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A Club of Incumbents? The African Union and Coups d'Etat

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A Club of Incumbents? The African Union and *Coups d'État*

Eki Yemisi Omorogbe**

ABSTRACT

This Article considers the response of the Organization for African Unity (the OAU, founded in 1963) and its successor, the African Union (the AU, which began operating in 2003) to coups d'état, since 1997. The Article addresses these organizations' policies concerning unconstitutional changes of government, as well as the application of these policies. In considering these issues, the Article examines the response of the AU to the coups in Togo (2005), Mauritania (2005 and 2008), Guinea (2008), Madagascar (2009), and Niger (2010). In each case, the AU was unwilling to recognize the government that came to power through coup, even when the regime had popular and political support within the state. The Article concludes by arguing that the AU should pursue a more nuanced policy in this area.

TABLE OF CONTENTS

I.	INTRODUCTION	124
II.	INSTRUMENTS AND POLICIES ON UNCONSTITUTIONAL CHANGE	125
	A. <i>The OAU Period (1963–2003)</i>	125
	B. <i>The Current African Union Treaties</i>	129
	1. Organs and Powers	130
	2. Unconstitutional Change: Definitions and Responses	133
	C. <i>The African Charter on Democracy, Elections and Good Governance (2007)</i>	135
III.	THE AFRICAN UNION PRACTICE ON <i>COUPS D'ÉTAT</i>	137
	1. Togo (2005)	138
	2. Mauritania (2005 and 2008)	142
	3. Guinea (2008)	146
	4. Madagascar (2009)	149
	5. Niger (2010)	151
IV.	CONCLUSION	153

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I. INTRODUCTION

From the end of the 1980s, Africa's one-party states and other authoritarian regimes faced internal and external pressure to conform to liberal democratic norms.¹ As a result, many states adopted multiparty political systems and introduced constitutional provisions for periodic elections and presidential term limits.² However, the democratic transitions were often an illusion. The elections were not free and fair, and many incumbents remained in office.³ Consequently, the degree of democracy among African states continues to vary considerably, with authoritarian regimes at one extreme, functional multiparty systems at the other, and many forms of imperfect democracy in the middle. In 2009, the Freedom House Report described eight African states as fully democratic, twenty-five states as partially democratic, and twenty-one states as authoritarian.⁴ The Organization for African Unity (the OAU), founded in 1963, and its successor, the African Union (the AU), which came into operation in 2003, have had the potential to influence the form of state governments in Africa. In practice, however, the OAU and the AU, endorsing the sovereign right of their member states to determine their own political systems, have generally tolerated governments that are undemocratic or imperfectly democratic.⁵ The one exception, which has emerged since 1997, concerns unconstitutional changes of government by *coup d'état*. Despite the argument that acting against *coups* violates the principle of noninterference in a state's internal affairs, the OAU and the AU

1. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 247–54 (2005) (discussing Western states' "promotion of democracy, free markets, and the rule of law" in the "Third World"); PAUL NUGENT, *AFRICA SINCE INDEPENDENCE* 366–433 (2004) (discussing Africa's recent rediscovery of competitive politics); WILLIAM TORDOFF, *GOVERNMENT AND POLITICS IN AFRICA* 109–15, 134–36, 221–39 (4th ed. 2002).

2. TORDOFF, *supra* note 1, at 221–22; see also H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, 5 INT'L J. CONST. L. 469, 471, 487–88 (2007) (describing the increase in multiparty elections over the past few decades and the creation of presidential term limits).

3. NUGENT, *supra* note 1, at 373–74. Examples are Mobutu in Zaire (1965–1997, overthrown in civil conflict); Gnassingbe Eyadema in Togo (1967 until his death in 2005); Omar Bongo in Gabon (1967 until his death in 2009); Biya in Cameroon (1982 to date); Lansana Conte in Guinea (1984 until his death in 2008); Campaore in Burkina Faso (1987 to date); and Idriss Deby in Chad (1990 to date). *Id.* at 390–95, 396–400.

4. FREEDOM HOUSE, *MAP OF FREEDOM 2010* (2010), http://www.freedomhouse.org/uploads/fiw10/FIW_2010_MOF.pdf.

5. The defense of the sovereignty, territorial integrity, and independence of member states is a stated purpose of the OAU and an objective of the AU. Constitutive Act of the African Union, art 3(b), May 26, 2001, 2158 U.N.T.S. 3 [hereinafter AU Constitutive Act]; Charter of the Organization for African Unity, art. II(1)(c), Sept. 13, 1963, 479 U.N.T.S. 39 [hereinafter OAU Charter].

have opposed *coups* in the belief that they threaten public order and economic development.⁶ Part II of this Article traces the evolution of OAU and AU *instruments and policies* concerning unconstitutional change. It shows that the AU's understanding of the circumstances in which sanctions and intervention against *coups* are justified has progressed beyond that of the OAU. Part III discusses AU *practice* in relation to successful *coups* since the formation of the AU Peace and Security Council (PSC) in 2004. It demonstrates that the AU has consistently refused to recognize governments that come to power through *coups* even when those governments have popular and political support within the state in question. The Article concludes by arguing that the AU should pursue a more nuanced policy in this area.

II. INSTRUMENTS AND POLICIES ON UNCONSTITUTIONAL CHANGE

This Part considers the definitions of unconstitutional change in OAU and AU instruments and the response mechanisms that those instruments provide. It begins with the change in OAU policy as reflected in its decisions and declarations, and then it considers the legal framework provided by AU treaties. It concludes with a discussion of how the range and strength of the proposals contained in the 2007 African Charter on Democracy, Elections and Good Governance have increased.⁷

A. *The OAU Period (1963–2003)*

The Organization for African Unity was established on May 25, 1963.⁸ Its declared aim was to safeguard African interests by promoting the unity and solidarity of African states and eradicating all forms of colonialism in Africa.⁹ The OAU generally followed the principles of “[n]on-interference in the internal affairs of States” and “[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence,” in line with the OAU Charter.¹⁰ It did, however, reject white minority rule in Rhodesia and apartheid in South Africa.¹¹

6. See *infra* Part II.A (discussing the OAU period).

7. African Charter on Democracy, Elections and Good Governance, Jan. 30, 2007, <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf> [hereinafter African Charter on Democracy].

8. See GINO J. NALDI, *THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE* 1–51 (2d ed. 1999) (citing and describing the date, creation, and structures of the OAU).

9. OAU Charter, *supra* note 5, art. II(1)(c)–(d).

10. *Id.* art. III(2)–(3).

11. See, e.g., OAU Council of Ministers, *Resolution on Sanctions Against the White Minority Regimes in Southern Africa*, Doc. No. CM/Res. 422 (XXV) (1975), http://www.africa-union.org/official_documents/council%20of%20ministers%20meetings/com/6CoM_1975b.pdf (condemning apartheid and authorizing the Administrative Secretary-General to work with anti-apartheid governments);

In other words, noninterference presupposed decolonization. Beyond that minimal requirement, the OAU did not question the internal policies of its member states, even when they maltreated their populations.¹²

The OAU's adherence to the principle of noninterference led to a reluctance to take effective action when *coups d'état* occurred. In principle, the OAU condemned violent *coups* and the assassination of political leaders as unlawful under the OAU Charter.¹³ In practice, however, the OAU usually accepted whichever government was in effective control of the territory and allowed that government to represent its state within the OAU.¹⁴ This trend is illustrated by the unsuccessful attempts by some member states to deny OAU recognition to governments that came to power through *coups* in Ghana (1966), Uganda (1971), Liberia (1980), and Chad (1982).¹⁵ Had it done otherwise, the OAU might have been bereft of state representation.¹⁶ From the formation of the OAU in 1963 to the end of 1989, there were sixty-one successful *coups* in Africa, and more than half of all African states had at some point been governed by military regimes that had displaced civilian governments.¹⁷

It was only after the Cold War that the OAU adopted an anti-*coup d'état* ethos, which it linked to its commitment to promote democratic institutions and good governance.¹⁸ Demonstrating a new willingness to become more actively engaged in the internal policies of its member states, the OAU began to deny recognition

RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 17–21 (2004) (discussing the same).

12. See U. O. Umzurike, *The Domestic Jurisdiction Clause in the OAU Charter*, 78 AFR. AFF. 197, 197–202, 205–09 (1979) (examining the foundation of the OAU's noninterference policies and its relationship with human rights violations).

13. See OAU Charter, *supra* note 5, art. III(5) (“Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other States.”); MURRAY, *supra* note 11, at 78–79 (noting this principle); Kofi Oteng Kufuor, *The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future*, 17 AM. U. INT’L L. REV. 369, 375 (2002) (“It was obvious, that at this stage, the OAU had accepted the international law principle of effective control as one of the primary conditions for recognition of governments.”).

14. See Paul D. Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFF. 252, 271 (2007) (noting that “the [OAU's] traditional response to *coups d'états* was official indifference”).

15. Kufuor, *supra* note 13, at 375.

16. *Id.* at 377–78 (arguing that it would have been too costly to seat “delegates of ousted regimes” and that the majority of OAU member states’ delegations would have been governments-in-exile).

17. MONTY G. MARSHALL, CTR. FOR SYSTEMIC PEACE, CONFLICT TRENDS IN AFRICA 1946–2004: A MACRO-COMPARATIVE PERSPECTIVE, ANNEX 2B: COUPS D’ÉTAT IN AFRICA (2006), <http://www.systemicpeace.org/africa/ACPPAnnex2b.pdf>. The author defines success according to whether *coup* leaders are able to hold central authority power for more than one week, which is the definition of success adopted in this Article.

18. See Williams, *supra* note 14, at 273 (noting that it was not until July 2000 that the OAU created an official framework for response to *coups*).

to new governments that came to power through unconstitutional means.¹⁹ This change came only after ten successful *coups* occurred between January 1990 and May 1997.²⁰

The turning point was the OAU response in 1997 to events in Sierra Leone.²¹ The government of Tejan Kabbah, which had been democratically elected in March 1996 as part of the peace process ending a six-year civil war, was overthrown by Major Johnny Paul Koromah on May 25, 1997.²² At its summit meeting in Harare, Zimbabwe, from May 28 to 31, 1997, the OAU Assembly called for a return to constitutional government in Sierra Leone and encouraged the Economic Community of West African States (ECOWAS) to achieve that goal.²³ The Assembly also called on African states and the international community not to recognize the new regime.²⁴ In February 1998, a Nigerian-led ECOWAS force (the Economic Community of West African States Monitoring Group (ECOMOG)) removed the junta, and Kabbah was reinstated as President.²⁵

Next, the OAU articulated a general policy against unconstitutional changes of government. At the OAU Assembly meeting at Algiers, Algeria, in July 1999, the Assembly declared that several governments that had come to power through unconstitutional means since the Harare summit should restore constitutional legality by the next annual summit in 2000.²⁶ These states were Comoros, Congo Brazzaville, Guinea Bissau, and Niger.²⁷ Then, at Lomé, Togo, in July 2000, the OAU

19. See *id.* (describing the 2005 response to Togo's *coup* and the Peace and Security Council's (PSC) and AU's refusal to allow Togo to participate in its activities).

20. MARSHALL, *supra* note 17.

21. Williams, *supra* note 14, at 272; see also Thomas Legler & Thomas Kwasi Tiekou, *What Difference Can a Path Make? Regional Democracy Promotion Regimes in the Americas and Africa*, 17 DEMOCRATIZATION 465, 469–70 (2010) (describing the measures Secretary-General Salim Ahmed Salim adopted to respond to the events in Sierra Leone).

22. See John Bobor Laggah et al., *Sierra Leone*, in COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE AND GOOD GOVERNANCE 174–88 (Adebayo Adedeji ed., 1999) (providing background information on the *coup*).

23. OAU Council of Ministers, Sierra Leone, 66th Sess., Doc. No. CM/2004 (LXVI)–C (1997), http://www.africa-union.org/root/au/Documents/Decisions/com/47CoM_1997b.pdf.

24. *Id.* ¶ (b).

25. See JOHN M. KABIA, HUMANITARIAN INTERVENTION AND CONFLICT RESOLUTION IN WEST AFRICA: FROM ECOMOG TO ECOMIL 103–35 (2009) (recounting ECOMOG's humanitarian intervention in Sierra Leone from 1997 to 2000); see also Laggah et al., *supra* note 22, at 184–88 (providing an analysis of this intervention).

26. OAU Ass., Decision on Unconstitutional Changes of Government, 35th Sess., Doc. No. AHG/Dec.142 (XXXV), ¶ 1 (July 12–14, 1999), <http://www.africa-union.org/root/au/Documents/Decisions/hog/9HoGAssembly1999.pdf>.

27. See MARSHALL, *supra* note 17. Comoros's *coup* was in 1999, Congo Brazzaville's in 1997, Guinea Bissau's in both 1998 and 1999, and Niger's in 1998 and 1999. *Id.*

Assembly adopted the Declaration on a Framework for Response to Unconstitutional Changes of Government (the Lomé Declaration).²⁸ In the Lomé Declaration, the OAU Assembly set out a new approach to *coups*:

We express our grave concern about the resurgence of coup d'etat in Africa. We recognize that these developments are a threat to peace and security of the Continent and they constitute a very disturbing trend and serious set back to the ongoing process of democratization in the Continent. . . . We reaffirm that coups are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect of the rule of law based on peoples[] will expressed through the ballot and not the bullet.²⁹

As Paul Williams observed, the OAU's commitment was especially noteworthy because many of the OAU's member state governments themselves assumed power through military *coups*.³⁰

The Lomé Declaration defined several situations that constitute an unconstitutional change of government:

- i) a military coup d'état against a democratically elected Government;
- ii) intervention by mercenaries to replace a democratically elected Government;
- iii) replacement of a democratically elected Government by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.³¹

The Lomé Declaration provided a variety of sanctions that could be taken incrementally in response to unconstitutional change.³² In the initial stage, the OAU would condemn the *coup* and refuse to recognize the government.³³ Next, the perpetrators would be

28. OAU Ass., Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, 36th Sess., Doc. No. AHG/Decl.5 (XXXVI) (July 10–12, 2000) [hereinafter Lomé Declaration], http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf; see also OAU Ass., Decision on Unconstitutional Changes of Government in Africa, 36th Sess., Doc. No. AHG/Dec.150 (XXXVI) (July 10–12, 2000) [hereinafter OAU Decision on Unconstitutional Changes of Government], http://www.chr.up.ac.za/test/images/files/documents/ahrdd/theme39/change_of_govt_decision_unconstitutional_2000.pdf (noting that the Assembly adopts the proposed framework for an OAU response to Unconstitutional Changes in Government).

29. Lomé Declaration, *supra* note 28.

30. Paul D. Williams, *The African Union's Emerging Security Culture: Options for U.S. Policymakers*, INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT (July 13, 2007), <http://www.responsibilitytoprotect.org/index.php/document-archive/news-articles?view=fjrelated&id=2412>; see generally MURRAY, *supra* note 11, at 73–115 (describing the development of the ways that the OAU promoted democratic ideals and governmental functions).

31. Lomé Declaration, *supra* note 28; see also OAU Decision on Unconstitutional Changes of Government, *supra* note 28 (restricting the definition of unconstitutional changes of government to paragraphs (B)(i)–(iv) of the “Framework for an OAU Response to Unconstitutional Changes of Government”).

32. Lomé Declaration, *supra* note 28.

33. *Id.*

given up to six months to restore constitutional order, during which time the unconstitutional government would be suspended from OAU policy organs.³⁴ After the six-month period, the OAU could impose targeted sanctions, including visa denials, restrictions on government-to-government contacts, and trade restrictions.³⁵

The primary responsibility for implementing the Lomé Declaration belonged to the Central Organ of the OAU Mechanism for Conflict Prevention, Management, and Resolution.³⁶ Thereafter, the Central Organ systematically condemned the successful *coups* that took place in the Central African Republic (CAR) (2003), Guinea Bissau (2003), and São Tomé and Príncipe (2003).³⁷

B. The Current African Union Treaties

In the 1990s, the OAU's failure to guarantee peace and security led many to question the organization's suitability to the circumstances of Africa at the time.³⁸ In 1999, at an extraordinary meeting in Sirte, Libya, the OAU Assembly proposed the replacement of the OAU by what became the African Union.³⁹ In a meeting in Lomé from July 10 to 12, 2000, the OAU Assembly adopted the Constitutive Act of the AU, which entered into force on May 26, 2001, after ratification by two-thirds of the member states of the OAU.⁴⁰ A transition period of two years was

34. *Id.*

35. *Id.*

36. *Id.*

37. AU Cent. Organ of the Mechanism for Conflict Prevention, Mgmt., and Resolution, Communiqué on its 95th Sess., at 1–2, Doc. No. Central Organ/MEC/AMB/COMM.(XCV) (Sept. 18, 2003), http://www.africa-union.org/news_events/Communiqués/communique95th.pdf (on Guinea Bissau); AU Cent. Organ of the Mechanism for Conflict Prevention, Mgmt., and Resolution, Communiqué of the 93d Sess., at 1–2, Doc. No. Central Organ/MEC/AMB/COMM.(XCIII) (July 24, 2003), [http://www.africa-union.org/news_events/Communiqués/Communique%20\(Eng.\)%2024-07-2003.pdf](http://www.africa-union.org/news_events/Communiqués/Communique%20(Eng.)%2024-07-2003.pdf) (on São Tomé and Príncipe); AU Cent. Organ of the Mechanism for Conflict Prevention, Mgmt., and Resolution, Communiqué of the 90th Sess., Doc. No. Central Organ/MEC/AMB/Comm.(XC) (Mar. 17, 2003), http://www.africa-union.org/news_events/Communiqués/Communique_20_Eng_17mar03.pdf (on the CAR); AU Peace and Sec. Council [PSC] Communiqué of the 33d Sess., Doc. No. PSC/PR/Comm.(XXXIII)–(ii) (June 24, 2005), http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2005/2005_33_C1E.pdf (on the CAR).

38. See Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365, 367 (2002) (noting that most analysts during this period agreed that the OAU needed serious reform if it was going to meet future demands).

39. OAU Ass., Sirte Declaration, 4th Sess., Doc. No. EAHG/Draft/Decl. (IV) Rev.1 (1999), http://www.africa-union.org/Docs_AUGovernment/decisions/Sirte_Declaration_1999.pdf.

40. AU Constitutive Act, *supra* note 5, arts. 28, 33(1); OAU Ass., Decision on the Establishment of the African Union and the Pan-African Parliament, 36th

allowed.⁴¹ As a result, although the AU was formally established in July 2002, the OAU continued to exist until July 2003.⁴² By then, all fifty-three OAU member states—every state in Africa other than Morocco—ratified the Constitutive Act.⁴³

1. Organs and Powers

In the field of peace and security, the key AU body is the Peace and Security Council (the PSC), which was established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the PSC Protocol).⁴⁴ The PSC Protocol was adopted pursuant to Article 5(2) of the AU Constitutive Act and entered into effect on December 26, 2003, after the deposit of instruments of ratification by a majority of the member states of the AU.⁴⁵ The PSC formally launched on March 25, 2004, at which point the peace and security responsibilities of the Central Organ of the AU—including responsibilities under the

Sess., Doc. No. AHG/Dec.143 (XXXVI) (July 10–12, 2000), http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf.

41. AU Ass., Decision on the Interim Period, 1st Sess., Doc. No. Ass/AU/Dec. 1 (I) (July 9–10, 2002), http://www.au2002.gov.za/docs/summit_council/audecis.pdf; OAU Ass., Decision on the Implementation of the Sirte Summit Decision on the African Union, 37th Sess., Doc. No. AHG/Dec.1 (XXXVII), ¶ 15 (July 9–11, 2001) [hereinafter Implementation of the Sirte Summit Decision], <http://www.africa-union.org/root/au/Documents/Decisions/hog/11HoGAssembly2001.pdf>.

42. See AU Ass., Special Vote of Thanks of the Assembly of the African Union to H.E. Amara Essy, Interim Chairperson of the Commission, 2d Sess., Doc. No. Assembly/AU/Decl.11 (II) (July 10–12, 2003), http://www.africa-union.org/Official_documents/Decisions_Declarations/Assembly%20final/Assembly%20%20DECLARATIONS%20%20%20Maputo%20-%20FINAL%2008-08-03.pdf (transferring the work of the OAU to the AU).

43. Morocco withdrew from the OAU in 1985 after the admission of Western Sahara (Sahrawi Arab Democratic Republic), which Morocco regards as part of its territory. Gregory W. White, *The "End of the Era of Leniency" in Morocco*, in NORTH AFRICA, POLITICS, REGION, AND THE LIMITS OF TRANSFORMATION 90, 95 (Yahia H. Zoubir & Haizam Amirah-Fernández eds., 2008).

44. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, http://www.africa-union.org/root/AU/organs/psc/Protocol_peace%20and%20security.pdf [hereinafter PSC Protocol].

45. Chairperson of the AU Comm'n (AUC), *Rep. on the Establishment of a Continental Peace and Sec. Architecture and the Status of Peace Processes in Afr.*, ¶ 7, Doc. No. PSC/AHG/3(IX) (May 25, 2004), <http://ausitroom-psd.org/Documents/PSC2004/9th/Report1.pdf>; 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 (Apr. 2, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/Peace%20and%20Security%20Protocol.pdf> [hereinafter List of Countries Acceded to the PSC Protocol]; PSC Protocol, *supra* note 44, art. 22.

Lomé Declaration—came to an end.⁴⁶ By February 2010, the PSC Protocol had fifty signatories and forty-four ratifications.⁴⁷

The PSC has fifteen members, all of whom are chosen by the Executive Council on the basis of equitable regional representation and rotation.⁴⁸ One of the criteria for choosing prospective states is “respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights.”⁴⁹ Each PSC member has one vote.⁵⁰ Where the PSC fails to reach a consensus, a two-thirds majority is required on substantive matters.⁵¹ The PSC acts on behalf of all AU members.⁵² PSC decisions are binding, and the Protocol provides that member states “agree to accept and implement the decisions of the [PSC]” and “extend full cooperation to, and facilitate action by the Peace and Security Council” in performing its duties in the “prevention, management and resolution of crises and conflicts”⁵³

Although the Protocol provides the mechanism for the implementation of the principles in the AU Constitutive Act, it is a separate treaty. Despite this distinction, the PSC practice has been to impose measures and sanctions against any member state in which a *coup* occurs, even if the nation has not ratified the Protocol. As an example, the PSC imposed sanctions on Mauritania in 2005 even though it had not ratified the Protocol (Mauritania signed in May 2003 and ratified in July 2008). The PSC then imposed sanctions on Guinea in 2009 (Guinea signed in July 2002, and has yet to ratify).⁵⁴ One argument supporting the PSC position is that these states were bound by their signature not to undermine the Protocol.⁵⁵ Alternatively, it could be argued

46. AU Ass., Decision on the Establishment of the Peace and Security Council of the African Union, 1st Sess., Doc. No. ASS/AU/Dec.3 (I) (July 9–10, 2002), http://www.au2002.gov.za/docs/summit_council/audecis.pdf; Implementation of the Sirte Summit Decision, *supra* note 41, ¶ 8(a).

47. States that have not ratified are the Central African Republic, Cape Verde (not signed), Democratic Republic of the Congo, Eritrea (not signed), Guinea Bissau, Guinea, Liberia, Seychelles, and Somalia. List of Countries Acceded to the PSC Protocol, *supra* note 45.

48. Members are chosen on the basis of equitable regional representation and rotation: ten members are elected for a period of three years; five members are elected for a period of two years each. PSC Protocol, *supra* note 44, art. 5(2).

49. *Id.* art. 5(2)(g).

50. *Id.* art. 8(12).

51. *Id.* art. 8(13).

52. *Id.* art. 7(2).

53. *Id.* arts. 7(3)–(4); see generally Paul D. Williams, *The Peace and Security Council of the African Union: Evaluating an Embryonic International Institution*, 47 J. MOD. AFR. STUD. 603, 603 (2009) (examining how the PSC is attempting to bring security to Africa).

54. See *infra* Part III.2–3 discussing the cases of Mauritania and Guinea.

55. See Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S. 337.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

that the PSC is simply the mechanism through which the AU responds to unconstitutional acts that are prohibited by the Constitutive Act, which all member states have ratified.⁵⁶

The AU Assembly, which is made up of the Heads of State and Government of the member states or their representatives, also has significant powers in the peace and security field.⁵⁷ Its decisions are made by consensus, or if a consensus cannot be reached, by a two-thirds majority vote.⁵⁸ A key power of the Assembly is to impose sanctions, under Article 23(1)–(2) of the Constitutive Act, on member states who fail to comply with the decisions and policies of the AU.⁵⁹ These sanctions include the denial of “transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.”⁶⁰ This is the only sanctioning power against unconstitutional changes of government conferred on the Assembly by the Constitutive Act.

In addition, the role of the AU Commission (the Secretariat) in this area should be recognized. In theory, the PSC powers in Article 7 of the Protocol are to be exercised “in conjunction with the Chairperson of the Commission.”⁶¹ In practice, the Chairperson of the Commission implements the decisions of the PSC and the AU Assembly and acts with the PSC in imposing sanctions under the PSC Protocol.⁶² Typically, the Chair immediately issues a statement condemning any unconstitutional change of government that occurs.⁶³ The PSC then suspends the offending state and directs the Commission to facilitate the return

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.

Id.; see generally Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003) (expounding alternative positions on the treaty obligation of signatories).

56. See Simon M. Weldehaimanot, *The PSC Protocol and Third Party African States* 22–23 (Nov. 22, 2009) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511222 (discussing how the PSC should work in conjunction with the Chairman of the AU and the Chairman of the AU Commission, on behalf of the AU itself, to counter unconstitutional changes in government); see also MALCOM N. SHAW, *INTERNATIONAL LAW* 928–30 (6th ed. 2008) (describing the effects of treaties on third-party states).

57. AU Constitutive Act, *supra* note 5, art. 6.

58. *Id.* art. 7.

59. *Id.* art. 23(1)–(2).

60. *Id.* art. 23(2).

61. PSC Protocol, *supra* note 44, art. 7(1).

62. *Id.* arts. 7, 10.

63. See Press Statement, H.E. Jean Ping, AUC Chairperson, The Chairperson of the Commission Condemns the Seizure of Power by Force in Niger (Feb. 19, 2010), http://www.africa-union.org/root/au/Conferences/2010/feb/pr/Communique_Niger_19%2002%2010%20_2_.pdf; Press Statement, H.E. Jean Ping, AUC Chairperson (Dec. 23, 2008), http://www.africa-union.org/root/ua/Actualites/2008/dec/PSC/Guinea_Eng_23dec08.pdf (condemning the *coup* in Guinea); *Mauritanian Army Coup Condemned*, BBC NEWS, Aug. 7, 2008, <http://news.bbc.co.uk/2/hi/africa/7546418.stm>; *West Africa Leaders Warn Togolese*, BBC NEWS, Feb. 12, 2005, <http://news.bbc.co.uk/2/hi/africa/4259931.stm>.

to constitutional order.⁶⁴ This process typically involves assisting in the organization of the mediation and negotiation process and setting up International Contact Groups.⁶⁵

2. Unconstitutional Change: Definitions and Responses

Several provisions in the introductory articles to the African Union's Constitutive Act condemn unconstitutional changes of government. Article 3(g) obligates the AU to "[p]romote democratic principles and institutions, popular participation and good governance . . ."⁶⁶ The Constitutive Act's list of "principles," set out in Article 4, includes "[r]espect for democratic principles, human rights, the rule of law and good governance," "condemnation and rejection of impunity and political assassination," and the "[c]ondemnation and rejection of unconstitutional changes of governments."⁶⁷ Moreover, although Article 4(g) of the Constitutive Act affirms the principle of noninterference by member states in the internal affairs of other member states, this restriction does not expressly cover the AU itself.⁶⁸ This omission opens up the possibility of AU action against a regime which has come to power by unconstitutional means.

Article 4(j) of the Constitutive Act allows member states to request intervention "in order to restore peace and security," and the AU Assembly must authorize action.⁶⁹ It is clear from this provision that a recognized government can request intervention in its own state in the event of a *coup*. However, Article 4(j) does not expressly exclude the possibility that the government of one state could request intervention in another state if a *coup* poses a threat to peace and security in the other state. When a member state requests intervention by the AU, PSC approval is not required.⁷⁰ Instead, the AU Assembly authorizes the action, and then the PSC approves the modalities for intervention.⁷¹

In addition, if read together, the Constitutive Act and the PSC Protocol provide for sanctions against a member state whose government has come to power by unconstitutional means. Article 30 of the Constitutive Act provides for suspension:

64. See H.E. Jean Ping, AUC Chairperson, Opening Remarks on the Occasion of the First Annual US-African Union High Level Meeting (Apr. 21, 2010) (explaining the protocol in which the PSC directs the Commission to facilitate a return to constitutional order).

65. *Id.*

66. AU Constitutive Act, *supra* note 5, art. 3(g); see generally Thomas Kwasi Tiekou, *Multilateralization of Democracy Promotion and Defense in Africa*, 56 AFR. TODAY 75 (2009) (discussing the promotion of democratic ideals in the reformed AU).

67. AU Constitutive Act, *supra* note 5, arts. 4(m), 4(o)-(p).

68. *Id.* art. 4(g).

69. *Id.* art. 4(j); PSC Protocol, *supra* note 44, art. 7(1)(e).

70. PSC Protocol, *supra* note 44, art. 13(3)(c).

71. *Id.* art. 7(1)(f).

“Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”⁷² The principle in Article 30 is given effect by Article 7(1)(g) of the PSC Protocol, which gives the PSC the power to “institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration”⁷³ As discussed earlier, the Lomé Declaration both provides a definition of situations that constitute unconstitutional change and establishes a list of incremental measures, including suspension of the state’s government from (now) AU bodies and targeted sanctions against members of the government.⁷⁴

Finally, under Article 4(h) the AU has the right to intervene—including by military means—in a member state “in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”⁷⁵ Procedurally, the PSC first recommends action under Article 4(h) to the Assembly, and then, after a decision by the Assembly, the PSC adopts the modalities for intervention.⁷⁶ A planned amendment, set out in a Protocol in 2003, would add “a serious threat to legitimate order” to the definition of “grave circumstances,” which could lead to intervention.⁷⁷ However, the Protocol does not provide a definition of “serious threat” or “legitimate order.” The most coherent approach within the AU system would be to interpret these terms in line with the unconstitutional change provisions of the Lomé Declaration. This interpretation would enable the AU to take military action against unconstitutional seizures of government from within a state and reinstate the constitutional government. The amendment will come into force after two-thirds of AU member states deposit instruments of ratification, but as of February 2010, only twenty-five states (less than half of the membership) had done so.⁷⁸

72. AU Constitutive Act, *supra* note 5, art. 30.

73. PSC Protocol, *supra* note 44, art. 7(1)(g).

74. See *supra* Part II.A (discussing the Lomé Declaration).

75. AU Constitutive Act, *supra* note 5, art. 4(h).

76. PSC Protocol, *supra* note 44, art. 7(1)(e)–(f).

77. Protocol on Amendments to the Constitutive Act of the African Union, art. 4(h), July 11, 2003, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20Amendments%20to%20the%20Constitutive%20Act.pdf>.

78. AU, List of Countries Which Have Signed, Ratified/Accessed to the Protocol on the Amendments to the Constitutive Act of the African Union (Mar. 2, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf>; Evarist Baimu & Kathryn Sturman, *Amendment to the African Union’s Right to Intervene: A Shift from Human Security to Regime Security*, 12 AFR. SEC. REV. 37, 37 (2003); Tiyanjana Maluwa, *Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union*, 51 NETH. INT’L L. REV. 195, 231–32 (2004).

*C. The African Charter on Democracy, Elections and
Good Governance (2007)*

On January 30, 2007, the AU Assembly adopted the African Charter on Democracy, Elections and Good Governance (the Charter).⁷⁹ The Charter will come into effect when the instruments of ratification are deposited by fifteen member states.⁸⁰ By July 2010, only three states (Ethiopia, Mauritania, and Sierra Leone) had done so.⁸¹ Despite this low level of ratification, the Charter is significant because it demonstrates the desire within the AU to strengthen the legal framework applicable to unconstitutional changes of government. If adopted, it would give treaty effect to the Lomé Declaration while expanding it in several respects.

In particular, Article 23(5) of the Charter provides a new definition of circumstances that are “illegal means of accessing or maintaining power.”⁸² It includes all of the unconstitutional scenarios listed in the Lomé Declaration definition and adds a new scenario: “Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.”⁸³

The Charter also would give the PSC two new powers to act to maintain constitutional order. First, Article 24 gives the PSC the power to act where a situation arises that might affect a state’s democratic political institutional arrangements or its legitimate exercise of power.⁸⁴ Although the coverage of this article is somewhat uncertain, it appears to enable AU military intervention to protect democratic political institutions or legitimate governments. Second, where an unconstitutional change has occurred and “diplomatic initiatives have failed,” Article 25(1) states that the PSC “shall” immediately suspend the state in question from participation in AU activities, in accordance with Article 30 of the AU Constitutive Act, and

79. African Charter on Democracy, *supra* note 7, at 19.

80. *Id.* arts. 47–48.

81. AU, List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance (Aug. 12, 2009), <http://www.africa-union.org/root/AR/index/Charter%20on%20Democracy%20and%20Governance.rtf>.

82. African Charter on Democracy, *supra* note 7, art. 23.

83. *Id.* art. 23(5).

84. *Id.* art. 24.

When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union.

Id.

initiate sanctions, in accordance with Article 7(g) of the PSC Protocol.⁸⁵

The Charter's measures for dealing with unconstitutional change are broader than those in the Lomé Declaration, the AU Constitutive Act, and the PSC Protocol. Under Article 25 of the Charter on Democracy, "perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."⁸⁶ Article 25 also provides that the perpetrators of unconstitutional change "may . . . be tried before the competent court" of the AU itself.⁸⁷ Although the Charter fails to specify the offense that perpetrators of unconstitutional change would be charged with, it appears that unconstitutional change is classed as a "crime against democracy." At present, the "competent court" would presumably be the African Court of Justice (ACJ), which, to date, has not heard any cases.⁸⁸ If a proposed merger between the ACJ and the African Court of Human and People's Rights proceeds, the court in question would be the African Court of Justice and Human Rights (ACJHR).⁸⁹ The Charter also bars states from providing sanctuary to perpetrators of unconstitutional change.⁹⁰ Rather, it applies the *aut dedere aut judicare* principle and obliges state parties either to bring perpetrators to justice or to extradite them.⁹¹

Under the Charter on Democracy, the AU Assembly would have the power to impose additional sanctions, including punitive economic measures against the perpetrators of unconstitutional change.⁹² The AU Assembly could impose sanctions on "any Member State that is proved to have instigated or supported unconstitutional change of government in another state."⁹³

85. *Id.* art. 25(1); PSC Protocol, *supra* note 44, art. 7(g).

86. African Charter on Democracy, *supra* note 7, art. 25(4).

87. *Id.* art. 25(5).

88. See AU Constitutive Act, *supra* note 5, arts. 5, 18 (establishing the Court of Justice); Protocol of the Court of Justice of the African Union, July 11, 2003, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf> (establishing the African Court of Justice).

89. Protocol on the Statute of the African Court of Justice and Human Rights, art. 2, July 1, 2008, <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>; see also AU, List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights (June 8, 2010), <http://www.africa-union.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> (listing the three states which have ratified the Protocol on the Statute of the African Court of Justice and Human Rights); see generally Olufemi Elias, *Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights*, 48 INT'L LEGAL MATERIALS 334 (2009) (providing background regarding the creation of the ACJHR and how it would operate).

90. African Charter on Democracy, *supra* note 7, art. 25(8).

91. *Id.* art. 25(9).

92. *Id.* art. 25(7).

93. *Id.* art. 25(6).

Although the Charter does not specify the types of sanctions that could be imposed, the allowable sanctions would presumably be limited to those provided for under Article 23(2) of the Constitutive Act. As discussed earlier, these include the denial of “transport and communications links with other Member States, and other measures of a political and economic nature.”⁹⁴ The PSC would have the power to lift sanctions, but only after the situation had been resolved.⁹⁵

If it comes into force, the Charter on Democracy will enhance the AU's ability to combat unconstitutional change. Although it is unclear why states have so far proved unwilling to ratify the Charter, the member states of the AU continue to reiterate their commitment to an enhanced response to unconstitutional change.⁹⁶ In particular, the AU Assembly issued a decision on February 2, 2010, stating that:

- [I]n cases of unconstitutional changes of Government, in addition to the suspension of the country concerned, the following measures shall apply:
- a. non-participation of the perpetrators of the unconstitutional change in the elections held to restore constitutional order;
 - b. implementation of sanctions against any Member State that is proved to have instigated or supported an unconstitutional change in another State;
 - c. implementation by the Assembly of other sanctions, including punitive economic sanctions.⁹⁷

The decision also stated that AU member states should not recognize unconstitutional regimes and called on international organizations not to accredit them.⁹⁸ Unless and until the Charter on Democracy comes into effect, however, the legal foundation for this approach will continue to lie in Article 23(2) of the AU Constitutive Act.

III. THE AFRICAN UNION PRACTICE ON *COUPS D'ÉTAT*

The previous Part showed the development of OAU and AU powers in respect to unconstitutional changes of government.

94. AU Constitutive Act, *supra* note 5, art. 23(2).

95. African Charter on Democracy, *supra* note 7, art. 26.

96. See, e.g., Union on the Consideration & Resolution of Conflicts in Afr. Ass., Tripoli Declaration on the Elimination of Conflicts in Africa and the Promotion of Sustainable Peace, Special Sess., Doc. No. SP/Assembly/PS/Decl. (I), ¶¶ 8, 11–12 (Aug. 3, 2009), http://www.africa-union.org/root/ua/Conferences/2009/aout/SUMMIT/31aout/Report/Declaration%20on%20Peace%20%20Security%20-%20Final%20_Eng.pdf (noting the resurgence of unconstitutional change, rejecting it, and undertaking to enhance prevention of and response to unconstitutional changes).

97. AU Ass., Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations, 14th Sess., Doc. No. Assembly/AU/Dec.269 (XIV) Rev.1, ¶ 6(i)(b) (Feb. 2, 2010), <http://www.africa-union.org/root/AR/index/Assembly%20Dec.268-288,%20Decl.1-3,%20Res%20E.pdf>.

98. *Id.* ¶ 6(i)(c).

This Part considers the actions taken by the AU with respect to *coups d'état* since the PSC came into being in March 2004. It looks at the AU response to the successful *coups* in Togo (February 2005), Mauritania (August 2005 and August 2008), Guinea (December 2008), Madagascar (March 2009), and Niger (February 2010). When responding to *coups*, the AU has consistently favored the constitutional order, irrespective of the conduct of incumbent regimes, the claims made by those challenging them, or the likelihood that the *coup* might advance democracy. As a result, the AU's actions have generally protected incumbent governments.

1. Togo (2005)

The President of Togo, General Gnassingbé Eyadéma, came to power in a *coup* in 1967. A multiparty constitution was introduced in 1992, and he then secured office in 1993, 1998, and 2003 in elections that were widely criticized as unfair.⁹⁹ He died on February 5, 2005, after thirty-eight years in office.¹⁰⁰ According to the provisions of the Togolese Constitution of 1992, as amended in December 2002, he should have been succeeded by the President of the National Assembly (Fambaré Natchaba Ouattara) for an interim period not exceeding sixty days, during which an election would be held.¹⁰¹ However, Faure Gnassingbé, the son of Gnassingbé Eyadéma, was installed as President of Togo in a *coup* by the Togolese Armed Forces.¹⁰² The army justified its actions on the grounds that Ouattara was out of the country; in reality, he had been prevented from returning to Togo by the army's closure of all Togolese borders.¹⁰³ The National Assembly, dominated by members of the Rally of the Togolese People, the party to which both Gnassingbé Eyadéma and Faure Gnassingbé belonged, attempted to legitimize Faure Gnassingbé's position as President of Togo.¹⁰⁴ As Adewale Banjo observed, this was probably done out of concern for the possible AU response to

99. See NUGENT, *supra* note 1, at 391 (describing Eyadéma's electoral victories in 1993, 1998, and 2003 as the result of the disqualification of opposition candidates, improper vote counting, and other undemocratic tactics).

100. Adewale Banjo, *Constitutional and Succession Crisis in West Africa: The Case of Togo*, 2 AFR. J. LEGAL STUD. 147, 150–51 (2008).

101. TOGO CONSTITUTION art. 65 (as amended in 2002); see also UN OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS [OHCHR], LA MISSION D'ÉTABLISSEMENT DES FAITS CHARGÉE DE FAIRE LA LUMIÈRE SUR LES VIOLENCES ET LES ALLÉGATIONS DE VIOLATIONS DES DROITS DE L'HOMME SURVENUES AU TOGO AVANT, PENDANT ET APRÈS L'ÉLECTION PRÉSIDENTIELLE DU 24 AVRIL 2005, § 4.1.1 (2005), <http://www.reliefweb.int/rw/RWFiles2005.nsf/FilesByRWDocUNIDFileName/EVO-D-6H3JDK-ohchr-tgo-29aug.pdf?File/ohchr-tgo-29aug.pdf>.

102. Banjo, *supra* note 100, at 151.

103. A.U. P.S.C., Brief on the Evolving Situation in Togo, ¶¶ 1–2 (Feb. 21, 2005), http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2005/2005_25_B1E.pdf [hereinafter Brief on Togo].

104. Banjo, *supra* note 100, at 151.

the military *coup*.¹⁰⁵ On February 6, 2005, the National Assembly voted to appoint Faure Gnassingbé and remove Ouattara as President of the National Assembly.¹⁰⁶ It also amended the Constitution to allow the new President to continue in office without organizing an election until the end of the mandate of Gnassingbé Eyadéma in 2008.¹⁰⁷

Togo ratified the PSC Protocol in February 2004.¹⁰⁸ Consequently, there was no doubt as to the PSC's power to take action against the *coup*. On February 7, 2005, the PSC condemned both the military *coup* and what it termed "the constitutional modifications intended to legally window dress the *coup d'état*."¹⁰⁹ It classed the succession as a violation of both the Togolese Constitution and AU instruments, and it threatened to impose sanctions under Article 7(g) of the PSC Protocol and the Lomé Declaration unless the constitutional order was rapidly restored.¹¹⁰ On February 9, 2005, in conjunction with ECOWAS (the sub-regional grouping to which Togo belongs), the PSC again demanded that the succession be conducted according to the provisions of the Constitution.¹¹¹

On February 24, the Togolese National Assembly restored the constitutional provisions requiring elections to be held within sixty days, but did not require Faure Gnassingbé to step down as President of Togo for the interim period.¹¹² The AU and ECOWAS found Faure Gnassingbé's insistence on remaining in office to be a continuation of his illegal seizure of power.¹¹³ As a result, on February 25, the AU confirmed its suspension of Togo from AU activities until the restoration of constitutional order, rejected "any election that would be organized under the conditions enunciated by the *de facto* authorities in Togo," required the resignation of Faure Gnassingbé, and endorsed the

105. *Id.*

106. *Id.*

107. Loi No. 2005-002 du 6 février 2005 portant modification des articles 65 et 144 de la Constitution [Law No. 2005-002 of February 6, 2005 amending Arts. 65 and 144 of the Constitution], *reprinted in* J. OFFICIEL DE LA RÉPUBLIQUE TONGOLAISE, Feb. 6, 2005; Banjo, *supra* note 100, at 152.

108. List of Countries Acceded to PSC Protocol, *supra* note 45.

109. A.U. P.S.C. Communiqué of the 25th Meeting, ¶¶ 1-4, Doc. No. PSC/PR/Comm. (XXV) (Feb. 25, 2005), http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2005/2005_25_C1E.pdf (emphasis added).

110. A.U. P.S.C. Communiqué of the 24th Meeting, ¶¶ (B)(1), (5), Doc. No. PSC/PR/Comm.(XXIV) (Feb. 7, 2005), <http://www.un.int/wcm/webdav/site/somalia/shared/documents/statements/1121715958.pdf>.

111. This course of action was agreed to during the ECOWAS Extraordinary Summit, held in Niamey on February 9, 2005, and attended by Olusegun Obasanjo of Nigeria, AU Chairperson, and Alpha Konare, AUC Chairperson. Brief on Togo, *supra* note 103, ¶ 11.

112. Loi No. 2005-006 du 24 février 2005 modifiant les articles 65 et 144 de la Constitution [Law No. 2005-006 amending Arts. 65 and 144 of the Constitution], *reprinted in* J. OFFICIEL DE LA RÉPUBLIQUE TONGOLAISE, Feb. 24, 2005.

113. Brief on Togo, *supra* note 103, ¶ 20.

sanctions (an arms embargo and a travel ban on leaders) that ECOWAS imposed on February 19, 2005.¹¹⁴ Most significantly, the AU directed ECOWAS to “take all such measures as it deem[ed] necessary to restore constitutional legality in Togo within the shortest time.”¹¹⁵ Essentially, the AU ordered ECOWAS to take military action to enforce a change of government, as the OAU had done in Sierra Leone in 1997.¹¹⁶

Under the weight of this pressure and other international criticism,¹¹⁷ Faure Gnassingbé resigned his position of President of Togo on February 25, 2005, and handed over power to an interim administration, in which Abass Bonfoh—previously a vice president of the National Assembly—became the new President of the Assembly and the acting President of Togo.¹¹⁸ This development alone was sufficient for ECOWAS—but not the AU—to accept that there had been “a full return to constitutional legality,” and it lifted its sanctions “with immediate effect” from February 26, 2005.¹¹⁹

The commitment of the regional and sub-regional organizations to democracy and genuine elections was tested when Faure Gnassingbé won the presidential election held on April 24, 2005.¹²⁰ The credibility of this election was disputed by the opposition, the *Union des Forces du Changement* (UFC), and

114. A.U. P.S.C. Communiqué of the 25th Meeting, *supra* note 109, ¶¶ 1–4; see also Brief on Togo, *supra* note 103, ¶ 21 (enumerating the PSC’s recommendations); *Togo’s Military-Installed President Says He Will Resign*, USA TODAY, Feb. 25, 2005, http://www.usatoday.com/news/world/2005-02-25-togo_x.htm [hereinafter *Togo’s President to Resign*] (noting the arms embargo and travel ban imposed by ECOWAS and opposition to the coup by European leaders); Solomon T. Ebrobrah, *The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?* (Open Soc’y Inst., Afr. Governance Monitoring & Advocacy Project, 2007), http://www.afrimap.org/english/images/paper/ACDEG&ECOWAS_Ebrobrah.pdf (discussing the powers, procedures, and responses related to unconstitutional change that are available to ECOWAS).

115. A.U. P.S.C. Communiqué of the 25th Meeting, *supra* note 109, ¶ 5.

116. See Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT’L L.J. 785, 799–803, 812–14 (2006) (explaining similar events in Sierra Leone and Togo).

117. See *id.* at 812–13 (citing several examples of international condemnation).

118. See, e.g., *Togo’s President to Resign*, *supra* note 114.

119. A.U. P.S.C. Report of the Chairperson of the Commission on the Developments in Togo, ¶¶ 1, 4, Doc. No. PSC/PR/2(XXX) (May 27, 2005) [hereinafter Report on Developments in Togo], <http://ausitroom-psd.org/Documents/PSC2005/30th/Report/Reporteng.pdf>; Press Release, Econ. Cmty. of W. African States [ECOWAS], Faure Gnassingbé Steps Down ECOWAS Lifts Sanctions (Feb. 26, 2005), available at <http://news.ecowas.int/> (select “2005” from “Select a Year” drop-down menu; then follow “Faure Gnassingbé Steps Down Ecowas Lifts Sanctions” hyperlink).

120. See A.U. P.S.C. Communiqué of the 30th Meeting, ¶ 1, Doc. No. PSC/PR/Comm.(XXX) (May 27, 2005) http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2005/2005_30_C1E.pdf (expressing “concern at the persistent tension in Togo, following the presidential election held on 24 April 2005”).

by international observers, including the European Parliament.¹²¹ However, the Constitutional Court of Togo, ECOWAS, and the AU accepted the election, despite the anomalies and irregularities observed.¹²² Paul Simon Handy argues that ECOWAS preferred political continuity through Gnassingbé Eyadema's son to political change in the form of known radical opposition leaders.¹²³ The dispute over the "stolen election" triggered violence in Togo. As a result, several hundred died, thousands were wounded, 15,000–16,000 were internally displaced, and 40,000 fled to neighboring states.¹²⁴ Despite these problems, the technical conditions set for a restoration to constitutional order had been met. On May 27, 2005, the PSC lifted its ban, and the Togolese authorities were allowed to participate in AU activities.¹²⁵

However, Togo continues to be politically unstable. Faure Gnassingbé won a second presidential term in elections held on March 4, 2010.¹²⁶ As in 2005, the validity of the results was disputed domestically but accepted by ECOWAS and the AU, and protesters took to the streets.¹²⁷ In an attempt to resolve the political crisis, the government and the leader of the UFC formed a coalition government on May 28, 2010.¹²⁸ The coalition government has proven unpopular with the majority of UFC

121. Press Release, European Parliament, EU Parliament Says Fresh Elections Needed in Togo (May 12, 2005), available at http://www.delusanyec.europa.eu/articles/en/article_4687_en.htm.

122. Report on Developments in Togo, *supra* note 119, ¶¶ 8–14; European Parliament Resolution on Togo, 2006 O.J. (C 92E) D–I; Williams, *supra* note 14, at 273–74; Togo: Court Confirms Gnassingbé as President, N.Y. TIMES, May 4, 2005, at A10.

123. Paul Simon Handy, *The Dynastic Succession in Togo: Continental and Regional Implications*, 14 AFR. SEC. REV. 47, 50 (2005).

124. See OHCHR, *supra* note 101, §§ 4.1.2, 6–7; see also Report on Developments in Togo, *supra* note 119, ¶ 12 (providing information regarding the number of people who were killed, injured, or forced to flee Togo in connection with the April 24 election).

125. A.U. P.S.C. Communiqué of the 30th Meeting, *supra* note 120, ¶ 3.

126. Togo's President Re-elected: Electoral Chief, AGENCE FRANCE PRESSE, Mar. 6, 2010, available at <http://news.ph.msn.com/top-stories/article.aspx?cp-documentid=3927381>.

127. See Bureau de la Mission D'observation De L'union Africaine Pour L'election Présidentielle Du 04 Mars 2010 AU TOGO, Déclaration Préliminaire (Mar. 6, 2010), http://www.africa-union.org/root/AU/AUC/Departments/PA/ELECTION_UNIT/AU_Election_Unit_Declarations.htm; Union Européenne Mission d'Observation Électorale—Togo 2010 Élection Présidentielle, Déclaration Préliminaire, at 3 (Mar. 6, 2010), http://www.deltgo.ec.europa.eu/fr/eu_and_country/evenement/election/MOE-UE_TOGO.pdf; Press Release, ECOWAS, New ECOWAS Commission President Visits Togo (Mar. 20, 2010), available at <http://news.ecowas.int/presseshow.php?nb=044&lang=en&annee=2010>; Togo's Opposition Leader Protests Election He Says Was Rigged, N.Y. TIMES, Mar. 7, 2010, available at <http://www.nytimes.com/2010/03/08/world/africa/08togo.html> (reporting that the opposition asserts voters were intimidated).

128. John Zodzi, Togo Opposition Leader Angers Supporters by Joining Government, REUTERS, May 28, 2010, <http://www.reuters.com/article/idUSTR E64R2MW20100528>.

members, and the UFC members have continued to challenge the legitimacy of Faure Gnassingbé's election.¹²⁹

In the case of Togo, the AU showed its unwillingness to accept a civilian government that came to power through a military *coup*. Its action against the *coup* proved effective in that it restored constitutional order through a presidential election. However, the election led to the validation of the *coup*, and Faure Gnassingbé was confirmed as President. There would be a similar outcome in Mauritania, the next country in which the AU opposed a *coup*.

2. Mauritania (2005 and 2008)

In Mauritania, Maaouya Ould Sid'Ahmed Taya came to power in 1984 as head of a military junta. In 1991, Mauritania adopted a new constitution that required multiparty democracy, with presidential elections to be held every six years.¹³⁰ Taya was then elected as President in 1992 (with 62 percent of the vote), reelected in 1997 (with 90 percent of the vote), and again in 2003 (with 67 percent of the vote).¹³¹ The main opposition parties called the credibility of each of these elections into question, and they went so far as to boycott the election held in 1997.¹³² Though supposedly a democratic state, the ruling party—through arbitrary arrests, prolonged detentions, and torture of opposition candidates, and the banning of several opposition parties—circumscribed the citizens' capacity to change the government.¹³³

On August 3, 2005, Taya was removed from power in a bloodless *coup* led by Colonel Ely Ould Vall and Colonel Mohamed Ould Aziz.¹³⁴ The new military regime reportedly promised to hold power for no more than two years, during which they intended to prepare and put in place genuine democratic

129. *Togo Opposition Rejects Leader's Move to Join Government*, AGENCE FRANCE PRESSE, May 28, 2010, available at <http://www.orange.co.bw/news/?p=31662>.

130. MAURITANIA CONSTITUTION arts. 11, 26 (1991).

131. *Elections in Mauritania*, AFR. ELECTIONS DATABASE (Apr. 21, 2007), <http://africanelections.tri pod.com/mr.html> (last visited Jan. 1, 2011).

132. *Incumbent Declared Winner in Mauritania Vote; Opposition Boycotts*, ASSOCIATED PRESS, Dec. 14, 1997.

133. See Boubacar N'Diaye, *Mauritania, August 2005: Justice and Democracy, or Just Another Coup?*, 105 AFR. AFF. 421 (2006); 21 U.S. DEP'T OF STATE, ANNUAL HUMAN RIGHTS REPORT TO CONGRESS 173, 174, 177–78 (1996) (discussing political and other extrajudicial killing and general political rights in Mauritania); 17 U.S. DEP'T OF STATE, ANNUAL HUMAN RIGHTS REPORT TO CONGRESS 162, 162–65 (1992) (discussing political killings, disappearances, and torture); 16 U.S. DEP'T OF STATE, ANNUAL HUMAN RIGHTS REPORT TO CONGRESS 239, 242, 246 (1991) (discussing arbitrary arrests and political rights).

134. *New 'Colonels' Regime in Charge in Mauritania*, AGENCE FRANCE PRESSE, Aug. 4, 2005, available at <http://www.news24.com/Africa/News/Colonels-regime-in-charge-20050804>.

institutions.¹³⁵ The *coup* was popular, and thousands of people demonstrated in support.¹³⁶

The PSC responded swiftly to the 2005 *coup*, even though it took no action during Taya's office and Mauritania had not ratified the PSC Protocol. On August 4, it condemned the unconstitutional change of government and suspended Mauritania from participating in AU activities until constitutional order had been restored.¹³⁷ As Paul Williams observed, the AU was obliged to "condemn the *coup d'état* in principle" even though it was aware of the "significant local support" and "international sympathy" for the *coup*.¹³⁸ Within a month of the *coup*, the PSC was aware that the "new Mauritanian authorities" were taking firm steps likely to "consolidate democracy and the rule of law" within the state, but the suspension remained in place.¹³⁹ Despite the suspension, the military junta pushed forward with its democratic agenda. A referendum on June 25, 2006, made changes to the Constitution that limited the powers of the President and set a limit of two five-year terms for each President.¹⁴⁰ In March 2007, the junta held genuine democratic elections, which Sidi Mohamed Ould Cheikh Abdallahi won.¹⁴¹ Following this election, the AU removed Mauritania's suspension.¹⁴²

General Mohamed Ould Aziz headed a military junta that launched a second *coup* in Mauritania on August 6, 2008.¹⁴³ The junta arrested President Sidi and transferred the office of President to Aziz.¹⁴⁴ Although the junta claimed that the regime was corrupt and that they needed to save Mauritanian democracy,

135. *Mauritanian Troops Seize Power, Promise Democracy*, AGENCE FRANCE PRESSE, Aug. 3, 2005, available at <http://www2.reliefweb.int/rw/RWB.NSF/eaeca085bacc7974c1256ec40042c62b/d4f2d307db14448a85257052005c4bb6?OpenDocument>.

136. Ahmed Mohamed, *Thousands Back Junta in Mauritania*, ASSOCIATED PRESS, Aug. 5, 2005.

137. A.U. P.S.C. Statement of the 36th Meeting, at 1, Doc. No. PSC/PR/Stat.(XXXVI)-(ii) (Aug. 4, 2005), <http://ausitroom-psd.org/Documents/PSC2005/36th/Mauritanie/Mauritania Eng.pdf>.

138. Williams, *supra* note 14, at 274.

139. A.U. P.S.C. Communiqué of the 37th Meeting, ¶¶ 3-7, Doc. No. PSC/PR/Comm.1(XXXVII) (Sept. 8, 2005), <http://ausitroom-psd.org/Documents/PSC2005/37th/Communique/CommuniqueMauritanieEng.pdf>.

140. MAURITANIA CONST. arts. 26-29 (as amended in 2006); Todd Pitman, *Mauritania Gets Taste of Freedom, Democracy from Unlikely Source: A Military Junta*, ASSOCIATED PRESS, June 26, 2006.

141. Ahmed Mohamed, *Former Mauritanian Government Minister Wins Landmark Presidential Election*, ASSOCIATED PRESS, Mar. 27, 2007.

142. *Mauritania: Country Outlook*, EIU VIEWSWIRE, Apr. 5, 2007, available at 2007 WLNR 27202132.

143. See generally Boubacar N'Diaye, *To 'Midwife'—and Abort—a Democracy: Mauritania's Transition From Military Rule, 2005-2008*, 47 J. MOD. AFR. STUD. 129 (2009) (providing background information about the events leading up to the 2008 *coup*).

144. Ahmed Mohamed, *Coup Leader Gets Presidential Powers in Mauritania*, ASSOCIATED PRESS, Aug. 12, 2008.

it is significant that the *coup* came hours after the announcement of a presidential decree to remove the top four military officers, including Aziz, from their positions.¹⁴⁵ On the same day, the majority of the members of Parliament issued a statement in support of the *coup*.¹⁴⁶ On August 7, 2008, the junta promised to organize free and transparent presidential elections.¹⁴⁷

On September 22, 2008, the PSC responded by demanding a return to legitimate constitutional order in Mauritania through the reinstatement of Sidi as President.¹⁴⁸ It urged AU member states and the international community to reject, as illegitimate and illegal, the activities and initiatives of the new regime.¹⁴⁹ In its decision, the PSC drew authority from the Lomé Declaration, the AU Constitutive Act, the PSC Protocol, and the African Charter on Democracy.¹⁵⁰ The PSC Protocol and the African Charter on Democracy were ratified by Mauritania on July 7, 2008, less than a month before the second *coup*.¹⁵¹

After these events, there followed a protracted stand-off between the AU and the Aziz government. Aziz initially called the AU's demands "unrealistic" and against the best interests of the Mauritanian people.¹⁵² The Aziz government eventually released Sidi from house arrest on December 21, 2008, but the next day the PSC warned the Mauritanian authorities that this gesture was insufficient to fulfill its requirements.¹⁵³ On January 23, 2009, the junta announced its plans for elections in June 2009.¹⁵⁴ However, despite this announcement, at its meeting held February 1–3, 2009, the AU Assembly gave its support to the

145. Christopher Boucek, *Mauritania's Coup: Domestic Complexities and International Dilemmas*, CARNEGIE ENDOWMENT FOR INT'L PEACE 1 (Aug. 14 2008), http://carnegieendowment.org/files/boucek_mauritania.pdf.

146. See *Mauritanian Parliamentarians Back Military Coup*, BBC MONITORING INT'L REPS., Aug. 6, 2008 (quoting *Mauritanian TV* (television broadcast Aug. 6, 2008)).

147. The UN and the European Parliament condemned the *coup* and supported AU efforts to restore constitutional order. U.N. President of the S.C., Statement, U.N. Doc. S/PRST/2008/30 (Aug. 19, 2008), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/465/95/PDF/N0846595.pdf?OpenElement>; European Parliament Resolution of 4 September 2008 on the Coup in Mauritania, 2009 O.J. (C 295E) 8.

148. A.U. P.S.C. Communiqué of the 151st Meeting, ¶ 6, Doc. No. PSC/MIN/Comm.2(CLI) (Sept. 22, 2008), <http://ausitroom-psd.org/Documents/PSC2008/151nd/Communique/Mauritania/MauritaniacommEng.pdf>.

149. *Id.* ¶ 8.

150. *Id.* ¶ 4.

151. *Id.* ¶ 4. Mauritania deposited instruments of ratification for these on July 28, 2008.

152. *Mauritanian Military Leader Says Return of Ousted President "Unrealistic,"* BBC MONITORING MIDDLE EAST, Sept. 28, 2008.

153. AUC Chairperson, *Report on Situation in Mauritania*, ¶¶ 3, 9, Doc. No. PSC/MIN/Comm.3 (CLXII) (Dec. 22, 2008), <http://www.africa-union.org/root/au/organs/163%20report%20mauritania%20eng.pdf>.

154. *Mauritanian Junta Plans Elections on June 6*, AGENCE FRANCE PRESSE, Jan. 23, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5iFwCrJl0SgmDpERqEqVHHMdrwiWg>.

PSC.¹⁵⁵ On February 6, 2009, the PSC imposed sanctions on Mauritania, including “visa denials, travel restrictions and freezing of assets, to all individuals, both civilian and military, whose activities are designed to maintain the unconstitutional status quo in Mauritania.”¹⁵⁶ Aziz’s next move was to resign as Head of State on April 21, 2009 and to stand as a civilian candidate in the elections planned for June 6.¹⁵⁷

A resolution to the crisis followed negotiations brokered by the International Contact Group on Mauritania, led by the AU, and facilitated by Abdoulaye Wade, President of Senegal.¹⁵⁸ These negotiations led to a framework agreement that was signed by the Aziz faction, the coalition of anti-*coup* parties, the *Front National Pour la Defense de la Defense de la Democratie*, and the opposition party, the *Rassemblement des Forces*.¹⁵⁹ Under the terms of the agreement, Sidi returned to head a transitional government made up of civilians and the soldiers that had toppled him; he then renounced his mandate as Head of State on June 28, 2009.¹⁶⁰ Additionally, the elections were postponed until July 18, 2009, to give the opposition time to field their candidates.¹⁶¹ These efforts were sufficient to lead to the lifting, on July 1, 2009, of Mauritania’s suspension from the AU and relevant sanctions.¹⁶² Aziz won the election and was sworn in as civilian President in August 2009, and remains in office at the time of writing.¹⁶³

Two lessons may be drawn from the case of Mauritania. The first, which is shown by the events of 2005 to 2007, is that *coups* need not be antidemocratic, but may instead make free and fair

155. AU Ass., Decision on the Resurgence of the Scourge of Coups d’État in Africa, 12th Sess., Doc. No. Assembly/AU/Dec.220 (XII), ¶ 3 (2009) [hereinafter Decision on the Resurgence of Coups], [http://www.africa-union.org/root/UA/conferences/2009/jan/summit_jan_2009/doc/conference/assembly%20au%20dec%20%20208-240%20\(xii\).pdf](http://www.africa-union.org/root/UA/conferences/2009/jan/summit_jan_2009/doc/conference/assembly%20au%20dec%20%20208-240%20(xii).pdf).

156. A.U. P.S.C. Communiqué of the 168th Meeting, ¶ 2, Doc. No. PSC/PR/(CLXVIII) (Feb. 5, 2009), <http://www.africa-union.org/root/au/organs/168%20COMMUNIQUE%20OF%20THE%20168th%20MEETING.pdf> (activating the sanctions discussed in the December 22 Communiqué).

157. *Mauritania and the African Union: All Is Rather Easily Forgiven*, ECONOMIST, July 23, 2009 [hereinafter *Mauritania and the African Union*], available at http://www.economist.com/node/14105592?story_id=14105592.

158. Union des Forces de Progrès, Accord cadre de Dakar Entre les Trois Grandes Poles Politiques de Mauritiens, ¶ 5, June 3, 2009, http://www.ufpweb.org/fr/IMG/article_PDF/article_a2344.pdf.

159. *Background Note: Mauritania—Government and Political Conditions*, U.S. DEPT OF STATE (Apr. 4, 2010), <http://www.state.gov/r/pa/ei/bgn/5467.htm>.

160. *Ousted Mauritania President Resigns*, ALJAZERRA (June 28, 2009), <http://english.aljazeera.net/news/africa/2009/06/2009627174110417987.html>.

161. *Id.* ¶ 2; A.U. P.S.C. Communiqué of the 192d Meeting, ¶ 4, Doc. No. PSC/PR/Comm.3(CXCII) (June 10, 2009), <http://ausitroom-psd.org/Documents/PSC2009/192nd/Communique/Mauritania11June/MauritaniaEN.pdf>.

162. *African Leaders Convene in Libya*, ASSOCIATED PRESS, July 1, 2009.

163. *Mauritania and the African Union*, *supra* note 157; Vincent Fertey, *Mauritania’s Aziz Sworn In, France Sees Key Partner*, REUTERS, Aug. 5, 2009, <http://af.reuters.com/article/topNews/idAFJ0E57502020090806>.

elections more likely.¹⁶⁴ The second lesson, which may be drawn from the 2008 *coup* and is also evident in the *coup* in Togo, is that an election may be used to validate the results of a *coup*. As discussed below, after the events in Mauritania from 2008 to 2009, the AU began to discourage the beneficiaries of *coups* from standing in elections intended to restore constitutional government.

3. Guinea (2008)

President Lansana Conte, an autocratic ruler who staged his own *coup* in 1984 and ruled Guinea for twenty-four years, died on December 23, 2008. On December 23, 1990, Guinea adopted a constitution paving the way to civilian government,¹⁶⁵ and Conte went on to win elections in 1993, 1998, and 2003. Conte was intolerant of challengers: opposition leaders operated in a climate of fear and intimidation, and the 2003 election was boycotted by the opposition.¹⁶⁶ Under Article 34 of the 1990 Guinean Constitution, the President of the National Assembly (Aboubacar Sompore) should have acted as President of the country for a period not exceeding ninety days after Conte's death, during which time elections would be held.¹⁶⁷ However, within hours of Conte's death, Captain Moussa Dadis Camara led a military *coup*.¹⁶⁸ The military regime suspended the Constitution and promised that elections would be held by the end of 2010.¹⁶⁹ The *coup* was popular among the citizens because impunity, corruption, drug trafficking, and insecurity had been undermining the country's institutions.¹⁷⁰

The AU responded swiftly to the military *coup*, even though the AU took no action during Conte's office and Guinea did not ratify the PSC Protocol. On December 29, 2008, the PSC suspended Guinea from the activities of the AU until the return of constitutional order, which meant succession as set out in the Constitution and elections within ninety days.¹⁷¹ ECOWAS

164. See Williams, *supra* note 14, at 274 (describing Mauritania's bloodless *coup* in positive terms as promoting, rather than undermining, democracy).

165. See FUNDAMENTAL LAW OF THE SECOND REPUBLIC OF GUINEA [CONSTITUTION].

166. See NUGENT, *supra* note 1, at 396 (giving background on Conte and his regime).

167. FUNDAMENTAL LAW OF THE SECOND REPUBLIC OF GUINEA art. 34; see *Guinean Coup a Flagrant Violation of Constitution, Lome, AU Act and AU Charter*, AUC NEWS (Comm'n and Info. Div. of the AUC, Addis Ababa, Eth.), Dec. 2008, at 6, <http://www.africa-union.org/root/ua/Newsletter/Publication%2036%20Dec%2008.pdf>.

168. Vivienne Walt, *Why Guinea's People Welcomed the Coup*, TIME, Dec. 26, 2008, available at <http://www.time.com/time/world/article/0,8599,1868754,00.html>.

169. *Id.*

170. *Id.*

171. A.U. P.S.C. Communiqué of the 165th Meeting, ¶ 3, Doc. No. PSC/PR/Comm (CLXV) (Dec. 29, 2008), <http://www.africa-union.org/root/au/organs/165%20Communiqu%C3%A9%20-%20Eng.pdf>; see also Decision on the Resurgence of Coups, *supra* note 155 (condemning the *coup*).

suspended Guinea from all meetings until constitutional democracy was restored.¹⁷² On January 30, 2009, the International Contact Group on Guinea, which was established on the initiative of the AU and ECOWAS, endorsed a requirement that the Guinean stakeholders complete the transitional process through the organization of free, fair, and transparent elections in 2009.¹⁷³ The contact group also endorsed prohibiting members of the military regime and the transitional government from participating in the 2009 elections.¹⁷⁴

Initially, Camara announced a provisional timetable for a return to constitutional order on the terms required by the AU and ECOWAS.¹⁷⁵ By July 10, 2009, however, it became apparent that Camara was unwilling to honor his commitment, and the PSC expressed its “concern at the lack of significant progress towards the restoration of constitutional order” and “the holding of legislative and presidential elections in 2009.”¹⁷⁶ On August 17, 2009, Camara announced that the presidential elections would take place on January 31, 2010, and that he might run for office.¹⁷⁷ On September 28, 2009, the regime’s soldiers fired on unarmed civilians taking part in a peaceful demonstration against Camara’s candidacy.¹⁷⁸ At least 156 people were killed; more than 1,000 were wounded; at least 109 women were subjected to sexual violence, including rapes and sexual mutilations; and opposition leaders were attacked and their homes looted.¹⁷⁹ The UN Commission of Inquiry, which looked into these events, concluded that there was evidence of violations of human rights and crimes against humanity, and that these violations were part of a widespread and systematic pattern of violence against the

172. ECOWAS, Extraordinary Summit of ECOWAS Heads of State and Government: Final Communiqué, ¶ 12 (Jan. 10, 2010), <http://appblog.wordpress.com/2009/01/11/nigeria-extraordinary-summit-of-ecowas-heads-of-state-and-government-final-communication/>.

173. ECOWAS, Statement of the Consultative Meeting on the Situation in the Republic of Guinea, ¶ 6 (Jan. 30, 2009), <http://www.iss.co.za/uploads/AUGUINEA30JAN09.PDF>.

174. *Id.* ¶ 5.

175. U.N. S.C. Final Communiqué of the 1st Sess. of the Int’l Contact Grp. on Guinea [ICG-G], ¶¶ 6–9, U.N. Doc S/2009/140, Annex (Mar. 12, 2009).

176. A.U. P.S.C. Communiqué of the 197th Meeting, ¶ 5, Doc. No. PSC/PR/COMM(CXC VII) (July 10, 2009), <http://ausitroom-psd.org/Documents/PSC2009/197th/Communiqué/GuineacommuniquéEng.pdf>.

177. *Guinea Junta Chief Says He May Run in Polls*, AGENCE FRANCE PRESSE, Aug. 24, 2009, available at <http://panafricannews.blogspot.com/2009/08/guinea-junta-leader-says-he-may-run-in.html>.

178. ECOWAS, Final Communiqué of the 8th Sess. of the ICG-G (Oct. 12, 2009), http://www.africa-union.org/root/au/Conferences/2009/october/Communiqué%5B1%5D_ICG-G.pdf.

179. See U.N. S.C. Rep. of the Int’l Comm’n of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, ¶ 2, U.N. Doc. S/2009/693, Annex (Dec. 18, 2009) (denouncing the incident).

civilian population by the Presidential Guard, the police, and the militia.¹⁸⁰

The AU sanctions, which included “travel restrictions and freezing of assets” against members of the junta and individuals supporting the activities of the junta, also seemed to have little effect.¹⁸¹ A December 3, 2009, assassination attempt on Camara dramatically changed the situation because it forced Camara to seek emergency treatment in Morocco, and from there he went into voluntary exile.¹⁸² After the assassination attempt, Brigadier-General Sekouba Konate, a member of the military junta, became Acting Head of State and entered into negotiations with opposition groups, supported by the AU and ECOWAS.¹⁸³ These negotiations led to the signing, on January 15, 2010, of the Joint Declaration of Ouagadougou, which established a framework for transition and barred, *inter alia*, members of the military junta, members of the transitional government, and members of the Defense and Security Forces in active service from participating in the presidential elections.¹⁸⁴ The opposition leader, Jean Marie Dore, was appointed civilian Prime Minister on January 26, 2010, to lead the transition and make preparations for elections scheduled for June 27, 2010.¹⁸⁵ The elections, which took place in June, are generally accepted to have been free and fair.¹⁸⁶ However, a presidential run-off election scheduled for July 2010 has been postponed indefinitely amidst allegations of voter fraud.¹⁸⁷

The case of Guinea shows the evolution of the AU policy against *coups*. Whereas its response to the *coups* in Togo and Mauritania allowed a *coup* outcome to be validated, on this occasion, the AU’s support of mediation was instrumental in barring members of the junta from the election of June 2010. It is

180. *Id.* ¶ 4.

181. See A.U. P.S.C. Communiqué of the 207th Meeting, ¶ 4, Doc. No. PSC/AHG/COMM.2(CCVII) (Oct. 29, 2009), http://www.africa-union.org/root/au/organs/207%20Communique%20Guinee%20_Eng_.pdf (discussing the implementation of sanctions).

182. See Joost Van Egmond, *A Leader Is Shot, and Guinea Again Faces Chaos*, TIME, Dec. 14, 2009, available at <http://www.time.com/time/world/article/0,8599,1947309,00.html> (recounting the story of the assassination attempt and predicting no immediate return to power for Camara).

183. ECOWAS, Final Communiqué of the 12th Meeting of the ICG–G, ¶ 3 (Apr. 8, 2010), <http://www.africa-union.org/root/ar/index/Guinee%20Communique%20final%20GIC-G12%20Conakry%20Engl.pdf>.

184. ECOWAS, Final Communiqué of the 10th Meeting of the ICG–G, ¶ 3 (Jan. 26, 2010), [http://www.reliefweb.int/rw/RWFFiles2010.nsf/FilesByRWDocUnidFilename/SNAA-8253L7-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFFiles2010.nsf/FilesByRWDocUnidFilename/SNAA-8253L7-full_report.pdf/$File/full_report.pdf); ECOWAS, *supra* note 183.

185. Boubacar Diallo & Rukmini Callimachi, *Amid Worry, Guinea Begins Transition to Democracy*, ASSOCIATED PRESS, Jan. 26, 2010.

186. Adam Nossiter, *Guineans Revel in Prospect of First Free Vote After Era of Repression*, N.Y. TIMES, June 27, 2010, available at <http://www.nytimes.com/2010/06/28/world/africa/28guinea.html>.

187. *Guinea’s Presidential Run-off Delayed over Fraud Claims*, BBC NEWS, July 9, 2010, <http://www.bbc.co.uk/news/10577834>.

significant that it was during the events in Guinea that the AU Assembly adopted its Decision of February 2, 2010, not to allow perpetrators of unconstitutional change to participate in elections held to restore constitutional order.¹⁸⁸ While the AU, so far, has not been successful in achieving a return to constitutional government in Guinea, its policy prevented the legitimization of the *coup* of 2008.

4. Madagascar (2009)

The AU adopted a similar approach to the *coup* in Madagascar in 2009, where the situation was akin to Guinea. On March 17, 2009, under pressure from the army and the civilian opposition, President Ravalomanana resigned and transferred power to the military directorate.¹⁸⁹ The military directorate transferred presidential authority to Andry Rajoelina, the mayor of Antananarivo, the capital city.¹⁹⁰ At age thirty-four, Rajoelina was six years too young to be President under the Malagasy Constitution.¹⁹¹ Additionally, in the event of a resignation, the Constitution required an election to be held for a new President.¹⁹² In the interim period, presidential powers should have resided in the President of the Senate.¹⁹³ Despite these problems, Rajoelina received the support of the Constitutional Court.¹⁹⁴ He promised elections within two years.¹⁹⁵

Madagascar ratified the PSC Protocol in June 2004,¹⁹⁶ thus providing a clear basis for action by the PSC. On March 17, 2009, the PSC demanded scrupulous compliance with the provisions of the Malagasy Constitution.¹⁹⁷ Accordingly, the PSC declared that the transfer of power to the military directorate was a violation of the Malagasy Constitution. It also declared that the decision to

188. See *supra* Part II.C (discussing the ratification of the Charter on Democracy and the AU Assembly's decision of Feb. 2, 2010).

189. Sebastien Berger, *Opposition Leader Takes Power in Madagascar*, DAILY TELEGRAPH (London), Mar. 18, 2009, at 18.

190. See *id.* (noting that Rajoelina, the thirty-four-year-old mayor, had taken control of the government).

191. See MADAGASCAR CONSTITUTION art. 46 (1992) (saying that one must be forty years old in order to run for President).

192. *Id.* arts. 47, 52.

193. *Id.* art. 52.

194. Bill Corcoran, *Highest Court Backs New Leader Rajoelina in Madagascar*, IRISH TIMES, Mar. 19, 2009, available at <http://www.irishtimes.com/newspaper/world/2009/0319/1224243068785.html>.

195. Gregoire Poutier, *Madagascar to Hold Presidential Poll in October 2010*, AGENCE FRANCE PRESSE, Apr. 3, 2009, available at <http://www.google.com/hostednews/afp/article/ALeqM5h2R3Fe6GSOZJeLsHyx6UOtOcN1Bg>; *An Odd Way to Change a Government*, ECONOMIST, Mar. 21, 2009, available at <http://www.economist.com/node/13331251>.

196. List of Countries Acceded to the PSC Protocol, *supra* note 45.

197. A.U. P.S.C. Communiqué of the 180th Meeting, ¶ 3, Doc. No. PSC/PR/COMM.(CLXXX) (Mar. 17, 2009), http://www.africa-union.org/root/au/organs/180%20Communique%20180th%20%20_Eng_.pdf.

confer presidential authority on Rajoelina amounted to an unconstitutional change of government.¹⁹⁸ In accordance with its powers, the PSC suspended Madagascar from AU activities until the restoration of constitutional order and threatened to impose sanctions if that did not occur.¹⁹⁹ The Southern African Development Community (SADC), the sub-regional grouping to which Madagascar belongs, also suspended Madagascar, but the SADC seemed to have different requirements than the AU.²⁰⁰

Under the auspices of the AU and the International Joint Mediation Team, mediation talks were held between the four political groupings led by Ravalomanana, Rajoelina, and two former Presidents of Madagascar, Didier Ratsiraka and Albert Zafy.²⁰¹ These talks led to the signing of the Maputo Agreements of August 8–9, 2009, and the Addis Ababa Additional Act of November 6, 2009.²⁰² These agreements provided for power-sharing during a transition to constitutional order by November 2010, during which period elections would be held, and members of the transition government would be barred from participating in these elections.²⁰³ In December 2009, following an impasse between the political groupings, Rajoelina withdrew from the talks and announced that he would instead unilaterally organize elections in March 2010.²⁰⁴ In February 2010, the PSC threatened to impose targeted sanctions on the regime and its supporters if Rajoelina's regime did not comply with the agreements entered into by the political groupings.²⁰⁵ After Rajoelina failed to change his behavior, on March 17, 2010, the

198. A.U. P.S.C. Communiqué of the 181st Meeting, ¶ 3, Doc. No. PSC/PR/COMM.(CLXXXI) (Mar. 20, 2009), http://www.africa-union.org/root/au/organs/181%20Communiqu%C3%A9%20on%20Madagascar%20_Eng%20-03-09.pdf.

199. *Id.* ¶ 4.

200. See S. Afr. Dev. Cmty. [SADC], Communiqué of the Extraordinary Summit of SADC Heads of State and Government, ¶¶ 14–22 (Mar. 30, 2009), http://www.actsa.org/Pictures/UpImages/Mar%2030.09_SADC_Communique.pdf (condemning the *coup* and suspending Madagascar from SADC activities). Article 33 of the Treaty of the Southern African Development Community of 1992, as amended in 2001, gives power to impose sanctions on a case-by-case basis. Declaration and Treaty of SADC, art. 33 (Aug. 17, 2008), <http://www.sadc.int/index/browse/page/119#article12>.

201. AU, SADC, UN, and Int'l Org. of la Francophonie, Communiqué of the Joint Mediation Team for Madagascar (Aug. 9, 2009), http://www.consulmadath.org/IMG/pdf/CommuniquA_c_of_the_Joint_Mediation_Team_for_Madagascar.pdf.

202. See A.U. P.S.C. Communiqué of the 208th Meeting, Doc. No. PSC/PR/Comm.(CCVIII) (Nov. 9, 2009), <http://www.africa-union.org/root/au/organs/208%20Communiqu%C3%A9%20CPS%20Madagascar%20EN.pdf> (discussing the signing of the Maputo Agreements and the Addis Ababa Additional Act).

203. AU et al., *supra* note 201.

204. Henrik Lomholt Rasmussen, *Hard Times as Madagascar Hangs in Political Limbo*, MAIL & GUARDIAN ONLINE (Jan. 22, 2010), <http://www.mg.co.za/article/2010-01-22-hard-times-as-madagascar-hangs-in-political-limbo>.

205. A.U. P.S.C. Communiqué of the 216th Meeting, ¶¶ 8, 10, Doc. No. PSC/PR/COMM.1(CCXVI) (Feb. 19, 2010) http://www.africa-union.org/root/AU/organs/216%20Communiqu%C3%A9%20Madagascar%20_Eng%20_.pdf.

AU imposed sanctions in the form of visa restrictions and the freezing of financial assets in foreign banks.²⁰⁶ In response to this pressure, on May 12, 2010, Rajoelina announced that he would not stand for election to the presidency and presented a roadmap for a return to constitutional rule, including a referendum on the Constitution and the holding of legislative and presidential elections later in the year.²⁰⁷

In the case of Madagascar, the actions of the AU, in addition to those of other international actors, put pressure on the regime and led to progress toward the restoration of a constitutional government. As in Togo (2005), the AU was unwilling to accept a civilian government that was the beneficiary of a *coup*. As in Guinea, the AU gave its support to the agreements between the stakeholders that barred the beneficiaries of a *coup* from a subsequent election. Here too, it is apparent that, following lessons learned in earlier *coups*, the AU no longer allows *coups* to be legitimized in that way.

5. Niger (2010)

Article 36 of the Niger Constitution of August 9, 1999, limited presidential term limits to two five-year periods.²⁰⁸ Mamadou Tandja was elected in 1999, and in 2004; therefore, Tandja's period in office was due to end on December 22, 2009.²⁰⁹ Tandja, through a referendum on August 4, 2009, removed the presidential term limits from the Constitution and extended his period in office for an additional three years.²¹⁰ Niger's constitutional court declared that these modifications violated the 1999 Constitution.²¹¹ After the court decision, on May 26, 2009, Tandja dissolved Parliament and assumed emergency powers under Article 53 of the Constitution.²¹² Three days later, he dissolved the constitutional court.²¹³ His actions led to national and international protests and to a constitutional crisis within the country.²¹⁴

206. A.U. P.S.C. Statement of the 220th Meeting, Doc. No. PSC/PR/BR(CCXX) (Mar. 17, 2010), http://www.africa-union.org/root/au/organs/220%20Communiqu%C3%A9%20-Guinea%20_Eng%20_.pdf.

207. *Madagascar: Rajoelian Not to Stand as President*, ALLAFRICA.COM (May 14, 2010), <http://allafrica.com/stories/201005140562.html>.

208. NIGER CONSTITUTION, art. 36 (1999).

209. See *Timeline: Niger*, BBC NEWS, Sep. 16, 2010, <http://news.bbc.co.uk/2/hi/africa/1054274.stm> (detailing the political timeline of Niger, including Tandja's elections in 1999 and 2004).

210. 8 INSTITUTE FOR SECURITY STUDIES [ISS], PEACE AND SECURITY COUNCIL REPORT 2-3 (2010), http://www.iss.co.za/uploads/No8March_2010.pdf.

211. *Id.*

212. *Niger Leader Dissolves Parliament*, BBC NEWS, May 26, 2009, <http://news.bbc.co.uk/2/hi/africa/8067831.stm>.

213. 8 ISS, *supra* note 210, at 2.

214. See *Niger*, CRISIS WATCH (Int'l Crisis Grp., Brussels, Belgium), Mar. 1, 2010, at 4, available at <http://www.crisisgroup.org/en/publication-type/>

ECOWAS found that the situation was unconstitutional and imposed sanctions, refusing “to support candidates presented by the Member State concerned for elective posts in the international organisations” and refusing “to organize ECOWAS meetings in the Member State concerned.”²¹⁵ ECOWAS also threatened to suspend Niger from all ECOWAS decision making bodies and to refer the matter to the AU for similar action, unless the nation indefinitely suspended a planned legislative election scheduled for October 20, 2009, and continued the political dialogue with other leading political parties on resolving the political crisis.²¹⁶ The PSC endorsed the ECOWAS decision on October 29, 2009, but it did not threaten specific action or suspend Niger’s membership.²¹⁷ Instead, the PSC requested that the Chairperson of the AU Commission work closely with ECOWAS for a speedy and consensual resolution of the crisis and the democratic functioning of Niger’s institutions.²¹⁸

On February 18, 2010, a military *coup* led by Salou Djibo ousted Tandja from office.²¹⁹ In the *coup*, the junta seized the President and ministers, suspended the Constitution, and stated that it wished to turn the country into “an example of democracy and of good governance.”²²⁰ The regime received support from the population and opposition leaders, shown through two days of demonstrations and a rally in Niamey on February 20, 2010.²²¹

Niger deposited its instrument of ratification of the PSC Protocol in August 2003.²²² Although the PSC did not take any action following Tandja’s violation of the constitutionally mandated term limit, it immediately condemned the *coup* and suspended Niger from all AU activities until the country returned to constitutional order as it existed before the referendum.²²³ In requiring a return to the pre-referendum period, the PSC implicitly recognized the illegality of Tandja’s actions. The PSC’s

crisiswatch/2010/crisiswatch-79.aspx (describing the constitutional crisis Tandja created, and the popular celebration of the *coup*).

215. Press Release, ECOWAS, ECOWAS Leaders Call for Suspension of Legislative Elections in Niger, Want New Transition Authority in Guinea, Doc. No. 111/2009 (Oct. 17, 2009), available at <http://news.ecowas.int/> (select “2009” from “Select a Year” drop-down menu; follow “ECOWAS Leaders Call for Suspension of Legislative Elections in Niger, Want New Transition Authority in Guinea” hyperlink).

216. *Id.*

217. A.U. P.S.C. Communiqué of the 207th Meeting, Doc. No. PSC/AHG/COMM.3(CCVII) (Oct. 29, 2009), http://www.africa-union.org/root/au/organs/207%20Communique%20Niger%20_Eng_.pdf.

218. *Id.*

219. David Smith et al., *Niger Coup Leaders Face International Censure*, GUARDIAN (London), Feb. 20, 2010.

220. *Id.*

221. *Thousands Rally in Support of Niger Coup*, BBC NEWS, Feb. 20, 2010, <http://news.co.uk/1/hi/world/africa/8526072.stm>.

222. List of Countries Acceded to the PSC Protocol, *supra* note 45.

223. A.U. P.S.C. Communiqué of the 216th Meeting, ¶ 5, Doc. No. PSC/PR/COMM.2(CCXVI) (Feb. 19, 2010), http://www.africa-union.org/root/au/organs/216%20Communique%20Niger%20_eng.pdf.

stance reinforced the December 2009 mediation between the Nigerien stakeholders, which was led by ECOWAS and supported by the AU.²²⁴ As a result, in May 2010, the *coup* leaders announced a transition timetable to achieve civilian rule by February 18, 2011, as well as elections from which the military would be barred.²²⁵ The *coup* might have paved the way for the democratic elections that were postponed by Tandja's illegal act.

In the case of Niger, as in Mauritania from 2005 to 2007, the PSC condemned a *coup* that might have advanced democracy. This is problematic when the incumbent displaced by the *coup* was undermining democratic institutions. That said, the AU's policy has the democratic merit of forcing the junta to promise to hold democratic elections, in which they will not participate.

IV. CONCLUSION

This Article has shown how the African Union has come to take a consistent approach to unconstitutional changes of government. Where, once, the OAU was generally indifferent to how the governments of its member states came to power, a new policy progressively has been established since the Harare Declaration in 1997. At the policy level, the key developments have been the Lomé Declaration on unconstitutional changes of government in 2000, the strengthening of the legal framework through the AU Constitutive Act (in force, 2001), and the PSC Protocol (in force, 2003). Further treaty changes are contained in the proposed African Charter on Democracy. In practice, since the PSC came into operation in early 2004, the AU bodies have sought to use their sanction powers to achieve a return to constitutional order when a *coup d'état* has taken place. In Togo (2005), Mauritania (2005 and 2008), Madagascar (2009), and Niger (2010), the AU's actions contributed to an actual or planned restoration of a democratic constitutional order. Only Guinea (2008) remains without a positive outcome at the time of writing.

However, the AU's efforts have not been uniformly successful. In Togo (2005) and Mauritania (2008), electoral endorsement of *coups* led to the maintenance of office by those

224. Press Release, ECOWAS, ECOWAS Leaders Exhort Nigerien Parties to Demonstrate Flexibility in Resolving Political Crisis, Doc. No. 020/2010 (Feb. 16, 2010), available at <http://news.ecowas.int/> (select "2010" from "Select a Year" drop-down menu; follow "ECOWAS Leaders Exhort Nigerien Parties to Demonstrate Flexibility in Resolving Political Crisis" hyperlink); Press Release, ECOWAS, ECOWAS Mediation and Security Council Endorses Steps to Restore Democracy in Member States, Doc. No. 096/2010 (June 10, 2010), available at <http://news.ecowas.int/> (select "2010" from "Select a Year" drop-down menu; follow "ECOWAS Mediation and Security Council Endorses Steps to Restore Democracy in Member States" hyperlink).

225. *Niger Junta Plans Polls Before Coup Anniversary*, BBC NEWS, May 6, 2010, <http://news.bbc.co.uk/1/hi/world/africa/8665070.stm>.

who took unconstitutional action. However, the AU learned from those experiences. As can be seen from its responses to the *coups* in Guinea, Madagascar, and Niger, those who come to power by *coups* can no longer expect to be permitted to take part in subsequent elections.

A second difficulty is that the AU appears unwilling to accept *coups* that could aid democratic development. In several cases (in Mauritania in 2005 and 2008 and in Niger), a *coup* had substantial domestic support, and in two cases (in Mauritania in 2005 and in Niger), a *coup* actually appeared likely to advance democratization. It appears that the AU policy is to systematically refuse to recognize regimes that come to power through *coups*, irrespective of the precise circumstances. The danger of the AU's focus on the restoration of constitutional order is that it may shore up the position of a regime that lacks legitimacy in the eyes of its own citizens.²²⁶

Therefore, the question is whether the AU should automatically impose sanctions on all *coups*. Although it can be argued that the AU approach is necessary to ensure stable governance, it would be preferable if the AU adopted a more nuanced policy. For example, it might be more appropriate to grant recognition for a fixed period to a government that comes to power through a *coup* if the ousted regime had undermined democratic institutions and the new regime appears likely to respect those institutions. As things stand, the AU's failure to adopt a more nuanced approach leaves it open to the criticism that it continues to protect incumbent governments rather than advance the cause of democracy on the African continent.

226. See Levitt, *supra* note 116, at 790 (noting that focusing on how a regime came to power rather than its behavior while in power may benefit bad regimes).