Taking Stock of African Union's Sanctions against Unconstitutional Change of Government

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Abstract

This article examines the African Union (AU) sanctions against unconstitutional change of government. It reviews the legal background to this phenomenon and finds that unconstitutional changes of government remain recurrent and widespread across the continent. However, the AU has at its disposal a variety of sanctions, ranging from politico-diplomatic sanctions to targeted as well economic sanctions. Furthermore, perpetrators of unconstitutional change of government can be prosecuted at the domestic, regional and continental levels. But sanctions do not suffice to restore democratic order despite their punitive character. In fact, the AU also keeps diplomatic contacts and provides support to the establishment of transition governments, power sharing deals, and the organization of new elections. This fosters the rise of constitutionalism in times of crises which precedes the establishment of new democratic political orders. If this can be considered as a success in itself, the paper contends that in most of the cases, the AU and even Regional Economic Communities (RECS)/Regional Mechanisms (RMs) fail to restore to power overthrown governments. Rather, de facto authorities succeed to retain their positions after legitimizing their governments through presumed democratic elections. In addition, member states and some RECs, such as the Economic Community of Central African States (ECCAS) in the situation in CAR in 2003, undermine the AU policy of sanctions. Be it as it may, the study concludes that the AU legal framework still has some loopholes in that a number of situations are not covered by it, such as infringing the principles of democratic government through fraudulent or delayed elections, and popular uprising. Therefore, it suggests that the better way to deal with unconstitutional changes of government is prevention. This requires a universal African adherence to common values and principles of democratic governance, including the ratification of relevant AU treaties and their implementation at the domestic level.

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Introduction

This paper examines how the African Union (AU) deals with unconstitutional change of government and sanctions its perpetrators. A regime of sanctions has been adopted since the epoch of the Organisation of African Unity (OUA), the AU predecessor. Although this development has taken time to be materialised, it was significant because of the prevalence and recurrence of unconstitutional changes of government in Africa after the end of the Cold War.

The UA and OAU adopted seven main instruments on unconstitutional change of government: the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (herein referred to as the Lomé Declaration);[1] the AU Constitutive Act; the Rules of Procedure of the AU Assembly;[2] the Protocol relating to the Establishment of the AU Peace and Security Council (PSC); the African Charter on Democracy, Elections and Governance (ACDEG);[3] the 2010 AU Decision on the Prevention of Unconstitutional Changes of Government;[4] and the Malabo Protocol.[5] Not only have these documents mandated the AU/OAU organs to institute predetermined sanctions but also, they opened room for AU competent institutions to devise and adapt targeted sanctions to specific situations.

However, questions arise as to the practicability and end result of this AU policy since the incumbents are often tempted – and may succeed – to retain their powers while expecting that, over the time, the resumption of the democratic process through transition governments and elections will lead to the lifting of the sanctions. The recent situation in Chad is much telling, following the death of President *Idriss Deby Itno* in April 2021. Observers have called it a blatant unconstitutional change of government while questioning the AU complaisant attitude, i.e. its failure to name the confiscation of the political power by the armed forces in violation of the Chadian constitution as a coup d'état and condemn or reject it.[6] This calls for a deep analysis of the effectiveness of AU sanctions towards the restoration of democratic constitutional order. In terms of methodology, the approach chosen reflects in essence a combination of legalistic, historical and analytical methods.

1 AHG/Decl.5 (XXXVI), Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, 36th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Lomé (Togo), 10–12 July 2000.

2 Rules of Procedure of the Assembly of the Union, Durban (South Africa), 9–10 July 2002.

3 The African Charter on Democracy, Elections and Governance (30 January 2007).

4 Assembly/AU/Dec.269(XIV) Rev.1, Decision on the prevention of unconstitutional changes of government and strengthening the capacity of the African Union to manage such situations, 14th ordinary session of the AU Assembly, Addis Ababa (Ethiopia), 31 January – 2 February 2010.

5 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (27 June 2014).

6 *Amani Africa* and *Research Services*, Consideration of the Fact Finding Mission on Chad (10 May 2021), <https://amaniafrica-et.org/consideration-of-the-fact-finding-mission-on-chad/> (accessed on 10 April 2022).

Towards this end, the study seeks, through the employment of a spectrum of data sources, inclusive of documentary sources, to analyse and interpret the central thesis, namely the phenomenon of unconstitutional changes of government in Africa and the sanctions thereto by AU. The proposed methodology is based on qualitative data collection tools and techniques. These include, but not limited to, literature review which entails a comprehensive review of AU legal instruments as well as a review of relevant documents and reports by AU organs and scholarly work on the subject matter. In this regard, primary and secondary sources are applied extensively in the paper. These include books, academic journals, OAU/AU reports, resolutions, declarations, as well as media and other electronic sources.

Section 2 clarifies the notion of unconstitutional change of government and demonstrates that this is not only prohibited but it also constitutes a crime punishable under African international criminal law, even though there are several other forms of unconstitutional take-overs of power which are not covered by the AU legal instruments. Section 3 identifies consequences attached to the perpetration of unconstitutional changes of government. Section 4 scrutinizes the AU sanctions against perpetrators of these changes, classifies them in different categories and highlights the procedures under which these sanctions can be adopted, before making, in section 5, an overall assessment of their application in order to show the strengths and weaknesses of the AU policy. The conclusion follows with some recommendations.

A. Clarification of the Notion of Unconstitutional Change of Government

The rejection of unconstitutional changes of government can be dated back to the 19th and early 20th centuries, following the development of the "Tobar Doctrine" by *Carlos Tobar*, former foreign minister of Ecuador, who was defending the denial of recognition to *de facto* governments coming to power through the use of force and other revolutionary means in order to promote political stability and socio-economic progress in Latin America.[7] It is now widespread in practice.[8] As to the African continent, such rejection has gained momentum since the 1990s. The legal framework which has been adopted under both the OAU and the AU captures various forms of unconstitutional changes but leaves several others outside its ambit.

7 *Charles L. Stansifer*, Application of the Tobar Doctrine to Central America, in The Americas, vol. 23 (3), 1967, pp. 251–272. See also *Sayman Bula-Bula*, Mise hors-la-loi ou mise en quarantaine des gouvernements anticonstitutionnels par l'Union africaine?, in African Yearbook of International Law 11 (2003), pp. 30–31.

8 See *Rafâa Ben Achour*, Changements anticonstitutionnels de gouvernement, in Recueil des Cours de l'Académie de Droit International 379 (2016), pp. 97–548.

I. Background to the Legal Framework

While the rejection of unconstitutional change of government became obvious in early 1990s, it is the African Commission on Human and Peoples' Rights which voiced first an explicit stance on the matter in its 1994 resolution on the military, restating "the trend world-wide and in Africa in particular (…) to condemn military take-overs and the intervention by the military in politics".[9] The African Commission further declared that such forcible take-overs violate articles 13(1) and 20(1) of the African Charter on Human and Peoples' Rights.[10] It clarified this position in two subsequent resolutions, adopted in reaction to the military coup d'état committed on 30 April 1999 in Comoros against President *Tadjeddine Bensaid* by Colonel *Azali Assoumane*, and the one which took place on 9 April 1999 in Niger against President *Ibrahim Mainassara Bare* who was assassinated by the army led by Colonel *Wanke*. In these resolutions, the African Commission specifies that military coups constitute "an intolerable infraction of the democratic principles of the rule of law",[11] whilst there is a fundamental principle requiring that "for a government to be legitimate it must be freely chosen by the people and through democratically elected representatives".[12]

The term unconstitutional change of government was used as such in the Declaration of Grand Bay (Mauritius) in April 1999 as one of the causes of human rights violations on the continent.[13] It was again referred to in two decisions of the OAU Assembly, adopted in Algiers (Algeria) in July 1999 as "unconstitutional remover of governments"[14] and governments which come to power "through unconstitutional means".[15] It also gained a lot of support from Regional Economic Communities (RECs).[16] In particular, the Economic

9 ACHPR /Res.10 (XVI) 94: Resolution on the Military (1994), preamble, para. 4.

10 Ibid. para.5. Article 13 (1) of the African Charter on Human and Peoples' Rights provides that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law"; and its article 20 (1) stipulates that "All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen".

11 ACHPR/Res.34(XXV)99: 34 Resolution on the Situation in Comoros (1999), preamble, para. 5; ACHPR/Res.35(XXV)99: 35 Resolution on the Situation in Niger (1999), preamble, para. 5.

12 Ibid., para. 4.

13 CONF/HRA/DECL (I), Declaration and Plan of Action, 1st OAU Ministerial Conference on Human Rights, Grand Bay (Mauritius), 12–16 April 1999, para. 8 (p).

14 AHG/Dec.141 (V), Decision, 35th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity, Alger (Algeria), 12–14 July 1999, para. 4.

15 AHG/Dec. 142 (XXXV), Decision, 35th Ordinary Session of the Assembly of Heads of State and Government of the Organization of African Unity, Alger (Algeria), 12–14 July 1999, para. 1.

16 There are eight Regional Economic Communities: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African

Community of West African States (ECOWAS) decided to use force, with the OAU's support as expressed in the Harare Declaration (Zimbabwe) of 4 June 1997, in order to re-establish in power elected President of Sierra Leone, *Ahmad Tejan Kabbah*, after the coup d'état of 25 May 1997 perpetrated by *Johnny Paul Koroma*.[17] In December 1999, it was formally agreed that ECOWAS would intervene in a member state, without its consent, in situations of serious and massive violations of human rights and the rule of law or "in the event of an overthrow or attempted overthrow of a democratically elected government".[18] This legal development significantly improved ECOWAS policy of "zero tolerance for power obtained or maintained by unconstitutional means".[19] The stake here is the protection of African democracies as political regimes in which "authority to exercise power derives from the will of the people".[20] In this regard, seizing or maintaining power through undemocratic means or practices is considered as "an unacceptable and anachronistic act and in contradiction of the 'commitment to promote democratic principles and conditions".[21]

The Lomé Declaration of July 2000 is however the first document to have defined the concept of unconstitutional change of government and OAU's procedures and sanctions in reaction to its commission. This Declaration is politically accepted within the AU framework and often referred to in the process of sanctions application.[22] While a declaration is not binding in principle, the notion of unconstitutional change of government was conventionalized in the AU Constitutive Act of 2000, the Protocol on the PSC of 2002

States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC). See Assembly/ AU/Dec.112 (VII), Decision on the Moratorium on the Recognition of the Regional Economic Communities (REC), 7th Ordinary Session of the Assembly of the African Union, Banjul (Gambia), 1–2 July 2006.

17 *Joseph Kazadi Mpiana*, L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement, in Revue québécoise de droit international 25 (2012), pp. 103–104; *Dominique Bangoura*, Les modalités d'intervention : deux cas de maintien de la paix (Liberia et Centrafrique), in *Paul Ango Ela* (ed.), La prévention des conflits en Afrique centrale. Prospective pour une culture de la paix, Paris, 2001, pp. 102–104.

18 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, article 25.

19 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (21 December 2001), article 1 (c).

20 *Costantinos Berhutesfa Costantinos*, Unconstitutional Regime Change: Trend Perspective and Political Requisite for Stricter Law Enforcement', in Pan-African Yearbook of Law 2012, p. 16.

21 AHG/Decl.5 (XXXVI), *supra* note 1, preamble, para. 4.

22 *Cynthia Mouafo Piaplie*, African solutions to African problems? The African Union's sanctions regime regarding unconstitutional changes of government, Master thesis, Carleton University, 2019, p. 46.

and the ACDEG of 2007.[23] The "condemnation and rejection of unconstitutional changes of governments" has become a binding rule under the AU Constitutive Act, while the PSC must deal with them "as provided for in the Lomé Declaration".[24] The Declaration is also part of the "Common African Defence and Security Policy"[25] and was included in the AU Non-Aggression and Common Defence Pact.[26] All these developments changed its nature from a soft law document to a binding legal instrument. *Nkosi* notes that "the Lomé Declaration is now considered to be one of the canons in the AU's drive to promote democracy and good governance, and consequently to rid the continent of the coup malaise".[27]

Meanwhile the AU has improved its legal framework from the mere prohibition of unconstitutional changes of government to their criminalization. This move has been made through the Malabo Protocol which lists unconstitutional change of government among crimes of collective concern to the community of African states and peoples which fall under the material jurisdiction of the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights.[28] Even if the Malabo Protocol has not yet come into force, it must be noted that the crime of unconstitutional change of government is part of *lex lata* at least after the entry into force of the ACDEG in 2012, obligating states parties to "(…) bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition".[29] It is also the ACDEG which requires their judgment by the competent AU criminal jurisdiction which overlaps domestic judiciaries of member states.[30]

This shift from prohibition to criminalization of unconstitutional changes of government is a further step in the protection of democracy in Africa. AU member states shall no longer enjoy the right to choose freely a political regime other than democracy. This public policy is apparently an aspect of a wide process towards the regionalization of African

23 *Blaise Tchikaya*, La Charte africaine de la démocratie, des élections et de la gouvernance, in Annuaire français de droit international 54 (2008), p. 525; *Eki Yemisi Omorogbe*, A Club of Incumbents? The African Union and *Coups d'État, in* Vanderbilt Journal of Transnational Law 44 (2011), pp. 134–135.

24 Protocol Relating the establishment of the Peace and Security Council of the African Union (9 July 2002), article 7(1) (g).

25 Ext/Assembly/AU/1–2 (II), Solemn Declaration on a Common African Defence and Security Policy, 2nd Extraordinary Session of the Assembly of the African Union, Sirte (Libya), 27–28 February 2004.

26 AU Non-Aggression and Common Defence Pact (31 January 2005), article 1(l).

27 *Mxolisi Nkosi*, Analysis of OAU/AU responses to unconstitutional changes of government in Africa, Master thesis, University of Pretoria, 2013, p. 46.

28 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), article 28A (1) (4).

29 African Charter on Democracy, Elections and Governance, article 25(9).

30 Ibid., article 25(5).

constitutional law, the creation of a Pan-African Constitutional Court,[31] and the promotion of "the objectives of the political and socio-economic integration and development of the continent with a view to realizing the ultimate objective of a United States of Africa".[32] The outlawed forms of unconstitutional change of government can show this better.

II. Forms or Manifestations

Under the Lomé Declaration, four types of unconstitutional change of government were legally fixed by member states, namely (1) a military coup d'état against a democratically elected government; (2) intervention by mercenaries to replace a democratically elected government; (3) the replacement of democratically elected governments by armed dissident groups and rebel movements; and (4) the refusal of an incumbent government to relinquish power to the winning party after free, fair and regular elections. Notwithstanding dissenting opinions of some AU members during meetings on the draft of the ACDEG and on the revision of the Lomé Declaration between 2003 and 2006,[33] a fifth situation of unconstitutional change of government was included in the 2007 ACDEG, namely, "any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government".[34] The 2014 Malabo Protocol added a sixth form of unconstitutional change of government, constituted by "any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors".[35]

It must be noted that the ACDEG provides for a non-exhaustive list of situations of unconstitutional change of government. This comes out of the chapeau of its article 23 which specifies that state parties agree that "the use of, *inter alia,* the following illegal means of accessing or maintaining power" constitutes such situations. This technical wording of the legal provision gives leverage to the AU to cover other situations upon determination on a case-by-case basis. In particular, the ACDEG can be interpreted to cover the aforementioned sixth situation stipulated by the Malabo Protocol. Likewise, the Malabo Protocol has improved the wording of the third situation, implying that a democratically elected government can be replaced by dissident groups or rebels "or through political

31 Assembly/AU/Dec.458 (XX), Decision on the Establishment of an "International Constitutional Court" (Doc Assembly/AU/12(XX) Add.1)', 20th Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 27–28 January 2013, paras 2–3.

32 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, preamble, para. 13.

33 Executive Council, Report of the Ministerial Meeting on the draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa' (EX.CL/258 (IX)), Banjul (The Gambia), 25–29 June 2006, paras. 40–44.

34 African Charter on Democracy, Elections and Governance, article 23(5).

35 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, article 28 E (1) (f).

assassination". This is simply a reiteration of the relevant provision of the AU Constitutive Act which condemns and reject "impunity and political assassination, acts of terrorism and subversive activities".[36] The Malabo Protocol contains an exhaustive list of situations of unconstitutional change of government simply because of its penal nature which requires precision and certainty in accordance with the principle of legality.

1. Military Coups

Since the years of independence and until the end of the Cold War, African states experienced several military coups d'état. These constituted the most common and frequent form of unconstitutional change of government challenging the democratic journey initiated by some states. From early 1990s onwards, with the new wave of democratisation, though many African states organised regular elections and some witnessed occasional transfers of power, it did not wipe out the practice of military putsches, as many states experienced them until as recently with successive military coups in Mali on 21 May 2021, in Guinea on 15 September 2021 and in Burkina Faso on 23 January 2022.

2. Intervention by Mercenaries to Replace a Democratically Elected Government

Mercenarism, or the state of being a mercenary has been a severe, long time sore for African international relations. While the use of mercenaries during armed conflict was still quite a normal phenomenon around the period states from the global south were being decolonized,[37] the legality of mercenary recruitment, use, financing and training, became particularly problematic during this time. Former colonial powers were suspected of resorting to the use of mercenaries since it had become politically difficult to use their regular armed forces in order to hinder the process of decolonization or, at least, of self-determination after independence.[38] In Africa, the phenomenon is best illustrated by the crisis of mercenaries during the Katanga Congolese secession (1960–1962), the Biafra secession in Nigeria (1968–1969), the civil wars in Soudan (1970) and Angola (1975–1976) and the war for the decolonization of Zimbabwe (1970).[39] Beyond these examples, mercenaries

36 AU Constitutive Act (11 July 2000), article 4(0).

37 *Stephen John Gordon Clarke*, The Congo Mercenary: A History and Analysis, Johannesburg, 1968, pp. 9–10; *Josiane Tercinet*, Les mercenaires et le droit international, in Annuaire français de droit international 23 (1977), p. 270.

38 *Lyal S. Sunga*, The Emerging System of International Criminal Law: Developments in Codification and Implementation, The Hague, London and Boston, 1997, p. 184; *John Riley* and *Michael Gambone*, Men with Guns, in Wisconsin International Law Journal 28 (2010), p. 56; *Juan Carlos Zarate*, The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder, in Stanford Journal of International Law 34 (1998), pp. 86–90.

39 *Eric David*, Les mercenaires en droit international (développements récents), in Revue belge de droit international 13 (1977), pp. 200–201; *Clarke*, note 37, pp. 9–10.

have been associated with almost all contemporary African armed conflicts, including those which occurred in Liberia, Sierra Leone, Ivory Coast, Central African Republic, and the DRC.[40] Outside the realm of armed conflicts, mercenaries have been involved in many military *coups d'état* across the continent, notably in Benin and Comoros.

According to *Manirakiza*, this situation involves the seizure of power (…) with the help of external forces, either mercenaries or major powers.[41] This was the case of Comoros. On 3 August 1975 the French government supported mercenaries *Bob Denard* and *Jacques Foccart* to overthrow President *Ahmed Abdallah* of the Comoros. Under the 1977 OAU Convention for the Elimination of Mercenarism in Africa, mercenarism is a crime against peace and security.[42] According to *Maru*, mercenarism "defeats the will of the people, sovereignty of a state, and the right of self-determination of the people of a given country. When foreigners engage in a direct or indirect participation and aiding of conflicts in African continent, such intervention is considered as a subversion of the will of the people. Thus, in effect, mercenary intervention is anti-thesis of proper revolution and constitutional changes of government."[43]

3. Replacement of Democratically Elected Governments by Armed Dissident Groups or Rebels

African states have also experienced situations involving the seizure of power by military dissidents or rebels or other armed movements sometimes with the help of external forces.[44] The case of the National Resistance Movement which conquered power in 1986 in Uganda and of that of the Rwanda Patriotic Front/Army which did the same in 1994 in Rwanda are illustrative of the above situations.

As a reminder, the Malabo Protocol incorporates in this form of unconstitutional change of government the replacement of a democratically elected government through political assassination. This is a heritage of the OAU Charter which stipulated an "unreserved condemnation, in all its forms, of political assassination as well as of subversive activities

40 *Jean-Paul Segihobe*, Le Congo en droit international: essai d'histoire agonistique d'un Etat multinational, Bruxelles, 2011, p. 208; *Khareen Pech*, The Hand of War: Mercenaries in the Former Zaïre 1996–97, in *Abdel-Fatau Musah* and *John 'Kayode Fayemi* (eds.), Mercenaries: An African Security Dilemma*,* London, 2000, pp. 117–154.

41 *Pacifique Manirakiza*, Insecurity Implications of Unconstitutional Changes of Government in Africa: from Military to Constitutional Coups, in Journal of Military and Strategic Studies 17 (2016), p. 91.

42 OAU Convention for the Elimination of Mercenarism in Africa (3 July 1977), article 1 (3).

43 *Mehari Taddele Maru*, On Unconstitutional Changes of Government: The Case of the National Transitional Council of Libya (20 September 2011) <https://issafrica.org/iss-today/on-unconstitutional-changes-of-government-the-case-of-libyas-ntc> (accessed on 10 April 2022).

44 *Manirakiza,* note 41, p. 91.

on the part of neighbouring States or any other States".[45] However, neither the AU Constitutive Act nor the OAU Charter defines political assassination.

Historically, the condemnation of political assassination under the OAU Charter was influenced by two prominent events: the regime changes in the DRC and Togo, respectively after the killing of the Congolese Prime Minister, *Patrice-Emery Lumumba*, on 17 January 1961,[46] and the assassination of the Togolese President, *Sylvanus Olympio*, on 13 January 1963. It follows that the assassination envisaged by the OAU Charter as well as the AU Constitutive Act is one which is committed for political purposes of regime change and not just the killing of a political leader for other reasons or the assassination of any citizen whom a government may have wanted to get rid of. According to *Joseph-Marie Bipoun-Woum*, the assassination in question must have diplomatic implications either by its origin or through the victim, or affect the political functions exercised by the latter.[47] This is because the perpetrator of a political assassination actually aims to target the organization and the functioning of the state and its political institutions.[48]

4. Refusal to Relinquish Power to the Winning Party after Free, Fair and Regular Elections

Situations of incumbents that have lost elections but refused to admit defeat and relinquish power to their opponents have also occurred in Africa. Gambia has provided such an example after the presidential election that took place in December 2016. *Adama Barrow* having been declared the winner of the election, the incumbent President *Yayah Jammeh*, who had first conceded defeat, rejected the result of the election due to "serious and unaccepted abnormalities during the electoral process".[49] He was forced to leave the power

45 OAU Charter (25 May 1963), article III (5).

46 *Georges Zongola-Ntalaja*, Patrice Lumumba: the Most Important Assassination of the 20th Century, *The Guardian* (17 January 2011) <https://www.theguardian.com/global-development/poverty-matters/2011/jan/17/patrice-lumumba-50th-anniversary-assassination?CMP=share_btn_fb> (accessed on 20 March 2022).

47 *Joseph Bipoun-Woum*, Le droit international africain et son objet : recherche du régionalisme international comparé, in Faculté de Droit et des Sciences économiques et Institut d'études politiques de l'Université d'Alger, Problèmes actuels de l'unité africaine, Alger, 1973, p. 215.

48 Ibid.

49 *Emma Farge*, Gambia President Jammeh rejects outcome of Dec. 1 election (10 December 2016) <https://www.reuters.com/article/us-gambia-election-idUSKBN13Y2QO>, (accessed on 20 December 2021).

and the country after serious condemnations from the United Nations,[50] the AU,[51] and the ECOWAS,[52] and after a threat of military intervention.[53]

In some cases, incumbents strategically orchestrated post-election violence that will help them remain in power at any cost.[54] That was the case in Kenya (2007), Zimbabwe (2008) and Côte d'Ivoire (2010).[55]

5. Constitutional Amendments and Modification of Electoral Laws Infringing the Principles of Democratic Change of Government

These situations of unconstitutional change of government were respectively introduced by the 2007 ACDEG to react against some soft manoeuvres concocted by some leaders to facilitate them to extend their stay in power. According to article 23(5) of this treaty "any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government" is prohibited. Contrastingly, leaders from across the African continent have managed to remove term and age limits in order to stay in power for additional terms or for life and the practice has become commonplace in Africa and it is not likely to end any time soon.[56] Countries such as the Republic of

50 SC Res. 2337 (2017), 19 January 2017, paras. 4–6.

51 PSC/PR/COMM. (DCXLIV), 12 December 2016, para.12; PSC/PR/COMM. (DCXLVII), 13 January 2017, para. 5.

52 Final Communiqué, Fiftieth Ordinary Session of the Authority of Heads of State and Government, Abuja (Nigeria), 17 December 2016, para. 38 (h).

53 *Aidan Hehir*, The questionable legality of military intervention in The Gambia (20 January 2017) <https://theconversation.com/the-questionable-legality-of-military-intervention-in-the-gambia-71595> (accessed on 23 December 2021).

54 *Jeremiah Shola Omotola*, Unconstitutional changes of government in Africa: what implications for democratic consolidation?, Discussion paper 70, Upsala 2011, p. 28.

55 See in this volume Marystella Auma Simiyu's article.

56 *Manirakiza*, note 41, p. 94.

Congo,[57] Rwanda,[58] Uganda,[59] Gabon,[60] Chad,[61] Djibouti,[62] and Equatorial Guinea[63] have succeeded to amend their constitutions and not always at the satisfaction of the public and opposition political forces.

However, this specific form of unconstitutional change of government cannot stand a serious legal challenge since there is nothing intrinsically illegal in making constitutional amendments and because neither AU law nor international law forbids long-term tenure in office following regular, fair and transparent elections.[64] The AU considers it to be a matter of concern likely because constitutional revisions or modifications of electoral laws are often made in violation of state constitutions when incumbents aim to remain in power while they have exhausted their term limits. These are cases of refusal by leaders to comply with their constitutions. They have the potential of triggering fierce contestations through violent demonstrations, thereby creating political instability and threatening peace and security in the continent.

III. Uncovered Situations

Despite efforts to improve the AU legal framework on unconstitutional change of government, there are situations which are still not covered, such as maintaining political power through fraudulent or delayed elections, overthrowing a non-democratically elected government and popular uprisings.

57 In 2015, the Republic of Congo held a constitutional referendum that allowed a President to be elected up to three times, eliminated the 70 years' age limit for candidates. The changes allowed President Denis Sassou Nguesso for presidency after the expiration of his second term in 2016.

58 In 2015, Rwanda amended the 2003 constitution after a constitutional referendum. The amendments allowed incumbent President Paul Kagame to run for a third term in 2017.

59 In 2017, the Parliament of Uganda passed a constitutional amendment to remove a 75 years' age limit for presidential candidates that would have blocked the then 74 years Museveni for running in the 2021 elections.

60 In 2018, the Parliament of Gabon adopted some constitutional amendments which increased the powers of the president and without including the term limits.

61 In 2018, the Parliament of Chad approved a new constitution that reinstated a two-term limits removed in the 2005 referendum; a two-term limits not to be applied retroactively hence allowing President Idris Debby to run for two more terms in office after the elections of 2021. He was killed in April 2021 after winning the elections.

62 In 2010, the Parliament of Djibouti voted for a constitutional amendment that removed term limits, thus allowing President Ismail Omar Guelleh to seek for reelection after the expiration of his second term in 2011.

63 In 2011, Equatorial Guinea held a referendum that voted for amendments of the constitution that removed, among other things, the 75 years' age limit for anyone running for presidency, thus allowing President Teodoro Obiang Nguema to stay in power.

64 *Manirakiza, note* 41, p. 94.

1. Fraudulent or Delayed Elections

The AU legal framework does not list fraudulent elections as a form of unconstitutional change of government, yet this is a subversion of democracy as it allows the extension of the incumbency of the serving government against the will of the people.

The ACDEG obligates states parties to hold 'transparent, free and fair elections', to establish independent bodies to oversee the elections and to maintain strong mechanisms to resolve elections related disputes.[65] However, it does consider election manipulation as an act that may constitute an unconstitutional change of government. Cases of dramatic scale of fraud in elections committed in order to stay in power should be assimilated to a refusal by incumbents to relinquish power to the winning party after elections. For instance, many international observers believed that Zimbabwe's 2000 and 2005 (legislative) and 2002 (presidential) elections were clearly unfree, unfair, fraudulent and therefore unconstitutional.[66] Yet, although the AU noted some of these concerns it did not condemn the election results.

The key point to note here is that the AU does not retain fraudulent elections as an unconstitutional change of government. Rather, its legal framework makes the slightly different point that the AU will refuse to support an incumbent government that does not relinquish power to the winning party after free, fair and regular elections. In this way, it is crystal clear that this issue has not yet been addressed and Africa will keep facing subsequent unfree and unfair elections.

Likewise, new political practices have emerged to circumvent the AU legal framework in order to stay in power against the will of the people and in violation of constitutions in force. For instance, the definition of unconstitutional change of government does not include the situation whereby an incumbent deliberately refuses to organize elections at the end of his constitutional term by maliciously alleging technical or financial problems, as it was the case in the DRC in 2016.[67] These practices are pertinent reasons for revising or adapting the AU legal framework to unforeseen and unpredicted circumstances in order to cover any other act of comparable gravity which is a breach of democratic change of government, resulting from the non-observation of laws in order to infringe the principles of democratic change of government, inconsistently with the constitution. This proposal can enable to sanction leaders who rely on their own bad governance in order to illegally cling

65 African Charter on Democracy, Elections and Governance, article 7.

66 *Ed Cropley*, Zimbabwe calls South African report on its 2002 election 'rubbish' (21 November 2014), <https://www.reuters.com/article/us-zimbabwe-politics-idUSKCN0J51RR20141121> (accessed on 22 December 2021).

67 *Balingene Kahombo*, *Emmanuel Kabengele Kalonji* et al., La RDC entre la sortie de l'impasse électorale et le respect de la Constitution : analyse de l'Accord politique de la Saint-Sylvestre – 5ème Rapport conjoint du Groupe de Travail composé du CREEDA, de la LE et du RRSSJ', 2017, pp. 4–5.

to power. Reversely, it can deter opposition forces and citizens to resort to violence as an ultimate mean to free themselves and come to power.

2. Overthrow of a Non-democratically Elected Government

It is obvious that the AU legal framework on situations of unconstitutional change of government applies to means of accessing or maintaining political power but it does not target the manner in which leaders rule their countries. In fact, power must be obtained or retained only through democratic means and elections. It follows from this that overthrowing a non-democratically elected government does not amount to an unconstitutional change of government. A case in point is the overthrow of the Libyan leader, *Muammar Gadhafi*, by rebels of the Transition National Council supported by NATO in 2011.[68] The situation could not fall within the remit of unconstitutional change of government simply because *Gadhafi's* regime came to power through a coup against King *Idris I* in 1969 and remained undemocratic throughout his reign. The Chairperson of the AU Commission acknowledged that for too long, the political system in Libya was at variance with the relevant AU legal instruments.[69]

However, a distinction must be drawn between non-democratically elected governments with transition governments put in place with the AU or RECs' support in order to restore the democratic constitutional order. Practice shows that the AU and RECs consider overthrowing such a transition government as a situation of unconstitutional change of government. In Mali, for instance, sanctions were imposed after the coup against transition President *Bah N'Daw* on 24 May 2021.[70] Likewise, the UA suspended the participation of Sudan in all its activities when General *Abdel Fattah al-Burhan* ousted and arrested transition Prime minister *Abdallah Hamdok* on 25 October 2021,[71] whilst his government had come to power in August 2019 following months of negotiations with the armed forces for a civilian led transition after the military coup d'état perpetrated against former President *Omar al Bashir* on 11 April 2019.

For two main reasons, it is unfortunate that the replacement of a non-democratically elected government by force is not covered by the AU legal framework. First, one of the reasons for prohibiting unconstitutional changes of government is that they pose a threat to the peace and security of Africa. Second, the AU should avoid legitimizing a situation that can be cyclical and stop the bleeding of illegalities. It must not support an illegitimate government or its detractors. It must be the church in the middle of the village, working for the restoration of democratic constitutional order. Therefore, because the said AU legal

68 *Kazadi*, note 17, p. 113.

69 Peace and Security Council, Report of the Chairperson of the Commission on the situation in Libya and on the efforts of the African Union for a political solution to the Libyan crisis (PSC/AHG/3(CCXCI)), 26 August 2011, para. 17.

70 PSC/PR/COMM.1/1057 (2022), 14 January 2022, para. 1.

71 PSC/PR/COMM.1041 (2021), 26 October 2021, para. 4.

framework does not apply in this particular case, the only possible way that remains is to address it as a constitutional crisis by the AU means of action other than sanctions against unconstitutional change of government.

3. Popular Uprising

In 2013, the AU Assembly gathered in Addis Ababa (Ethiopia) to celebrate the 50th anniversary of the OAU creation. In its final solemn declaration, it reiterated the rejection of unconstitutional change of government but recognized the right of each people "to peacefully express their will against oppressive systems".[72] The declaration raised again awareness on the question whether popular uprising that results in regime change could be dealt with as an unconstitutional change of government.

It is well known that international law provides for the right to resist against tyranny and oppression that violate human rights and particularly people's democratic rights.[73] In Africa, the African Charter on Human and Peoples' Rights acknowledges the right to self-determination which includes the right of each people to free itself from domination and oppression by using any means authorized by international law.[74] Some African constitutions also acknowledge the right to resist gross undemocratic practices,[75] such as the DRC Constitution of 18 February 2006 which provides for the duty of every Congolese to defeat any individual or group of individuals who takes power by force or who exercises it in violation of the constitutional provisions.[76]

Given this legal pedigree, the question of including popular uprising in the definition of unconstitutional change of government has always been controversial. The discussions were particularly intense during the drafting process the aforementioned 2014 Malabo Protocol instituting the International Criminal Section of the African Court of Justice and Human and Peoples' Rights. Indeed, the original draft of the said treaty as submitted to the AU Assembly in 2012 had stipulated in article 28E that "any acts of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article".[77] But it could not be adopted because member states still disagreed on this in the aftermath of uprisings that had occurred in North Africa,

72 50th Anniversary Solemn Declaration, AU Assembly, 21st ordinary session, Addis Ababa (Ethiopia), 26 May 2013, para. F (ii).

73 *Pacifique Manirakiza*, Towards a Right to Resist Gross Undemocratic Practices in Africa, in Journal of African Law 63 (2019), pp. 87–90.

74 African Charter on Human and Peoples' Rights (27 June 1981), article 20.

75 *Manirakiza*, *note* 73, p. 92.

76 Constitution of the Democratic Republic of the Congo (18 February 2006), article 64.

77 Executive Council of the African Union, 'The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General – Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: Revisions up to Tuesday 15th May 2012 (Exp/Min/IV/Rev.7)', EX.CL/731(XXI), Addis Ababa (Ethiopia), 9–13 July 2012, p. 24.

particularly in Tunisia and Egypt, in the context of the so-called Arab Spring.[78] This time, the AU Commission was requested to obtain inputs from the AU Commission on International Law (AUCIL)[79] and the African Commission on Human and Peoples' Rights (ACmHPR).[80] To this end, a workshop gathering these three AU organs was convened in Arusha (Tanzania) from 19 to 20 December 2012. As a result, it was suggested that where the PSC determined that "the change of government through popular uprising is not an unconstitutional change of government the Court shall not be seized of the matter".[81] However, this proposal was not approved by states during the meetings of the Specialised Technical Committee (STC) on Justice and Legal Affairs, held in Addis Ababa from 6 to 14 May 2014 (experts), and from 15 to 16 May 2014 (ministerial level).[82] Due to the lack of consensus, popular uprising was simply deleted in the final daft Protocol that was submitted to the AU Assembly and adopted by it in Malabo (Equatorial Guinea) on 27 June 2014.[83] Therefore it is not to date a situation of unconstitutional change of government but the AU can still deal with it by other means as a case of constitutional crisis.

B. Consequences of the Commission of Unconstitutional Change of Government

Given the wide rejection of unconstitutional change of government by the AU, RECs and their member states through various legal instruments and policy documents, it is clear that its prohibition is now a rule of African customary international law.[84] As such the rule

78 African Union, Report of the Fifth Ordinary Session of the African Union Commission on International Law, AUCIL/Legal/ Rpt (V), Addis Ababa (Ethiopia), 26 November – 5 December 2012, para. 28 (iii).

79 See Statute of the African Union Commission on International Law (4 February 2009).

80 Assembly/AU/Dec.427(XIX), Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Peoples' Rights (Doc. Assembly/AU/13(XIX)a), 19th Ordinary Session of the Assembly of the African Union, Addis-Ababa (Ethiopia), 15–16 July 2012, para. 3.

81 Executive Council of the African Union, Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implication, 19–20 December 2012 (AfCHPR/LEGAL/Doc.3)', EX.CL/773(XXII) Annex 1, 21–25 January 2013, para. 12.

82 Executive Council of the African Union, The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs – Report (STC/Legal/Min/Rpt.), EX.CL/846(XXV), Malabo (Equatorial Guinea), 20–24 June 2014, paras 1 and 22–23. Accordingly, the African Union Commission on International Law also deleted popular uprising in the final version of its proper definition of unconstitutional changes of government. See African Union Commission on International Law, Records of Activities of AUCIL and Extraordinary Sessions, Legal Opinions, Forum of Experts of International Law and African Union Strategic Plan for the Period 2010–2012, in Yearbook of African Union Commission on International Law, 2013, p. 82.

83 Assembly/AU/Dec.529(XXIII), Decision on the Draft Legal Instruments (Doc. Assembly/AU/8(XXIII), 23th Ordinary Session of the Assembly of the African Union, Malabo (Equatorial Guinea), 26–27 June 2014, para. 2 (e).

84 *Kazadi,* note 17, p. 113.

is binding on all members of the African community of states and peoples. Several consequences follow from this, beginning with the duty not to recognize illegal governments or de facto authorities who have come to power or retain it by force or undemocratic means, and then the imposition of sanctions to perpetrators of unconstitutional change of government and/or their supporters. To draw these consequences, AU decision making organs must comply with some procedural rules.

I. Non-recognition of Illegal Governments

This is a duty for all AU member states once a situation has been qualified as an unconstitutional change of government. To decipher its content, inspiration can be taken from the Draft Articles on State Responsibility adopted by the International Law Commission (ILC) in 2001. The reason is simple. Indeed, in articles 40 and 41, it clarifies the specific consequences of a serious violation of a peremptory norm of general international law (*jus cogens*).[85] But this does not mean that the rejection of unconstitutional change of government is also a rule pertaining to *jus cogens*. At the very least, it must be regarded as one of the highest obligations to which the AU and its member states attach eminent significance, which goes beyond legal effects of a mere binding rule from which a deviation is permitted in some circumstances. The rejection of unconstitutional change of government is a rule protecting African public order, and due to its customary nature between African states, its entails an *erga omnes* obligation in the African continent.

Article 41 (2) of the Draft Articles on State Responsibility lays down the following cardinal rule: « No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation ». It is clear from this that the obligation of non-recognition on the part of the state is coupled with the obligation not to assist in its maintenance. Assistance can be political similar to diplomatic support; military assistance, such as the supply or sale of weapons and other military equipment; and economic assistance, such as financial aid. It also implies the duty to cooperate to bring an end to the situation. But non-recognition does not imply suspension of all contacts at the diplomatic level. A bridge of dialogue must be maintained to allow discussions aimed at bringing the de facto authorities to the restoration of democratic constitutional order.

In the situation of armed conflict in Chad in 2008, the AU Assembly underscored this obligation of non-recognition of illegal governments by warning armed groups, which had carried out attacks against the Chadian government, that no authority that would come to power by force will be recognized by the Union.[86] The law has rapidly evolved such that African states bear the duty not to recognize such *de facto* authorities under the 2010

85 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), article 41.

86 Assembly/AU/Dec.188 (X), Decision on the Situation in Chad, 10th ordinary session of the AU Assembly, Addis Ababa (Ethiopia), 31 January – 2 February 2008, para. 2.

AU decision on the strengthening of AU capacity to prevent or manage situations of unconstitutional change of government.[87]

Consequently, a state which recognizes a situation held to be unlawful or unconstitutional is liable to sanctions for the violation of « decisions and policies of the Union » pursuant to article 23 (1) of the AU Constitutive Act. This conclusion is supported by article 25 (6) of the ACDEG, which stipulates that "the Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act". This provision has also been incorporated, but in a slightly different wording, in the aforementioned 2010 AU decision,[88] which implies that it applies to African states even if they have not yet ratified the ACDEG.

In practice, the UA has never implemented such sanctions. However, of the cases that would have given the opportunity to sanction its member states is the takeover of power by General *François Bozize* who overthrew President *Ange Félix Patassé* in CAR on 15 March 2003. The AU condemned and suspended the participation of the new unconstitutional government in its activities, while Gabon, the Republic of Congo and Chad rather recognized it, in violation of the AU Constitutive Act and other subsequent legal instruments.[89] Worse still, CAR returned to the AU after the 2005 presidential elections which General *François Bozize* won with 64.6 % of the votes cast.

II. Imposition of Sanctions

Although this paper deals with AU sanctions only, it is important to note that other sanctions can be adopted, first, by states themselves at the domestic level. A case in point is Burkina Faso after the failed attempt by former President *Blaise Compoaré* to revise the constitutional term limit in order to stay in power in 2014. He was forced to resign through a popular uprising supported by the army which seized the power before establishing a civilian government led by transition President *Michel Kafando*. Despite ECOWAS Court of Justice's judgement upholding freedom for all to participate in democratic elections,[90]

87 Assembly/AU/Dec.269(XIV) Rev.1, note 6, para. 6 (i) (c).

88 Ibid., para. 6 (i) (b).

89 *Balingene Kahombo*, La politique africaine commune de défense et de sécurité : fondement et cadre de mise en œuvre du pouvoir d'intervention de l'Union africaine dans les Etats membres, Mémoire d'études supérieures en droit public, University of Kinshasa, 2011 (on file with the author), p. 45.

90 ECOWAS Court of Justice, Suit no. ECW/CCJ/APP/19/15, Congress for Democracy and Progress v. The State of Burkina Faso, Judgment no. ECW/CCJ/JUG/16/15, 13 July 2015, paras. 28 and 30. In paragraph 30 specifically, the ECOWAS Court of justice controversially said: '(…) the argument regarding illegality of the anti-constitutional change of government, extended to the Applicants, on the basis of the new electoral code, is untenable. Without going into an argumentation on the very manner in which the previous regime attempted to amend the Constitution, the Court recalls that the sanction of an anti-constitutional change of government goes against

members of the former ruling regime who had allegedly participated in the attempted unconstitutional change of government were excluded from the legislative elections of 11 October 2015 as decided by the Constitutional Council in application of the electoral law and the ACDEG.[91] Second, sanctions can be adopted at the level of RECs whose means of action are complementary to those of the AU, as is the case of ECOWAS's sanctions in the aforementioned Mali situation after the military coup of May 2021.[92]

Regarding sanctions adopted at the AU level, it is obvious that this follows a shift of security paradigm because until the 1990s, inter-African relations were governed by the principle of non-interference among member states or by the OAU.[93] AU sanctions are imposed when mediation and warnings have not induced the perpetrators of unconstitutional change of government to restore constitutional order. These sanctions are adopted in line with article 9(1) (g) of the AU Constitutive Act which provides that the Assembly shall "monitor the implementation of policies and decisions of the Union as well ensure compliance by all Member States". Of great importance is also article 7, paragraph 3, of the Protocol on the PSC which stipulates that "member States agree to accept and implement the decisions of the Peace and Security Council, in accordance with the Constitutive Act".

As to the competent bodies, sanctions can be taken by the AU Assembly or the PSC. In this regard, a distinction must be made between sanctions imposed on a member state who support or foment unconstitutional change of government in another state and those which can be adopted against *de facto* government, non-state actors such as rebel groups

regimes, States and possibly their leaders, and does not concern the rights of ordinary citizens. Neither the spirit behind the sanction of anti-constitutional change of governments, nor the general developing trends in international law, which seek to make Human Rights a sanctuary, disregards the reasoning of States and regimes, and does not permit an inconsiderate and indiscriminate application of the coercive measures capable of being envisaged in such circumstances.'.

91 Constitutional Council, Decision no. 2015–021/CC/EL on the petition of Mr DABIRE Ambaterdomon Angelin to declare ineligible candidates in the general elections of 11 October 2015, 25 August 2015 (on file with the author), pp. 5–7.

92 Final Communiqué, 4th Extraordinary Summit of the ECOWAS Authority of Heads of State and Government on the Political Situation in Mali, Accra (Ghana), 9 January 2022, para. 9. In this paragraph, the ECOWAS Authority of Heads of State and Government decided 'to uphold the initial sanctions already imposed on Mali and on the transition authorities' and 'to impose additional economic and financial sanctions, in conformity with its deliberations at its Sixtieth Ordinary Session held on 12 December 2021 in Abuja, Federal Republic of Nigeria. These additional sanctions include: a) Recall for consultations by ECOWAS Member States of their Ambassadors accredited to Mali; b) Closure of land and air borders between ECOWAS countries and Mali; c) Suspension of all commercial and financial transactions between ECOWAS Member States and Mali, with the exception of food products, pharmaceutical products, medical supplies and equipment, including materials for the control of COVID-19, petroleum products and electricity; d) Freeze of assets of the Republic of Mali in ECOWAS Central Banks; e) Freeze of assets of the Malian State and the State Enterprises and Parastatals in Commercial Banks; f) Suspension of Mali from all financial assistance and transactions with all financial institutions, particularly, EBID and BOAD'.

93 OAU Charter, article III (2–3).

and individual perpetrators. In the first case, sanctions are imposed by the AU Assembly pursuant to article 23(2) of the Constitutive which prescribes that:

> *(...) any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as 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.*

However, the AU Assembly can delegate its power to the PSC.[94] It is also possible to have the AU Executive Council, which sits at the ministerial level, step in, especially when it is directed to do so by the AU Assembly. This stems from the provision of article 9(1) (g) of the Constitutive Act which provides that the latter has the power to "give directives to the Executive Council on the management of conflicts, war and other emergence situations and the restoration of peace". Likewise, the Executive Council "shall consider issues referred to it and monitor the implementation of policies formulated by the Assembly".[95] In discharging its mission, it accounts to the AU Assembly which is "the supreme organ of the Union"[96] to which it is responsible.[97] Such "institutional responsibility" has been inherited from the OAU and simply implies that the AU Assembly can approve, reject, revise or annul decisions adopted by the Executive Council.[98]

In the second case, those sanctions can be imposed by the PSC. There is, foremost, article 30 of the AU Constitutive Act which prescribes that "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union". Article 7(1) (g) of the Protocol on the PSC confers on this body the power to "institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration". The latter instrument provides that:

> *At the expiration of the six months suspension period, a range of limited and targeted sanctions against the regime that stubbornly refuses to restore constitutional order should be instituted, in addition to the suspension from participation in the OAU Policy Organs. This could include visa denials for the perpetrators of an unconstitu-*

94 Protocol Relating the Establishment of the Peace and Security Council of the African Union (9 July 2002), article 7(1) (r).

95 AU Constitutive Act, article 13(2).

96 Ibid., article 6(2).

97 Ibid., article 13(2).

98 *Balingene Kahombo* and *Jean-Paul Segihobe*, L'état de l'intégration juridique panafricaine. Essai d'analyse du pouvoir réglementaire de l'Union africaine, in Annales de la Faculté de Droit de l'Université de Kinshasa, 2013, p. 369; *François Borella*, Le droit international africain et l'OUA, in Faculté de Droit et des Sciences économiques et Institut d'études politiques de l'Université d'Alger, Problèmes actuels de l'unité africaine, Alger, 1973, pp. 191–192.

> *tional change, restrictions of government-to-government contacts, trade restrictions, etc.*[99]

Other types of sanctions fall within the discretion of the PSC and may vary depending on the nature of the threat to be faced. This is founded on two distinct provisions. On the one hand, article 7(1) (r) of its founding Protocol provides that the PSC shall decide "on any other issue having implications for the maintenance of peace, security and stability on the continent". On the other hand, the same legal instrument states that:

> *The Peace and Security Council shall take initiatives and action it deems appropriate with regard to situations of potential conflict, as well as to those that have already developed into full-blown conflicts. The Peace and Security Council shall also take all measures that are required in order to prevent a conflict for which a settlement has already been reached from escalating.*[100]

Obviously, to apply these sanctions, the AU Assembly or the PSC must come, beforehand, to a conclusion that a given situation qualifies as an unconstitutional change of government. This may sometimes create discrepancy among member states or between AU policy and decision-making organs, such as the PSC and the Chairperson of AU Commission who issues, in consultation with the Chairperson of the AU Assembly, the first reaction to situations of unconstitutional change of government. The PSC can also establish subsidiary bodies when necessary for the performance of its functions;[101] and it is in conformity with this that, in March 2009, it established a Committee on sanctions whose attributions are to administer, monitor and implement AU sanctions.[102]

Finally, other sanctions relate to criminal responsibility of perpetrators of unconstitutional change of government. The ACDEG prescribes the duty for state parties to bring them to justice or take necessary steps to proceed to their extradition. Likewise they can be tried before the AU competent court, as provided for under the Malabo Protocol.

III. Procedures and Policy Standard Responses

Procedures and a range of policy standard responses are outlined in the Lomé Declaration and the ACDEG. *Souaré* presents these central points in his review of these instruments

99 AHG/Decl.5 (XXXVI), note 1, p. 5.

100 Protocol Relating the Establishment of the Peace and Security Council of the African Union, article 9(1).

101 Ibid., article 8(5).

102 *AU Commission*, Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa, Ezulwini (Kingdom of Swaziland), 17–19 December 2009, p. 7.

which include, in order, the following actions.[103] First, the Chairperson of the AU Commission and the Chairperson of the AU Commission immediately and publicly condemn the act of unconstitutional change of government and urge for the speedy recovery to constitutional order and also urge for consistency of action at the bilateral, inter-state, sub-regional and international levels.[104] Second, the PSC convenes, as a matter of urgency, to discuss the matter.[105] While the country where unconstitutional change of government occurred is suspended from participating in the AU activities, the perpetrators are given a period of six months to restore constitutional order.[106] Third, during the six-month time period, the AU is to remain seized of the matter and "engage with the new authorities with a view to ascertaining their intentions regarding the restoration of constitutional order in the country, and, in so doing, seek the contribution of African leaders and personalities in the form of discreet moral pressure on the perpetrators of the unconstitutional change in order to get them to cooperate with the AU in its efforts".[107] Collaboration with the REC to which the country concerned belongs is also underlined. Fourth and not least, in implementing AU sanctions, all member states, RECs and the wider international/donor community, including the UN, should be involved.[108]

The Rules of Procedure of the AU Assembly reiterate these procedures and responses. In particular, Rule 37 provides for the procedure for dealing with unconstitutional changes of government and engages joint actions by the Chairpersons of the AU Assembly and Commission. They shall not only condemn action promptly and urge for the constitutional order be reinstated, but also warn that the act shall neither be tolerated nor recognized by the Union.

Furthermore, Rule 37(6) in the Rules of Procedure of the AU Assembly obligates the Chairperson of the AU Commission, in consultation with the Chairperson of the AU Assembly, to "gather the facts relevant to the unconstitutional change of government; to establish appropriate contacts with the perpetrators with a view to ascertaining their intentions regarding the restoration of constitutional order in the country, without recognizing or legitimizing the perpetrators; to seek the contribution of African leaders and personalities in order to get the perpetrators of the unconstitutional change to cooperate with the Union; and to enlist the cooperation of the RECs to which the concerned country belongs".

103 *Isaaka K. Souaré*, The AU and the challenge of unconstitutional changes of government in Africa, Paper 197, Institute for Security Studies, Pretoria (South Africa), 2009.

104 Ibid., p. 3.

105 Ibid.

106 Ibid.

107 Ibid.

108 Ibid.

IV. Review of Types of Sanctions

Based on the assessment of the political situation in the concerned state, the AU response ranges from sanctions to military intervention.[109] Concerning applicable sanctions, they are political and diplomatic or criminal sanctions.

1. Political and Diplomatic Sanctions

Political sanctions are defined as actions that seek to interrupt the target's relations with the external world in areas apart from basic trade.[110] Political sanctions are intangible in the sense that they are intended to negatively affect the moral aspect of a targeted state.[111] Political sanction can be diplomatic in case it is used to disturb the official relations between a targeted government and the external world. Such sanctions normally come in the form of limiting or cancelling high government visits of the targeted state and expelling diplomatic missions from the targeted state. In some cases, these sanctions mainly take the form of suspending the rogue regime from the policy structures of international and regional organisations.[112] In the AU sanctions regime against unconstitutional change of government, they take the shape of condemnations, suspensions and other targeted sanctions. The following lines focus on presenting the above-mentioned sanctions.

a) Condemnation

This is the very first step in dealing with an unconstitutional change of government. AU organs shall promptly condemn the unconstitutional change of government and urge for the speedy return to the constitutional order. The condemnation starts by the recognition of the act of perpetrators as an unconstitutional change of government. With the exception of the situation of Chad in April 2021, the PSC has named and condemned many situations as constituting coup d'état or unconstitutional change of government.

In the recent situation of Chad, the AU has been ambivalent to designate the situation as an unconstitutional change of government. The PSC communiqué of 22 April 2021 condemned the killing of President *Idriss Deby Itno*, and stressed the urgent need to investigate it in order to bring the perpetrators to justice, without mentioning the unconstitutional move taken by the Transition Military Council that seized the power after his death.[113] It is worth mentioning that a Fact-Finding Mission on Mali was set up by the AU with the mission to support the investigation into the death of *Idris Deby Itno*, to ascertain efforts to restore

109 *Manirakiza*, note 41, p. 91.

110 *Jeremy Matam Farral*, United Nations Sanctions and the Rule of Law, New York, 2007, p. 123.

111 Ibid.

112 Ibid.

113 PSC/BR/COMM.2 (CMCXIII), 22 April 2021, para. 3.

constitutional order and to produce their report within fifteen (15) days of the issuance of the communiqué.[114]

In its subsequent communiqué after consideration of the Fact-finding mission's report, the PSC reiterated its total rejection to any unconstitutional change of government in the continent without pointing to the specific situation of Chad.[115] Dwelling on the volatile security situation of the Lake Chad Basin and the Sahel and insisting to the return of constitutional order after the 18-month transitional period, the PSC did not impose sanctions on members of the Transitional Military Council, and rather recognised the formation of a civilian-led Transitional Government headed by the Prime Minister it named. The Chadian situation reveals the challenge faced by the AU in imposing sanctions where in some instances, even if rare, pragmatism prevails over legalism.

b) Suspension

This approach consists in the automatic application of the Lomé Declaration, article 30 of the AU Constitutive Act and article 7(1) (g) of the Protocol on the PSC, which results in the immediate suspension of the country from participating in AU activities. Since its establishment and until its 993rd session on Chad, the PSC used its power under article 7(1)(g) in situations such as of Togo (2005), Mauritania (2005), Mauritania (2008), Guinea (2008), Madagascar (2009), Niger (2010), Mali (2012), Guinea Bissau (2012), Central African Republic (2013), Egypt (2013), Burkina Faso (2014), Burkina Faso (2015), Sudan (2019) and Mali (2020).

The period of suspension is six months in accordance with the Lomé Declaration. *Elvy* is very critical of the six-month suspension period arguing that there is no need to wait six-months when in four months it is evident that the perpetrators of the unconstitutional change are not willing to restore constitutional order or are responsible of the mass killing of civilians.[116] In the same vein, she also questioned the relevance of a requirement, in the Lomé Declaration, for concerned OAU/AU organs to use "discreet moral pressure" on the perpetrators of the unconstitutional change of government during the six-month suspension. The term "discreet moral pressure" not being defined in the declaration, there is also doubt as to the effectiveness of this measure vis-a-vis targeted sanctions.[117]

There is a discrepancy among AU documents on when the suspension has to be imposed. Article 25(1) of the ACDEG, while referring to article 30 of the AU Constitutive Act and article 7 (g) of the Protocol on the PSC, provides that sanctions can only be issued after diplomatic initiatives have failed. It is worth noting that these articles do not condition

114 Ibid., para. 9.

115 PSC/BR/COMM. (CMXCVI), 14 May 2021, para. 1.

116 *Stacy-An Elvy*, Towards a New Democratic Africa: the African Charter on Democracy, Elections and Governance, in Emory International Law Review 27 (2013), pp. 62–63.

117 Ibid.

the suspension of a state or imposition of sanction on failed diplomatic initiatives. The ACDEG did not elaborate on what diplomatic initiatives have to be conducted and what standards have to be applied to determine that diplomatic initiatives have failed. This may only cause delays in imposing sanctions and thus allow perpetrators of unconstitutional change of government to only buy time instead of really working on the restoration of the constitutional order. For instance, in the 2009 Madagascar crisis, AU sanctions were issued a year from the date of the unconstitutional change of government.[118] They were imposed after a seemingly successful process of negotiations concluded by agreements between perpetrators of the unconstitutional change and other political forces that in end had not been implemented.[119]

c) Targeted Sanctions

Targeted sanctions usually follow when, at the expiration of the six-month suspension period, perpetrators of unconstitutional change of government refuse to reinstate constitutional order. They are imposed in addition to the continued suspension from participation in AU activities. These sanctions could include visa denial, restrictions of government-to-government contacts, trade restrictions, etc.

In 2008, the PSC imposed targeted sanctions to the military junta in Mauritania led by General *Mohamed Ould Abdel Aziz* which had deposed the democratically elected President *Sidi Ould Cheikh Abdellahi*. These sanctions involved the denial of visas, travel restrictions and the freezing of assets to all individuals, both civilian and military, whose activities sustained "unconstitutional status quo".[120] Similar targeted sanctions plus diplomatic isolations were also imposed on Madagascar in March 2010 after *Andry Rajoelina's* government failed to implement agreements reached in a bid to restore constitutional order.[121] More or less, alike sanctions were also imposed on Guinea in 2009,[122] CAR in 2013 and Mali in 2012. In Comoros, the PSC had imposed sanctions on the illegal authorities of the Anjouan Island under its decision of 10 October 2007, including a maritime blockade and a travel ban.[123] These sanctions were extended three times in a row[124] and paved the way for the success of the AU armed intervention in March 2008, named Operation Democracy in the Comoros, which enabled to prevent secession from the archipelago.

In the implementation of sanctions, the AU is obligated to involve all its Member States, RECs and the wider international/donor communities, including the UN. A duty

118 PSC/PR/BR(CCXX), 17 March 2010, para. 4.

119 Ibid., para. 3.

120 PSC/MIN/Comm.3 (CLXIII), 22 December 2008, para. 9.

121 PSC/PR/BR(CCXX), note 118, para. 4.

122 PSC/AHG/COMM.2 (CCVII), 29 October 2009, para. 4.

123 PSC/PR/Comm(XCV), 10 October 2007, para. 5.

124 PSC/PR/Comm(CII), 26 November 2007; PSC/PR/Comm(CVII), 21 January 2008; PSC/PR/Comm(CXI), 18 February 2008.

of care is of paramount importance to ensure that the ordinary citizens of the sanctioned state do not carry disproportionately the burden of sanctions.[125] Most of these sanctions are termed as smart sanctions; they are understood as collective or unilateral measures that apply coercive pressure to targeted individuals and entities while minimizing unintended social and economic consequences for the vulnerable population.[126] This type of sanctions are specifically designed to cause harm to the regime of the targeted state, and are not aimed at harming innocent civilians.[127] For instance, travel sanctions, also known as travel bans, refer to measures that seek to prohibit or inhibit the "ability of individuals associated with the target of the sanction regime" to travel internationally.[128] These sanctions have been developed to cause a symbolic sense of isolation from the international process in order to delegitimise the targeted authority. Moreover, asset freezing is comprised of confiscating the private property and international bank accounts of those who have been isolated by the international community. These measures are intended to deprive particular entities, such as business entities or political actors in a targeted regime, of their assets or property. Furthermore, these types of sanctions are "enacted to undermine the activities of the target or irritate the target by naming and shaming it in a symbolic manner".[129]

On top of other targeted sanctions, article 25 of the ACDEG adds two important punitive measures. In its paragraph 4, it prohibits perpetrators of unconstitutional change of government to run for elections held in a bid to restore the democratic order or to hold any position of leadership in political institutions of their State. This measure had already been incorporated in the aforementioned 2010 AU decision on the strengthening of its capacity to prevent or manage situations of unconstitutional change of government which is applicable even if a member state has not ratified the ACDEG. The AU position has been acclaimed until 2015 with the situation of Egypt where it tolerated the election of General *Abdel Fatah el-Sisi*, one of the main instigators of the coup d'état against the democratically elected *Mohamed Morsi* in 2013. The Egyptian situation is one of the instances where the AU had to consider realpolitik over legalism to "maintain peace, order, and stability in a member state".[130]

2. Criminal Sanction

Unconstitutional change of government constitutes a criminal offence whose perpetrators are liable to penal sanction. The question can however arise as to who can commit this

125 AHG/Decl.5 (XXXVI), note 1, p. 5.

126 *Mikael Eriksson,* Targeting Peace: Understanding UN and EU Targeted Sanctions, London 2011, p. 25.

127 *Daniel W. Drezner*, How Smart are Smart Sanctions?, in International Studies Review 5 (2003), pp. 107–110.

128 *Farral,* note 110, p. 107.

129 Ibid.

130 *Manirakiza,* note 41, p. 101.

crime to face the said sanction. As may be implied from its constituent elements, unconstitutional change of government can be committed only by more than one person. It can also be committed by omission. Everything depends on the form of participation in the perpetration of the crime: direct offender, accomplice or superior acting in shadow. It may be the case of a statesman who, knowing that a coup d'état is being executed, omits to discharge his duty to defend the state institutions under his protection in order to facilitate the success of the operation undertaken by putschists or an armed group. The perpetrators of unconstitutional changes of government are *de jure* or *de facto* authorities because this is essentially a leadership crime.[131] But outside those persons who have the aim of illegally accessing or maintaining power, there are also accomplices, devoid of such a special intent, who may have with knowledge supported the coup. Accomplices might not necessarily be rulers. This is the case of mercenaries who can be punished in addition to the crime of mercenarism, even though they do not themselves accede to power. Accomplices may also be members of a band constituted or used to capture the power or even a scientist who may have been recruited to support and facilitate the manipulation of a constitution to prevent a democratic change of government. Even if these perpetrators are not rulers, the struggle against impunity would not be served if they were not subjected to the crime. The same argument applies to corporations which organise or finance unconstitutional changes of government. In fact, the Malabo Protocol admits criminal liability of legal persons, with the exception of states.[132]

Criminal sanction will be applied by the International Criminal Law Section of the African Court of Justice and Human and Peoples' Rights which is not yet operational. Its jurisdiction is in relationship with domestic tribunals and potential criminal jurisdictions of RECs, to which it is expected to be complementary.[133] However, the prosecution of unconstitutional change of government raises two main legal and political challenges.

The first one relates to immunities attached to official capacities or personal immunities. In this regard, article 46Abis of the Malabo Protocol provides that "Heads of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions". There were concerns over the clarity of this provision, especially in respect of officials who may qualify as "other senior state officials". The discussion during the meeting of the Specialised Technical Committee on Justice and Legal Affairs in May 2014 was summarized as follows:

> *During the consideration of Article 46ABis of the Draft Protocol, delegations raised concerns regarding extension of immunities to senior state officials and its conformity with international law, domestic laws of Member States and jurisprudence, under-*

131 *Abdoulaye Soma,* Le crime international de changement anticonstitutionnel de gouvernement, in Swiss Review of International and European Law 26 (2016), pp. 417–442.

132 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Annex), article 46 C (1).

133 Ibid., article 46 H.

> *lining the challenges inherent in widening immunities, and especially considering the lack of a precise definition of "senior state official", as well as the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials. After exhaustive deliberations, taking into consideration the relevant Decisions of the Assembly of the Union, and appreciating that some senior state officials are entitled to functional immunities by virtue of their functions, the meeting resolved that Article 46ABis should include the provision "senior state officials based on their functions." The meeting further resolved that interpretation of "senior state official" would be determined by the Court, on a case-by-case basis taking their functions into account in accordance with international law.*[134]

Another "retort of critics of the provision is that the temporary nature of the protection might well encourage leaders in danger of prosecution to illegally extend their stay in office, thus endangering democratic progress in Africa".[135] *Max Du Plessis* gave the following example:

> *Take the crime of unconstitutional change of government and consider situations in which the incumbent may commit such a crime. This could be by his refusal to 'relinquish power to the winning party or candidate after free, fair and regular elections' (Article 28E (1) (d)), or revising 'the Constitution or legal instruments' (Article 28E (1) (e)) or modifying 'the electoral laws … without the consent of the majority of the political actors' (Article 28E (1) (f)). The incumbent, however, cannot be prosecuted because of the provisions of Article 46Abis, which secures his or her immunity before the court. The immunity provision has therefore rendered this crime entirely redundant.*[136]

134 Executive Council of the African Union, The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs – Report (STC/Legal/Min/Rpt.), EX.CL/846(XXV), Malabo (Equatorial Guinea), 20–24 June 2014, paras 1 and 22–23, paras. 25–26. It has to be noted that the expression 'functional immunities' referred to in the quotation should be read 'personal immunities' for they are the ones which are granted to incumbent state officials due to the positions they hold, in particular the troika made up of Heads of States, Heads of Government (Prime Ministers) and Ministers of Foreign Affairs. Functional immunities are those which cover acts performed in official capacity, regardless of the official position held by the perpetrator. Such acts are supposed to be acts of the state on behalf of which they have been committed. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, I.C.J. Reports 2002; *Balingene Kahombo*, The Theory of Implicit Waiver of Personal Immunity – Commentary on the Decision on the Obligation for South Africa to Arrest and Surrender President Omar al-Bashir of Sudan to the International Criminal Court, in Law in Africa 18 (2015), pp. 181–198.

135 *Charles Chernor Jalloh*, International Justice, Reconciliation and Peace in Africa, CODESRIA Policy Briefs No.1, March 2015, p. 6.

136 *Max Du Plessis,* Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders, Institute for Security Studies Paper No. 278, November 2014, p. 8.

However, *Max Du Plessis's* concern can be tempered because rulers holding their power from unconstitutional changes of government shall not be recognized and so no immunity would apply to them. The reason is that they are or become illegitimate and illegal rulers *ab initio*, that is to say from the time when the commission of the crime in question is completed. But, while such non-recognition by the AU would open the doors for regional prosecutions against the suspects, it is without prejudice to AU's diplomatic contacts and initiatives aiming to restore democracy.[137]

The second challenge is the articulation of the relationship between the African Court and the PSC. As already mentioned, the PSC is competent to qualify situations of unconstitutional changes of government and to adopt sanctions against their individual authors or suspend the *de facto* government from participating in the AU activities. In addition, it can refer situations to the African Court which will be used for "strengthening the commitment of the African Union to promote sustained peace, security and stability on the continent and to promote justice and human and peoples' rights (…)".[138] How to reconcile the exercise of the Court's jurisdiction with the power of the PSC? Should the Court wait for the decision of the PSC on whether an unconstitutional change of government has been committed before any determination on individual criminal responsibility? Or could the Court remain free to exercise its criminal jurisdiction rather than eventually being blocked by political considerations within the PSC? The same problem arises with respect to the AU Assembly which can also decide on situations of unconstitutional change of government when it intends to impose sanctions on any member state pursuant to article 23 (2) of the Constitutive Act,[139] or "to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures".[140] The whole debate is therefore about the independence of the African Court vis-à-vis the PSC and the AU Assembly, as well as the balance between judicial process and the AU political control over situations within its member states.

The silence of Malabo Protocol on the issue can be interpreted as if the AU Assembly, the PSC and the African Court will exercise their powers regardless of the action of each other. However, the risk of contradiction between political and judicial decisions can undermine the credibility of the African Court as an independent judicial body, in particular when it establishes a case of unconstitutional change of government whereas the AU Assembly or the PSC has decided that there is none. A credible solution to this problem can be borrowed from the relationship between the United Nations Security Council and the International Criminal Court (ICC) with respect to the crime of aggression, pursuant

137 African Charter on Democracy, Elections and Governance, article 25(3).

138 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Preamble, paras. 5 and 13.

139 African Charter on Democracy, Elections and Governance, article 23(6).

140 Ibid., article 25(7).

to article 15bis of the Rome Statute of 17 July 1998.[141] As Abdoulaye Soma argues, if a competent AU political organs has made a determination establishing an unconstitutional change of government, the African Court may rely on it subject to its own findings.[142] In the same vein, when a competent AU political organ has not decided on the matter or when it has differently qualified the situation, the African Court remains totally free to act or not to proceed.

3. Have AU's Sanctions Been Effective?

Although the AU has established various legal instruments by which a number of sanctions can be applied in case of unconstitutional change of the government, there are still unsettled issues regarding their applicability and effectiveness because in most cases the incumbent's leaders retain all the powers and consequently limit the AU intervention. This section analyses the effectiveness of AU's sanctions towards the restoration of constitutional order.

a. Overall Assessment

Governments, global and regional organisations use sanctions for the realisation of "international political goals, such as constraining a state to conform to the international standards and practices"[143] and in so doing exercise an influence on its domestic policies.[144] The viability of any sanctions is evaluated by its inclination and capacity to meet its motivations and targets. As far as the AU sanctions are concerned, it is important to assess their effectiveness and adequacy under a practical point of view. To this end, it is important to take into account the number of military coups and other types of illegal changes of government occurred in Africa since the AU operationalization in 2002.

141 In short, article 15bis of the Rome Statute provides that the ICC Prosecutor shall proceed with an investigation upon the Security Council's determination whether the state concerned has committed an act of aggression. When no such prior determination is made within six months, the ICC Prosecutor may proceed with an investigation, 'provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article16' (suspension of proceedings, a power which is not provided for regarding the African Court). Anyway, 'a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute'.

142 *Soma,* note 131.

143 *Lance Davis* and *Stanley Engerman,* History Lessons: Sanctions: Neither War Nor Peace, in Journal for Economic Perspectives 17 (2003), pp. 187–197.

144 *Fiona McGillivray* and *Allan C. Stam,* Political Institutions, Coercive Diplomacy and the Duration of Economic Sanctions, in Journal of Conflict Resolution 48 (2004), pp. 154–172.

List of some successful unconstitutional changes of government between 2002 and 2022[145]

N°	Country	Year	Means of perpetration	AU measures, other developments and outcomes	Observations
01	Madagascar	May 2002	Refusal of President *Didier Ratsiraka* to hand over power to the winner of the presidential election of December 2001, *Marc Ravalomanana*, former mayor of the capital city, Antananarivo	● Mediation by the OAU amidst clashes between supporters of two sides ● Support from the army to the elected president ● Flight of *Didier Ratsiraka* and exile in France	
02	CAR	15 March 2003	Seizure of power by General *François Bozize* following the rebellion directed against the regime of President *Ange Félix Patassé*	● AU condemns new unconstitutional regime and suspends CAR's participation in its activities ● Return to constitutional order after the May 2005 elections, won by General *François Bozize*, with 64.6 % of votes cast	The new unconstitutional government was notably supported by Gabon, the Republic of Congo and Chad in violation of AU decisions
03	Togo	7 February 2005	Coup d'état: *Faure Eyadema* was able to confiscate the constitutional legality by being nominated by the Togolese National Assembly as Interim President of the Republic of Togo, after the death of his father (on 5 February 2005), *Gnassingbé Eyadema*, while, according to the Constitution, the position was held by the legitimate Speaker of the National Assembly	● Condemnation of the new unconstitutional regime by the AU and suspension of Togo's participation in its activities ● Rehabilitation of the President of the National Assembly thanks to pressure from the AU, after renunciation of power by the unconstitutional President, *Faure Eyadema*, on 25 February 2005 ● Organisation of the presidential election of 24 April 2005, won by *Faure Eyadema*	

145 The list has been established based on daily observation of the facts, existing literature and media reports. See also *André Mbata Mangu*, The Role of the African Union and Regional Economic Communities in the Implementation of the African Charter on Democracy, Elections and Governance, in African Journal of Democracy and Governance 5 (2018), pp. 140–142.

04	Mauritania	3 August 2005	Coup d'état: President *Maaouiya Ould Tay* is replaced by Colonel *Ely Ould Mohammed Vall* at the head of a junta, called the Military Council for Justice and Democracy or *Conseil militaire pour la justice et la démocratie (CMJD)*	• Condemnation of the new unconstitutional regime by the AU and suspension of Mauritania's participation in its activities • Demand for a return to constitutional order and subsequent organization of the presidential election in March 2007, won by *Sidi Ould Abdallahi*	
05	Mauritania	6 August 2008	• Coup d'état by General *Mohamed Oul Abdel Aziz* against democratically elected President *Sidi Ould Abdellahi* • The putschist general is at the head of a junta, called the High Council of State or *Haut Conseil d'Etat (HCE)*	• Condemnation of the new unconstitutional regime by the AU and suspension of Mauritania's participation in its activities • Demand for a return to constitutional order and establishment of an International Contact Group on Mauritania (UN, AU, OIF, permanent and African members of the Security Council, etc.) • Sanctions imposed by the PSC against putschists: restriction on travel, freezing of assets, etc. • 12 April 2009: thanks to AU mediation, resignation of General *Mohamed Oul Abdel Aziz*. The President of the Senate becomes the President of the Republic, *Ba Mamadou* • Organization of the elections of 18 July 2009, won by the former putschist General *Mohamed Oul Abdel Aziz*	General *Mohamed Oul Abdel Aziz* had already played a leading role in the August 5, 2005 coup. He was, at the time, colonel and commander of the presidential guard, while the head of the military junta () colonel *Ely Ould Mohammed Vall*, was director of national security.

06	Guinea (Conakry)	23 December 2008	Military coup just after the death of the former President of the Republic, *Lansana Conté*, while the interim President of the Republic was to be ensured by the President of the National Assembly, Captain *Moussa Dadis Camara*, at the head of the military junta, known as the National Council for Democracy and Development (*Conseil national pour la démocratie et le développement* – CNDD), calls himself Head of State	● Condemnation of the new unconstitutional regime by the AU and ECOWAS and suspension of Guinea's participation in their activities ● Establishment of an International Contact Group for Guinea ● 3 December 2009: the junta leader is wounded in the head following an attempted shooting by his aide-de-camp and commander of the presidential guard, *Aboubacar Toumba Diakité*. He is evacuated to Morocco, while his interim is provided by General *Sékouba Konaté*, who later became President of the transition ● Elections are held in 2010 and have been won by the historical opponent, *Alpha Condé*, new President of the Republic	The successful conduct of the transition to the return to constitutional order allowed the AU to appoint General *Sékouba Konaté* to a prestigious military post in Addis Ababa (Ethiopia): High Representative for the operationalization of the African Standby Force and responsible for the strategic planning and management of AU peace support operations
07	Madagascar	March 2009	Coup d'état, disguised as a forced resignation of *Marc Ravalomanana*, under pressure from the civil opposition and the army, in favour of *Andry Rajoelina*	● Condemnation of the new unconstitutional regime by the AU and SADC and suspension of Madagascar's participation in their activities ● Establishment of the International Contact Group for Madagascar ● Signing of the Maputo Agreements of 8 and 9 August 2009 and the Addis Ababa Additional Act of 6 November 2009 ● AU sanctions: travel bans and asset freezes against de facto President *Andry Rajoelina* and members of his political sphere ● Establishment of a transition which led to the 2013 elections, won by *Hery Rajaonarimampianina* who was sworn in on 25 January 2014.	

08	Niger	18 February 2010	Military coup overthrowing President *Mamadou Tanja*. General *Djibo Salou* takes power at the head of the Supreme Council for the Restoration of Democracy (*Conseil suprême pour la restauration de la démocratie* – CSRD)	• Condemnation of the new unconstitutional regime by the AU and suspension of Mauritania's participation in its activities • 7 April 2011: the putschist general hands over power to the new President *Mahamadou Issoufou*, having won the elections with 57.95 votes.	• This coup, although condemned by the AU, was still somewhat tolerated, in that it was provoked by the confiscation of the democratic order by former President *Mamadou Tanja*. He took the initiative to abolish the Constitution of 9 August 1999, to dissolve the institutions of the state and to adopt by referendum a new constitution, in defiance of the negative opinion delivered by the Constitutional Court and objections of the political class and civil society organizations
09	Côte d'Ivoire	3 December 2010	Outgoing President *Laurent Gbagbo* refuses to hand over power to elected President *Alassane Ouattara*	• Condemnation of the new unconstitutional regime by the AU and ECOWAS and suspension of Côte d'Ivoire's participation in their activities • PSC decision recognizing *Alassane Ouattara* as elected president • Arrest of *Laurent Gbagbo* on 11 April 2011 by the Republican Forces of Côte d'Ivoire (FRCI), loyal to *Alassane Ouattara*, with the assistance of the United Nations and France	

10	Mali	21–22 March 2012	Coup d'état against President *Mamadou Toumani Touré*, in favour of Captain *Amadou Sanogo*, president of the military junta, called the National Committee for the Recovery of Democracy and the Restoration of the State (*Comité national pour le redressement de la démocratie et la restauration de l'Etat* – CNRDRE)	• Condemnation of the new unconstitutional regime by the AU and ECOWAS and suspension of Mali's participation in their activities • Creation of a Support and Monitoring Group on the situation in Mali (ECOWAS, AU, UN) • 1 April 2012: restoration of the Malian Constitution of 25 February 1992 • Agreement of 6 April 2012 thanks to AU mediation in collaboration with Burkina Faso: transfer of power to civilians, notably to the President of the Republic ad interim (on 12 April 2012), former President of the National Assembly, *Dioncounda Traoré*, after the official resignation of President *Mamadou Toumani Touré* on 8 April. • New presidential elections were organized in 2013, won by *Ibrahim Boubacar Keïta*	• The military junta denounced mismanagement of armed conflict in northern Mali against Tuareg rebel groups • The coup d'état put down the head of state who was at the end of his constitutional term, because the next presidential election was scheduled for 29 April 2012, when he was no longer entitled to run as a candidate

11	Guinea Bissau	12 April 2012	Military coup against interim President *Raimundo Pereira* for the benefit of the army, commanded by General *Mamadou Ture Kuruma*, at the head of a military junta, called the National Transitional Council (*Conseil national de transition* – NTC)	● Condemnation of the new unconstitutional government by the AU and ECOWAS and suspension of Guinea Bissau's participation in their activities ● Requirement to return to constitutional order ● Political consultations between the army and the Guinean social forces for the organization of a political transition: the agreement on the transition is concluded between the army and political parties; the National People's Assembly is also constituted ● Through ECOWAS mediation, a transition of up to 12 months has been agreed. *Manuel Serifo Nhamadjo* became President of the transition since 10 May 2012 and a government of national unity was formed, under the leadership of the Prime Minister, *Rui Duarte Barros* ● Deployment of an ECOWAS mission to support the transition in Guinea Bissau (ECOMIB) ● New presidential elections were organized in 2014, won by *José Mario Vaz*	● -The army was challenging the defence agreement between the Guinean government and Angola. The presence of the contingent of the Angolan Military Assistance Mission in Guinea Bissau (MISSANG) was then seen as an attempt by the government to acquire an autonomous protection force, with heavy armaments and tanks, more powerful to the Guinean army. ● -The political context is also marked by the expectation of the second round of the presidential election, scheduled for 29 April 2012, between the former Prime Minister, *Carlos Gomes Junior*, and the former Head of State, *Kumba Lala*. But, the latter already challenged the regularity of the first round, won by *Carlos Gomes* Junior. Because of his numerous supporters in the army, he was suspected of having ordered the coup to prevent the holding of the second round. ● -The President of the Republic ad interim, the Prime Minister (*Adiato Djalo Nandigna*) and the candidate *Carlos Gomes Junior* were arrested

12	CAR	24 March 2013	The Seleka rebel group overthrows President *François Bozizé* after the takeover of the capital city, Bangui, in favour of *Michel Djotodia*, president of the Union of Democratic Forces for Assembly (UFDR), coalesced with the Patriots Convention for Justice and Peace (CPJP) and the Central African People's Democratic Front (FDPC)	• Condemnation of the new unconstitutional government by the AU and suspension of CAR's participation in its activities. • UN Security Council condemns coup d'état • From 3 to 4 April 2013: ECCAS summit in N'Djamena (Chad) endorsing the eviction of *François Bozizé*. Summit decision to impose an 18-month transition under the leadership of the National Transitional Council (*Conseil national de la transition* – CNT) • 13 April 2013: *Michel Djotodia* is appointed president of the CNT by the social forces of the CAR and his choice is confirmed by the ECCAS Summit in N'Djamena on 18 April 2013. This Summit also set up an International Contact Group for CAR to accompany the country in its full return to constitutional order, with the organization of new elections • 10 January 2014, *Michel Djotodia* resigned under ECCAS pressure due to the escalation of the crisis in the country. He is replaced by *Catherine Samba-Panza*, elected by the CNT. • In order to restore constitutional order and normalize the political situation, the final round of presidential elections are organized on 14 February 2016 and won by *Faustin-Archange Touadera*	The AU and ECCAS did not express the same opinion: condemnation of the new unconstitutional regime for the first, pragmatism and endorsement of the ouster of President *François Bozizé* for the second

14	Egypt	3 July 2013	Military coup d'état: President *Mohamed Moris* is forced to resign and replaced by General *Abdel Fattah Sis*i	• Condemnation of AU and suspension of Egypt's participation in its activities • New presidential elections are organized on 28 May 2014 and won by the putschist General *Abdel Fattah Sisi*	
15	Rwanda	2015	Amendments to the Constitution of 4 June 2003 to abolish the term limit and allow President *Kagame* to remain in power until 2034	No condemnation by UA or EAC	The constitutional amendment was early upheld by the Supreme Court in its judgment of 18 October 2015 despite objections based on the ACDEG, concerning notably the violation of principles of democratic change of government, submitted by the Democratic Green Party of Rwanda, and in spite of criticisms from civil society organisations and opposition leaders in exile
16	Republic of Congo	25 October 2015	Adoption of a new Constitution to abolish the constitutional term limit and allow President *Sassou Ngouesso* to stand for elections, despite violent protests by the opposition and civil society organization	No condemnation by UA and ECCAS	
17	Uganda	217	Constitutional amendment to abolish term limit and all the re-election of President *Yoweri Museveni*	No condemnation by UA and EAC	President *Yoweri Museveni* come to power by force in 1986 after overthrowing President *Milton Obote*.
18	Zimbabwe	15 November 2017	Coup d'état by the army against *Robert Mugabe* who is forced to resign and replaced by former Vice-President *Emmerson Mnangagwa*	• No condemnation by AU or SADC. • New presidential elections were organized on 30 July 2018 and won by *Emmerson Mnangagwa*	*Robert Mugabe* was Zimbabwe independence leader against the white minority. He stayed in power between 1987 and 2017.

19	Sudan	11 April 2019	Military coup d'état against President *Omar al Bashir*, replaced by General *Ahmed Awad Ibn Auf* at the head of the Transitional Military Council. After resigning next day on 12 April 2019 due to continuous protests in the streets, he was replaced by General *Abdel Fattah Abdelrahman al-Burhan*.	• Condemnation of the new unconstitutional government and suspension of Sudan's participation in AU activities • Negotiations with the opposition and social forces were initiated to put in place a civilian led government. A Sovereign Council, a transitional body, is instituted for a period of 36 months. A civilian government is put in place in August 2019 and led by *Abdallah Hamdok*. The UA lifted its sanction. • On 25 October 2021, General *Abdel Fattah al-Burhan* ousted and arrested transition Prime Minister *Abdallah Hamdok*. This promoted the AU to suspend again Sudan from participating in its activities. • Transition Prime Minister *Abdallah Hamdok* is re-established in power due to diplomatic pressure but resign on 2 January 2022		
20	Mali	18 August 2020	Military coup d'état against President *Ibrahim Boubacar Keita*. Colonel *Assimi Goita* comes to power at the head of the National Committee for the Salvation of the People (*Comité national pour le salut du people* – CNSP)	• Condemnation of AU and ECOWAS ad suspension of Mali's participation in their activities; • Targeted, financial and economic sanctions imposed by ECOWAS • Thanks to ECOWAS mediation and pressure for civilian led transition, the CNSP appointed *Bah N'Daw* on 21 September 2020 to assume the functions of Head of State. Colonel *Assimi Goita* became Vice-President in charge of security and defense issues. • 24 May 2021: transition President *Bah N'Daw* is ousted by the armed forces and replaced by Colonel *Assimi Goita*	Beyond security issues, the coup d'état of 18 August 2020 was justified by popular protests against alleged widespread irregularities and frauds during legislative elections of March and April 2020 in favour of the ruling party	

21	Guinea (Conakry)	5 September 2021	Coup d'état against President *Alpha Condé*. He is replaced by Colonel *Mamadi Doubouya* at the head of the military junta, called National Assembly for Development Committee (*Comité national du rassemblement pour le développement* -CNRD)	• Condemnation of AU and ECOWAS ad suspension of Mali's participation in their activities • A Transition Charter is adopted on 27 September 2021 to server as the interim constitution of the country for a transition period of 24 months. And a transition government is put in place as well as the National Transition Council which becomes the interim Parliament including members of the armed forces, political parties and civil society organizations	The coup d'état was justified by the controversial adoption of a new Constitution on 22 March 2020 to allow President *Alpha Condé* to run for a contested third term, and by alleged fraud elections which followed
22	Burkina Faso	23 January 2022	Military coup d'état against President *Roch Marc Christian Kaboré*. He is replaced by Colonel *Paul-Henri Sandaogo Damiba* at the head of the military junta, called Patriotic Movement for Preservation and Restoration (*Mouvement patriotique pour la sauvegarde et la restauration – MPSR*)	• Condemnation of AU and ECOWAS and suspension of Mali's participation in their activities; • On 29 January 2022, On 29 January 2022, the Fundamental Act of the MPSR was adopted. It complements the Constitution of 2 June 1991 which remains in force in all the provisions which are not contrary to that Act. • On 1 March 2022, a transition period of three years was put in place by the Transition Charter which abrogated the Fundamental Act of 29 January 2022	

As the above list shows, Africa has experienced various unconstitutional changes of government since 2002. While their number is still relatively high, there has been a decline

of military coups compared to the OAU epoch.[146] It is only since 2017, with the military coup in Zimbabwe, that they seem to be again on the rise given successive overthrows of heads of state and government in Sudan, Mali, Guinea and Burkina Faso. It is noticeable that West Africa is the most affected region of the continent.[147]

The success of the AU and RECs in resolving unconstitutional changes of government is mixed and limited. They fail to restore the pre-existing constitutional order by re-establishing the overthrown governments to power or even tolerate some unconstitutional changes of government as was the case of Rwanda in 2015 and Uganda in 2017. They prefer the peaceful resolution of constitutional crises through negotiation and mediation rather than using force to restore democracy. To this end, an International Contact Group (ICG), a high level informal structure of exchange and partnership which can gather the AU, the United Nations, the relevant REC and other stakeholders, is often created to support these efforts and the transition government towards holding new elections. This practice was observed in situations such as in Mauritania (2008), Guinea (2008), Madagascar (2009) and CAR (2013). Likewise, as requested by the PSC,[148] the Transition Support Group in Mali (GST -Mali) was set up in 2020 and is chaired by the AU.

It can also be noted that the 6-month moratorium after which the constitutional order is supposed to have been restored is not respected in practice. In some cases, such as recently in Sudan (2019), Mali (2021), Guinea (2021) and Burkina Faso (2022), transition periods have been fixed for more than two years. The AU and RECs have not been able to suggest and impose an alternative political agenda. Furthermore, in many situations, perpetrators of unconstitutional changes of government enjoy impunity. Some of them succeeded to stand for elections, won them and joined the bodies of the AU and the RECs (cases of the CAR in 2003, Togo in 2005 and Mauritania in 2008). In other situations, the AU was weakened due to contradictions with some member states which did not comply with its decisions and policies on unconstitutional change of government. This is the case of the situation in the CAR in 2003, as already indicated, to the extent that some member states (Gabon, Chad and Congo-Brazzaville) recognized the new unconstitutional regime of General *François Bozizé*, while the AU condemned it.

There have also been contradictions between AU institutions themselves, for example, in the case of Mauritania in 2008, in so far as, on 24 March 2009, the PSC renewed the AU sanctions against the unconstitutional government against the opinion of the Chairperson of the AU Assembly, *Muammar Gadhafi*, who felt that they were no longer necessary, the Mauritanian case being closed for him. A similar contradiction took place between the Chairperson of the AU Commission, *Jean Ping*, and the PSC regarding the situation

146 *John Franck Clark,* The Decline of the African Military Coup, in Journal of Democracy 18 (2007), pp. 141–155.

147 See in this volume Balingene Kahombo's paper on 'constitutional crisis and the jurisdiction of the African Union'.

148 PSC/PR/COMM. (CMLIV), 9 October 2020, para. 8.

of Guinea Bissau, following the assassination of President *Nino Viera* on 2 March 2009. The Chairperson of the AU Commission considered that there had been an unconstitutional change of government, by means of a coup d'état, while the PSC refused to apply the AU sanctions on the ground that the constitutional order had not been broken, in so far as the succession to power was carried out in accordance with the Guinean constitution, the ad interim presidency having been entrusted to the President of the National Assembly.

All these contradictions are often doubled by interferences of the external powers, as in the situations of Guinea Bissau in 2012 and the CAR in 2003. In Guinea Bissau, the army was challenging the defence agreement between the Guinean government and Angola. The presence of troops of the Angolan Military Assistance Mission in Guinea Bissau (MISSANG) was then seen as an attempt by the government to acquire an autonomous protection force, with heavy armaments and tanks, more powerful than the Guinean army. In the CAR, ECCAS was probably influenced by France, which, ahead of all the African organizations, had taken note of the regime change in Bangui, where French soldiers were deployed and stationed in coordination with other military bases held in Gabon and Chad. This is a case demonstrating the extent to which a REC acts in a manner which undermines the AU response measures to a situation of unconstitutional change of government.

b. Inconsistencies of Actions between the African Union and the Regional Economic Communities/ Regional Mechanisms

As a reminder, in the implementation of sanctions, the AU has to involve the RECs to which the concerned country belongs for consistency of action. However, in the practice, some discrepancies between AU sanctions and measures of RECs have transpired. The situation of Niger provides an instance of such inconsistencies between the AU and ECOWAS. When President *Mamadou Tanja* decided to dissolve parliament on 26 May 2009, the AU did not condemn the move whereas the ECOWAS did in fact consider this as act which clearly was meant to prepare for a third term in office which was not foreseen in the country's constitution, a case of unconstitutional change of government.[149] It was only until the military ousted *Tandja* on 18 February 2010 with the intention to restore democracy in Niger that the AU invoked her policy on unconstitutional change of government. Promptly Niger was suspended (19 February 2010) and an immediate return to the constitutional order as was before 4 August was called for.[150]

In the Madagascar situation in 2009, some decisions taken within SADC undermined the AU sanctions policy and this has made it difficult for international organizations to adopt a common position towards Madagascar. The SADC Roadmap recognized *Andry Rajoelina* as the President of the Transitional Government. In turn, this generated a situati-

149 ECOWAS suspended Niger on 21 October 2009 as it violated the ECOWAS Protocol on Democracy and Good Governance. ECOWAS also imposed sanctions. The African Union, however, endorsed this move. See PSC/AHG/COMM.3 (CCVII), 29 October 2009.

150 PSC/PR/COMM.2 (CCXVI), 19 February 2010, paras. 4–5.

on whereby *Rajoelina* exploited divisions among members of the African community of states and peoples, and continued to enact decisions that did not include the other political stakeholders such as *Ravalomanana*, *Zafy* and *Didier Ratsiraka*. All this enabled him to stay in power from March 2009 to January 2014.

Conclusion

AU sanctions against unconstitutional change of government have produced different policy outcomes. One can mention the lifting of sanctions conditioned by the establishment of a democratic process to restore the constitutional order, mediation, the adoption transition charters, power sharing during transition governments and the organisation of new elections. In some situations, AU sanctions have smoothly helped restore constitutional order whereas in other situations perpetrators of unconstitutional change of government have been absolved under the cover of the return to the constitutional order, hence rendering sanction results less productive.

It is important to note that a policy cannot be adjudged to have failed if objective conditions for its implementation do not exist or have not been created. AU member states should therefore individually and collectively accept responsibility, not for the failure of the policy but for failing to create conducive conditions for its application. The project to transform the African state should be predicated on the principles enshrined in the AU legal instruments and policy documents. Given the fact that some governmental actions are still considered right yet they lead to the concealed unconstitutional change of government, AU should take initiative and fill the gap in order to avoid re-writing of constitutional provisions with the aim of retaining the power in unjust manners.

In any case, despite the relative weaknesses of the AU and the RECs in dealing with unconstitutional change of government, however, their action has contributed to the alleviation of crises and conflicts through stabilization and promotion of constitutionalism as well as democratic culture. In this context, the AU and the RECs have experimented with a new type of conflict resolution, involving collaboration with external partners, such as the United Nations. In some cases, African mediation was based on the dynamics of the negotiations fostered by the establishment of an ICG for the affected countries. This paper has however shown that there is a need to strengthen cohesion of action, not only between the AU and RECs, but also with external partners, because divisions and contradictions within the international community entails limited efficacy. This must not obscure the crucial role of preventing cases of unconstitutional change of government. Prevention can be partially attained through adherence of all AU member states to political values and legal instruments that have been adopted to address takeovers of power by force or other undemocratic means, including the ACDEG and the Malabo Protocol.[151] These instruments

151 The ACDEG has been signed by forty-six states since its adoption on 30 January 2007 but it is ratified by thirty-four states only out of fifty-five African countries. In contrast, the Malabo Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of

need also to be refined and adapted to unforeseen political and legal practices, such as fraudulent or delayed elections, having the effect of infringing the principles of democratic change of government but which are still not covered by the AU framework on unconstitutional change of government. They should finally be implemented at the domestic level.

instruments of ratification by fifteen member states; but, since its adoption on 27 June 2014, it has been signed by fifteen states but received no ratification so far. See African Union, 'OAU/AU Treaties, Conventions, Protocols & Charters' <https://au.int/en/treaties> 30 April 2022.