/world/2019/apr/19/egypt-holds-snap-vote-on-extending-presidents-term-limit.

¹⁷⁵ 'Chad's President Could Stay on Until 2033 Under Proposed Reforms', *Reuters* (28 March 2018), available at <https://www.reuters.com/article/us-chad-politics-idUSKBN1H41R1>.

¹⁷⁶ Wiebusch and Murray, *supra* note 28, at 140.

¹⁷⁷ During the last five years, the relaxation or removal of the presidential term limit occurred, inter alia, in Chad, the Comoros, Republic of Congo, Rwanda and Zimbabwe. See Wiebusch and Murray, *supra* note 28, at 133 ff.; Steyn Kotze, 'Africa Faces a New Threat to Democracy: The "Constitutional Coup"', *The Conversation* (8 February 2017), available at <https://theconversation.com/africa-faces-a-new-threat-to-democracy-the-constitutional-coup-72011>. See generally Fombad, 'Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects', 59 *Buffalo Law Review* (2011) 1007, at 1007ff.

¹⁷⁸ Wiebusch and Murray, *supra* note 28, at 132. See also Camara, 'Here's How African Leaders Stage "Constitutional Coups": They Tweak the Constitution to Stay in Power', *Washington Post*, 16 September 2016), available at <https://wapo.st/3kGH749>. See also Steyn Kotze, *supra* note 177.

well as political interference from internal, regional and external actors. Such lack of determinacy necessarily weakens the legitimacy of the respective benchmark in terms of coherence and adherence.

This also applies to the most well-established manifestation of an unconstitutional change of government, namely a military coup against a democratically elected government. Significant discretion remains as to whether a military coup has indeed taken place and, if so, whether it would necessarily be a 'bad' one that amounts to an unconstitutional change of government. Moreover, even though the toleration of military coups and other violent governmental overthrows has declined within the AU since its inception, this does not in and of itself imply a growing respect for democratic governance through free and fair elections on the continent. The manipulation of elections and presidential term limits by incumbent presidents and governments arguably poses as big a challenge to democratic governance on the continent as any potential overthrow by the military or other actors.

However, when one considers these developments from a European perspective, it transpires that not all of the challenges faced by the AU pertaining to democratic governance are unique to the continent. Both the CoE and the EU are currently confronted with members that formally go through the motions of regular elections while systematically dismantling the substantive elements of democracy.¹⁷⁹ In the wake of the breakup of the Soviet Union and the subsequent democratic elections held in central and eastern Europe, the membership of the CoE expanded to 47 states. While the CoE's Statute, which dates back to 1949, does not explicitly refer to democracy, it is considered as interlinked with the rule of law and human rights, which Article 3 of the CoE Statute requires all member states to uphold.¹⁸⁰ Democracy is further referred to in the preamble of the European Convention of Human Rights and Freedoms of 1950 (ECHR), which all states are expected to ratify when joining the CoE.¹⁸¹ The right to free and fair elections specifically is guaranteed in Article 3 of the First Protocol to the ECHR.¹⁸²

¹⁷⁹ Bugarcic, 'Central Europe's Descent Into Autocracy: A Constitutional Analysis of Authoritarian Populism', 17 *IJCL* (2019) 616.

¹⁸⁰ Statute of the Council of Europe, 5 May 1949, in force 3 August 1949, ETS No. 001, Art. 3, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001; Parliamentary Assembly, Recommendation 1247 (4 October 1994) para 3, available at <https://pace.coe.int/en/files/15281>. See also Klein, 'Membership and Observer Status', in S. Schmahl and M. Breuer (eds), *The Council of Europe: Its Law and Policies* (2017) 40, at 47–48.

¹⁸¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, amended by Protocols Nos. 11 and 14, 4 November 1950, ETS No. 5, available at www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005; PACE, Recommendation 1247, *supra* note 180. See also Klein, *supra* note 180, at 47–48.

¹⁸² Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9, available at www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/009. Over the years, the European Court of Human Rights (ECtHR) has significantly contributed to the determinacy of this article, inter alia, underscoring that it requires 'the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population'. See ECtHR, *United Communist Party of Turkey and Others*, Judgment, 30 January 1998, para. 44; ECtHR, *Refah Partisi v. Turkey*, Judgment, 13 February 2003, para. 100. See also Nieuwenhuis, 'The Conception of Pluralism in the Case-Law of the European Court of Human Rights', 3 *European Constitutional Law Review* (2007) 367, at 375ff.

Where a state has ‘seriously violated’ Article 3 of the CoE Statute, the possibility of sanctions is foreseen in Article 8. The Committee of Ministers (the executive body of the CoE) may suspend the respective state’s right of representation, as well as ask it to withdraw. It may also terminate the state’s membership in case of non-compliance.¹⁸³ In instances of a serious violation of Article 3 of the CoE Statute, a suspension of the right to representation restricted to the Parliamentary Assembly (the CoE’s deliberative body) can also be realized on the basis of the latter’s rules of procedure. The same applies to more limited sanctions that suspend certain rights of participation (e.g. voting rights) in activities of the Parliamentary Assembly.¹⁸⁴

In its early years, the CoE seemed committed to sanctioning serious violations of the democratic order within member states. This can be exemplified by the withdrawal of Greece in 1969 (in order to pre-empt suspension) following the military coup in the country.¹⁸⁵ It re-joined the CoE in November 1974, subsequent to the replacement of the military regime by a democratically elected government.¹⁸⁶ In the wake of the military coup in Turkey in 1980, the Parliamentary Assembly suspended its right of representation between May 1981 and January 1984, by which time a democratically elected government was again in place.¹⁸⁷ However, in recent years, the CoE has shown little willingness to sanction conduct that – while not amounting to a military coup – nonetheless severely undermines democratic legitimacy of origin and exercise of governmental power.

A poignant recent example was the decision in June 2019 to restore Russia’s voting rights in the Parliamentary Assembly, which were suspended in 2014 due to Russia’s annexation of the Crimea.¹⁸⁸ This restoration took place despite the fact that the Crimea remained annexed. In addition, free and fair elections within Russia were occurring only in name.¹⁸⁹ Other salient examples of democratic backsliding that remained

¹⁸³ Statute of the Council of Europe, *supra* note 180, Art. 8. See also Klein, *supra* note 180, at 68–69 (equating ‘serious violations’ with material breaches of treaty norms).

¹⁸⁴ Parliamentary Assembly, Res. 1209 – Rules of Procedure, 4 November 1999, as amended <http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp>; Klein, *supra* note 180, at 71–72.

¹⁸⁵ See, e.g., Council of Europe (Committee of Ministers), CM (69) PV 4, 12 December 1969, at 20.

¹⁸⁶ Klein, *supra* note 180, at 66.

¹⁸⁷ See Council of Europe (Parliamentary Assembly), Order No. 398, 14 May 1981. See also Leach, ‘The Parliamentary Assembly of the Council of Europe’, in Schmah and Breuer (eds), *supra* note 180, at 166, 192–193. Leach criticized the Committee of Ministers for remaining reluctant to suspend Turkey from the CoE. In July 2016, Turkey was again confronted with a (failed) coup attempt. See Barkey, ‘One Year Later, the Turkish Coup Attempt Remains Shrouded in Mystery’, *Washington Post* (14 July 2017), available at <https://wapo.st/3bXUuHM>.

¹⁸⁸ PACE, Res 2292 – ‘Challenge, on Substantive Grounds, of the Still Unratified Credentials of the Parliamentary Delegation of the Russian Federation’, 26 June 2019 <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28049&lang=en>. Russia’s voting rights in the Parliamentary Assembly were also briefly suspended in 2000 due to its conduct in Chechnya. See PACE, Recommendation 1456 – ‘Conflict in the Chechen Republic – Implementation by Russia of Recommendation 1444’, 6 April 2000, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16797>.

¹⁸⁹ Bogush ‘Voting in Russia: Please Don’t Call It Elections’, *Verfassungsblog* (25 September 2019), available at <https://verfassungsblog.de/voting-in-russia-please-dont-call-it-elections/>. In July 2020, President Putin called a national referendum regarding amendments which, inter alia, extended his Presidential term limit to 2036. The credibility of the overwhelmingly positive outcome was highly questionable. See

unsanctioned by the CoE include Hungary, Poland and Turkey. These member states were undergoing a systematic erosion of democratic legitimacy of origin and exercise, among others, through measures that undermined the separation of powers and judicial independence, freedom of expression and assembly and freedom of the press.¹⁹⁰

In the case of Hungary and Poland, it remains to be seen whether more forceful action will be forthcoming from the EU, to which the two countries acceded in 2004 along with eight other countries from Central and Eastern Europe. In accordance with the Copenhagen Criteria adopted by the European Council in 1993, EU membership required candidate countries to have achieved 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities . . .'.¹⁹¹ In 1997, these criteria were also included in Articles 6 and 49 of the Treaty of the European Union (TEU) as principles common to the member states.¹⁹² Since the Treaty of Lisbon of 2007 (which was adopted after enlargement), these standards are enshrined as 'founding values' in Article 2 of the TEU.¹⁹³ Article 7 of the TEU further provides for a procedure to sanction member states in case of a 'serious and persistent breach' of the EU founding values. These include also the possibility of the suspension of voting rights in the European Council.

In December 2017, the European Commission invoked Article 7 against Poland, out of concern for the values in Article 2 TEU. It called on the European Council to determine a breach of the rule of law in Poland and to propose action that would restore the independence of the Polish judiciary. In September 2018, the European Parliament followed with a similar procedure against Hungary, with reference to the electoral system, independence of the judiciary, freedom of expression and association, the rights

Smirnova, 'Bis 2036 bleibt es Putins Russland', *Die Zeit* (2 July 2020), available at www.zeit.de/politik/ausland/2020-07/verfassungsreform-russland-wladimir-putin-amtszeit-volksabstimmung; van Gall, 'Demoralisierung als Verfassungsfunktion', *Vefassungsblog* (30 Juni 2020), available at <https://verfassungsblog.de/demoralisierung-als-verfassungsfunktion/>.

¹⁹⁰ See, e.g., PACE (Monitoring Committee), 'The Progress of the Assembly's Monitoring Procedure (January–December 2017) and the Periodic Review of the Honouring of Obligations by Estonia, Greece, Hungary and Ireland', Doc. 14450 Part 4 (HU), 8 January 2019, paras. 114ff., available at <https://bit.ly/3qfi1dV>; Mijatovic, Commissioner for Human Rights of the Council of Europe, Report Following her Visit to Poland from 11 to 15 March 2019, Doc. CommDH(2019)17, 28 June 2019, at 5ff., available at <https://rm.coe.int/2nd-quarterly-activity-report-2019-by-dunja-mijatovic-council-of-europ/16809718f1>; Mijatovic, Commissioner for Human Rights of the Council of Europe, 'The Worsening Situation of Opposition Politicians in Turkey: What Can Be Done to Protect Their Fundamental Rights in a Council of Europe Member State?', Doc. 14812, 22 January 2019, paras. 8ff., available at <https://bit.ly/3qclFFh>.

¹⁹¹ Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, para. 7A(iii), available at www.europarl.europa.eu/enlargement_new/europeancouncil/pdf/cop_en.pdf. In 1991, the (then still) European Community also included these criteria as conditions for the recognition of new states in Eastern Europe and the Soviet Union. See Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, 31 ILM (1992) 1485, at 1486–1487.

¹⁹² Consolidated Version of the Treaty on the Functioning of the European Union, 9 May 2008, OJ C 115/47 (hereinafter TEU). See also Janse, 'Is the European Commission a Credible Guardian of the Values? A Revisionist Account of the Copenhagen Political Criteria During the Big Bang Enlargement', 17 *IJCL* (2019) 44.

¹⁹³ TEU, *supra* note 192, Art. 2.

of minorities and the situation of migrants and refugees.¹⁹⁴ However, by 2020, the EU Parliament had criticized the European Council for not making effective use of Article 7 TEU, underscoring that the situation in both countries has worsened.¹⁹⁵

These examples indicate that, across regions, there is a risk that formal commitments to democratic governance will not be honoured in practice, if they are undertaken by states with hardly any prior experience in practising its core elements.¹⁹⁶ Unless, and until, these elements have been internalized by both the political elite and broader society as the preferred form of governance, authoritarian practices will persist or be repeated.¹⁹⁷ Furthermore, when states lacking experience with democratic governance join regional organizations which have elevated democracy to a founding principle, their lack of internalization of its core elements is likely to spill over on the conduct of the organization. After all, where these very same states make up (part of) the political organs responsible for sanctioning violations of democratic legitimacy of origin or exercise, it is unlikely that they will support any determination that a (serious) violation of democratic governance has occurred within a member state. On the one hand, because of a different understanding of what constitutes such a violation, compared to those with a long democratic pedigree. Second, out of fear of becoming the target of such sanctions themselves in future. As a result, it becomes very difficult to reach the high majority thresholds usually required for a determination that a (serious) violation of democratic governance has occurred and for triggering sanctions of any kind.

Within the AU, this challenge is particularly pertinent, as many if not most member states are still struggling to come to terms with notions of democracy that were imported into their constitutions in the post-colonial era.¹⁹⁸ Only once this process of internalization has occurred within a very large majority of member states is it likely that the AU will develop a clear understanding of the parameters of ‘unconstitutional change of government’, as well as their inter-relationship with free and fair elections. Until then, the right to democratic governance within the AU remains a moral prescription rather than a right under international law.

¹⁹⁴ European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340, 12 September 2018, para. 4, available at www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html.

¹⁹⁵ European Parliament, Resolution of 16 January 2020 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary, 2020/2513(RSP), 16 January 2020, para. 3, available at www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.html. The Court of Justice of the European Union (CJEU), for its part, has ruled that Polish legislation reorganizing the judiciary violated EU law for not upholding judicial independence. See Case C-619/18, *European Commission v. Poland*, ECLI:EU:C:2019:531 (24 June 2019); C-192/18C, *European Commission v. Poland*, ECLI:EU:C:2019:924 (5 November 2019).

¹⁹⁶ Bugarcic, *supra* note 179, at 616.

¹⁹⁷ *Ibid.*, at 616, 609.

¹⁹⁸ See Fombad, ‘Some Perspectives on Durability and Change Under Modern African Constitutions’, 11 *IJCL* (2013) 382, at 382ff.