

**African Court of Justice and Human and Peoples' Rights:
Prospects and challenges of prosecuting unconstitutional
changes of government as an international crime**

**Submitted in partial fulfilment of the requirements of the degree LLM
(Human Rights and Democratisation in Africa)**

By

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Plagiarism Declaration

I, **Albab Tesfaye Ayalew**, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other peoples' works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

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Signature

Date.....

Dedication

To my incredible family and my beloved, soon to be husband, Zemen. I treasure you all!

Acknowledgment

I appreciate the Centre for Human Rights, University of Pretoria for having given me the chance to be part of this life-changing journey. The support of Dr Magnus Killander and Professor Roland Henwood in shaping this study is most notable and I thank you.

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Above all, I thank God, my strength and refuge.

Acronyms

ACDEG	African Charter on Democracy, Elections and Governance
APRM	African Peer Review Mechanism
AU	African Union
AUCIL	African Union Commission on International Law
CEN-SAD	Community of Sahel Saharan States
CEO	Chief Executive Officer
CNDD	National Council for Democracy and Development
CoM	Council of Ministers
COMESA	Common Market for Eastern and Southern Africa
CSOs	Civil Society Organisations
CSRD	Supreme Council for the Restoration of Democracy
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOMOG	ECOWAS Military Observer Group
ECOWAS	Economic Community of West African States
EU	European Union
HoSG	Heads of State and Government
ICC	International Criminal Court
ICG-G	International Contact Group on Guinea
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
ISS	Institute for Security Studies
LAS	League of Arab States
MAES	AU Electoral and Security Assistance Mission to The Comoros
NAI	New African Initiative
NATO	North Atlantic Treaty Organisation

NEPAD	New Partnership for Africa's Development
NTC	National Transitional Council
OAS	Organisation of American States
OAU	Organisation of African Unity
OIC	Organisation of Islamic Conference
OLC	Office of the Legal Counsel
PALU	Pan African Lawyers Union
PAP	Pan African Parliament
PSC	AU Peace and Security Council
RECs	Regional Economic Communities
SADC	Southern Africa Development Community
UCG	Unconstitutional Changes of Government
UN	United Nations
UNSC	United Nations Security Council

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‘[i]rrespective of how hard any given regional or continental organisation tries to condemn unconstitutional changes of governments, as long as the material conditions in African countries remain unchanged, in terms, especially, of constricted spaces for peaceful political change, some members of society, either acting out of self-interest or in the public interest, will always stage coups.’

Francis N Inkome*

* FN Inkome ‘Good coups and bad coups: The limits of the African Union’s injunction on unconstitutional changes of power in Africa’ (February 2007) *Institute for Global Dialogue occasional paper no 55* 49.

Abstract

In its latest attempt to curb the plight of unconstitutional changes of government in Africa, the African Union (AU) is in the process of empowering the African Court of Justice and Human and Peoples' Rights (African Court) to prosecute perpetrators of unconstitutional changes of government in member states. This study considers the prospects and challenges of such prosecution by the proposed African Court. The study first identifies the normative and institutional framework developed by the Organisation of African Unity (OAU), and later the AU to address unconstitutional changes of government in the continent. It then analyses the AU's response to unconstitutional changes of government in member states, taking Guinea, The Comoros, Niger, Tunisia, Egypt and Libya as case studies. In doing so, it identifies the strengths and weaknesses of the AU's response to the changes in these countries, including the capability of the AU's normative and institutional framework to address all forms of unconstitutional changes in the region. Most importantly, the study addresses the challenges and prospects of prosecuting unconstitutional changes of government by the proposed African Court and whether the Court would be able to overcome the short-comings identified in the case studies. It finally concludes and recommends based on the findings of the study.

Chapter I

1. Introduction

1.1 Background

Presently, the only Court that exists at the continental level in Africa is the African Court on Human and Peoples' Rights which came into existence in 2006 following the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) in 1998.¹ This Protocol came into force in 2004 after ratification by the required 15 member states.²

Article 18 of the 2002 African Union (AU) Constitutive Act also provided for the establishment of an AU Court of Justice to handle inter-state matters. Accordingly, the Protocol of the Court of Justice of the AU (Protocol on the Court of Justice) was adopted in 2003 and came into force in 2010. However, the AU Court of Justice was never established, because in 2004 only a year after the adoption of the Protocol on the Court of Justice, the Assembly of Heads of State and Government (HoSG) of the AU decided to merge the African Court on Human and Peoples' Rights and the AU Court of Justice into a single Court³ consisting of a human rights section and a general affairs section.⁴ To this end, the Assembly in 2008 adopted the Protocol on the Statute of the African Court of Justice and Human Rights. This Protocol merging the Courts has not yet come into force.⁵

Most recently, following an Assembly decision,⁶ the AU has taken steps to add a criminal section to the human rights and general affairs section of the African Court of Justice and Human Rights. Donald Deya, Chief Executive Officer (CEO) of the Pan African Lawyers Union (PALU) and consultant assisting the AU Commission in the merger process provides the three major reasons necessitating the addition of the criminal section as

¹ Article 1 Court Protocol.

² It has been ratified by 26 member states as at 22 October 2012.

³ Assembly/AU/Dec.83 (V) Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union adopted at the 5th Ordinary Session of the HoSG Assembly in Sirte, Libya, from 4 – 5 July 2005.

⁴ Article 19 Statute of the African Court of Justice and Human Rights.

⁵ It has been ratified by five member states as at 22 October 2012.

⁶ Assembly/AU/Dec.213(XII) adopted at the 12th Ordinary Session of the HoSG Assembly in Addis Ababa, Ethiopia, from 1 – 3 February 2009, para 9.

follows: concern of AU member states about the abuse of the principle of universal jurisdiction by non-African states; problems encountered in the prosecution of the former President of Chad, Hissene Habre by Senegal for international crimes and the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance (ACDEG) which provides for the prosecution of perpetrators of unconstitutional changes of government (UCG) by the competent court of the Union.⁷ Murungu suggests that the main reason for giving the Court criminal jurisdiction is another, namely the AU's strained relations with the International Criminal Court (ICC) which issued an arrest warrant for a sitting Head of State, Omar Hassan Al-Bashir of Sudan in 2007.⁸

The AU Commission had organised two Validation Workshops in 2010⁹ which were followed by Government Legal Experts and Ministers of Justice/Attorneys General Meetings to revise the 2008 Protocol on the Statute of the African Court of Justice and Human Rights to extend the jurisdiction of the Court to include international crimes¹⁰ and the crime of UCG.¹¹ The Draft Statute to the Protocol on the African Court of Justice and Human and Peoples' Rights (the Draft Statute)¹² enables the African Court of Justice and Human and Peoples' Rights (the Court) to prosecute perpetrators responsible for the crime of UCG. During their 7 – 14 May 2012 Meeting, the government experts and Ministers of Justice/Attorneys General adopted the Draft Statute, but bracketed article 28E on UCG, for further consideration by the Executive Council and the Assembly 'taking into account the

⁷ D Deya 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' (6 March 2012) *Open Society Initiative for Southern Africa* 22 available at www.osisa.org/sites/default/files/is_the_african_court_worth_the_wait_-_don_deya.pdf (accessed 3 August 2012).

⁸ CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067 – 1079.

⁹ AU organs, Regional Economic Communities (RECs), regional courts, regional parliaments and other independent experts participated in the Validation Workshops. The first Validation Workshop was held from 10 – 13 August 2010 in Midrand, South Africa and the second Validation Workshop was conducted from 8 – 12 November 2010 in Midrand, South Africa. The drafting process is discussed in more detail under Chapter IV.

¹⁰ The crimes over which the Court would have jurisdiction include genocide, crimes against humanity, war crimes, UCG, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. Not all these crimes are classic international crimes and some have never been litigated by an international criminal tribunal.

¹¹ In addition to the government legal experts and Ministers of Justice/Attorneys General, participants in the Meetings include the representatives of the Office of the Legal Counsel (OLC) of the AU Commission, the President of the African Court on Human and Peoples' Rights, the International Committee of the Red Cross (ICRC) delegate to the AU and appointed consultants such as PALU CEO Donald Deya as well as other legal experts.

¹² The 2008 Protocol on the Statute of the African Court of Justice and Human Rights does not include Peoples' in the Court's name, so it was decided to include it in the current Draft Protocol to the Statute. See, Deya (n 7 above) 23.

high political nature’ of the article.¹³ One of the concerns raised includes the lack of precision of the UCG definition.¹⁴

The Executive Council considered the Report of the Ministers of Justice/Attorneys General during the July 2012 Summit in Addis Ababa, Ethiopia and requested the AU Commission and the African Court on Human and Peoples’ Rights ‘to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction’ of the African Court.¹⁵ The Executive Council further requested the AU Commission, the African Union Commission on International Law (AUCIL) and the African Court on Human and Peoples’ Rights to work on and submit a definition on UCG for consideration by AU policy organs during the January 2013 Summit.¹⁶ If an agreeable definition is developed by these bodies resulting in the adoption of the Draft Statute, the proposed Court will be empowered to prosecute perpetrators of UCG.

The Organisation of African Unity (OAU) and later the AU, have produced several documents on UCG in Africa, including AHG/Dec.150(XXXVI)2000 Decision on Unconstitutional Changes of Government in Africa and the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5(XXXVI)2000). Article 4(p) of the AU Constitutive Act condemns and rejects UCG and article 30 provides for its sanction. There are several other AU instruments which condemn UCG, such as the ACDEG (2007), Grand Bay (Mauritius) Declaration and Plan of Action (1999), Conference on Security, Stability, Development and Co-operation in Africa (CSSDCA) Solemn Declaration (2000) and the Declaration on Democracy, Political, Economic and Corporate Governance (2002). The current AU policy on UCG goes beyond condemnation and rejection of the act, to suspension of the state from participation in AU policy organs and sanctions.¹⁷

¹³ Min/Legal/Rpt Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, held in Addis Ababa, Ethiopia, from 14 - 15 May 2012, para 16.

¹⁴ As above, para 17.

¹⁵ Mr Ben Kioko, the then Legal Counsel of the AU Commission explains that PALU had already conducted a study on the implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern and describes the Executive Council’s request as a misunderstanding. Interview with Mr Ben Kioko *Legal Counsel of the AU Commission* 27 July 2012.

¹⁶ EX.CL/DEC.706(XXI) Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and Peoples’ Rights adopted at the 21st Ordinary Session of the Executive Council in Addis Ababa, Ethiopia, from 9 – 13 July 2012 para 3.

¹⁷ Article 30 AU Constitutive Act and Rule 37 Rules of Procedure of the Assembly of the Union.

In light of the above instruments, it was inevitable for the AU to design a mechanism of prosecuting UCG to re-enforce its commitment to the condemnation and rejection of UCG. Prosecuting UCG seems to be the next step in the AU's endeavour to overcome the plight of UCG that terrorises Africa. This study analyses the prospects and challenges in the prosecution of such crime by the Court.

1.2 Statement of the problem

Sub-Saharan Africa has suffered 80 *coups* and 180 attempted *coups* between 1956 and 2001.¹⁸ On the chance the Assembly adopts the Draft Statute, including the provision on UCG, the Statute will be the first international instrument to identify UCG as an international crime and prosecute it accordingly. Problems have been identified in the existing AU framework on UCG as well as the AU's lack of uniform response to incidences of UCG in member states. If the Court is empowered, it will be interesting to see how it will be able to overcome these short-comings.

1.3 Research questions

- Identify the normative and institutional framework developed by the AU to address UCG.
- Analyse how the AU addressed incidences of UCG in member states, what challenges it faced and identify any notable achievements.
- Consider the prospects and challenges of prosecuting UCG as crime by the Court.

1.4 Significance of study

The African Court will be the first continental court of its kind to possess criminal jurisdiction over crimes of UCG if the Draft Statute is adopted by the Assembly. In a region where *coups* and other more subtle changes of government are prevalent, the empowerment of the Court to prosecute UCG becomes relevant. The study gives a much needed insight into the prospects and challenges of exercising international criminal jurisdiction over UCG and gives recommendations based on the findings. Furthermore, due to its novelty, no adequate research, if at all, has been conducted on the area.

¹⁸ S Vandeginste 'The African Union, constitutionalism and power-sharing' (June 2011) *IOB Working paper / 2011.05 7*.

1.5 Preliminary literature review

There have been some writings on the expansion of the jurisdiction of the African Court to try international crimes, including Murungu's article 'Towards a criminal chamber in the African Court of Justice and Human Rights'¹⁹ and more recently an article by Viljoen entitled 'AU Assembly should consider human rights implications before adopting the amending Merged African Court Protocol.'²⁰ Plessis, in his paper 'Implications of the AU decision to give the African Court jurisdiction over international crimes' deliberates on the process of expanding the jurisdiction of the Court and its implications at the international, regional and domestic level.²¹ In his article 'Worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes,'²² Deya discusses the reasons behind the expansion of the jurisdiction of the Court, the succession of African international courts thus far, the process of merging the courts and gives an overview of the proposed international criminal jurisdiction for the African Court.

There have also been pieces on the AU's response to UCG, in terms of the organisation's policies and practice. In 'The OAU and the recognition of governments in Africa: Analyzing its practice and proposals for the future,' Kufuor examines the recognition policy and practice of the OAU and how it proceeded from its policy of non-interference in the domestic matters of member states to gradually adopting a declaration condemning and rejecting UCGs.²³ In 'A club of incumbents? The African Union and *coup d'état*,' Omorogbe²⁴ assesses the OAU's and later the AU's policy on UCG by analysing its response to UCGs that occurred in member states. Similarly, in 'The AU and the challenge of unconstitutional changes of government in Africa,' Souare looks into the AU's definition of UCG, the AU's policy position on UCG and the adequacy of the AU response

¹⁹ Murungu (n 8 above).

²⁰ F Viljoen 'AU Assembly should consider human rights implications before adopting the amending Merged African Court Protocol' *AfricLaw* (23 May 2012) available at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/> (accessed 23 June 2012).

²¹ MD Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' (June 2012) *Institute for Security Studies (ISS) Paper No 235* 1.

²² Deya (n 7 above).

²³ KO Kufuor 'The OAU and the recognition of governments in Africa: Analyzing its practice and proposals for the future' (2002) 17 *American University International Law Review* 369 – 372.

²⁴ EY Omorogbe 'A club of incumbents? The African Union and coup d'état' (2011) 44 *Vanderbilt Journal of Transnational Law* 123.

to UCGs in Africa.²⁵ Inkome distinguishes between good coups and bad coups and explains the AU's limitation in that regard.²⁶ He argues that *coups* are likely to take place and rightfully so, in situations where African leaders overstay their welcome in power, suppress the will of the people, and present no democratic means for people to change their governments.²⁷ In his paper, Vandeginste, analyses the AU normative framework and practice, focusing on the AU Peace and Security Council (PSC)'s response to UCG, especially as regards its efforts to restore constitutional order.²⁸

From the aforementioned it is clear that there are publications dealing with the expansion of the jurisdiction of the African Court of Justice and Human Rights as well as the AU's response to UCG. There are however none that address the empowerment of the African Court of Justice and Human and Peoples' Rights to prosecute UCG.

1.6 Proposed methodology

The methodology employed is analytical study, comparative and unstructured interviews. Analysis of pertinent documents to the study, including the last draft of the Statute to the Protocol on the African Court of Justice and Human and Peoples' Rights, reports of the Government Experts, Ministers of Justice/Attorneys General, Validation Workshop Reports on the expansion of the jurisdiction of the African Court of Justice and Human and Peoples' Rights as well as OAU/AU documents on UCGs in Africa.

Interviews with persons directly involved in the drafting process, including the Legal Counsel of the AU Commission, OLC legal officers and consultants that participated in drafting the Draft Statute has been conducted. In-depth desk research and the consultation of relevant scholarly articles is another method employed.

1.7 Overview of chapters

The study has five chapters which seek to address the research questions posed above. The first chapter introduces and sets the context for the discussions which follow in the other chapters. The second chapter discusses the normative and institutional framework

²⁵ IK Souare 'The AU and the challenge of unconstitutional changes of government in Africa' (August 2011) *ISS Paper 197*.

²⁶ FN Inkome 'Good coups and bad coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa' (February 2007) *Institute for Global Dialogue occasional paper no 55*.

²⁷ As above, 47.

²⁸ Vandeginste (n 18 above) 6.

developed by the AU to deal with UCG and see if the same exists in other regional systems. The third chapter analyses the AU's response to UCG in member states and identify the challenges and successes. The fourth chapter considers the actual implementation of the provision on UCG by the African Court, and determines the prospects and challenges the Court may face. The last chapter concludes and recommends based on findings in the preceding chapters.

1.8 Limitation of the study

The scope of the study concerns the empowerment of the African Court of Justice and Human and Peoples' Rights to prosecute UCGs and hence will not discuss the other international crimes the Court can prosecute, nor will it deal with the justification for expanding the jurisdiction of the Court to prosecute international crimes. This study will limit itself to the substantive aspects of the empowerment of the African Court to prosecute UCG. The study will not go into the details of the administrative aspects, including financial implications.

Furthermore, this study is not attempting to address the root causes of UCG in the continent, rather it deals with the AU's attempt to address incidences of UCG by empowering the African Court to prosecute perpetrators of UCG.

Chapter II

2. Unconstitutional changes of government: Normative framework in Africa and other regions

2.1 Introduction

This chapter discusses the approaches taken by the OAU and then the AU to address the scourge of UCGs in the continent, including the normative and institutional frameworks. The chapter further highlights the UCG normative frameworks in the Organisation of American States (OAS), the Commonwealth and the RECs.

2.2 The OAU on unconstitutional changes of government

The OAU had the primary purpose of liberating African states from colonialism, strengthening socio-economic development, promoting state sovereignty and ensuring territorial integrity.²⁹ The OAU considered the method of accession to state power a domestic matter and preferred not to intervene based on its ideal of state sovereignty. However, the OAU could not continue with its policy of non-interference in incidences of UCGs that were scourging the African continent. Estimates show that between 1961 and 1997, 78 UCG's took place in the continent.³⁰

The end of the Cold War³¹ brought with it a new commitment to democratic governance and the international community could no longer tolerate UCG.³² The dissolution of East-West factions meant that African states no longer received blind support from their Western allies and respect for human rights and adherence to democratic principles became preconditions for the strengthening of relations. There was also pressure from civil society organisations (CSOs) on African states to yield to

²⁹ See article II(1) of the OAU Charter on the purposes of the Organisation. See also, Conflict Management Division of the AU Commission's Peace and Security Department 'Meeting the challenge of conflict prevention in Africa' (2008) 2.

³⁰ M Vunyingah 'Unconstitutional changes of government in Africa: An assessment of the relevance of the Constitutive Act of the African Union' (March 2011) *Policy Brief Africa Institute of South Africa No. 44* 2.

³¹ From the establishment of the OAU in 1963 to the fall of the Berlin Wall in 1989, there were 61 successful *coups* in Africa. See Omorogbe (n 24 above) 126.

³² United Nations Office for West Africa (UNOWA) Issue Papers 'Life after the state house: Addressing unconstitutional changes in West Africa' (March 2006) 11.

the post–Cold War wave of democratisation.³³ In the early 1990s, some dictatorial African regimes, including Cape Verde, Benin and Zambia handed over power after the conduction of free and fair elections.³⁴ However, not all African states followed suit, with some refusing to be part of the democratisation process and others only paying lip service.³⁵

The OAU did gradually embrace the idea that unconstitutional changes of government are unacceptable. Although primarily a human rights instrument, the adoption of the 1981 African Charter on Human and Peoples’ Rights (African Charter) was a positive step towards drawing the attention of OAU member states to ensure the right of citizens to participate freely in their government ‘either directly or through freely chosen representatives.’³⁶ The African Charter eroded the idea that human rights violations which take place in states are purely internal matters and it introduced a compliance monitoring mechanism in the form of the African Commission on Human and Peoples’ Rights (African Commission).³⁷ The 1990 African Charter for Popular Participation in Development and Transformation³⁸ further entrenched the idea that a state is responsible for creating the necessary conditions for the empowerment and facilitation of effective popular participation of its people through a political system that allows for democracy.³⁹ The Charter recognised the contagious nature of the forces of freedom and democracy and that ‘inevitably and irresistibly, popular participation will have a role to play in the continent of Africa.’⁴⁰

The OAU for the first time clearly presented the ‘core democratic principles of competitive and transparent multi-party elections and human rights’⁴¹ in the Kampala Document adopted by the Conference on Security, Stability, Development and Cooperation in Africa in 1991. The Document established the link between security and

³³ Inkome (n 26 above) 5.

³⁴ As above.

³⁵ As above, 6.

³⁶ Article 13(1) African Charter.

³⁷ Article 30 African Charter.

³⁸ This Charter is not an inter-state instrument and was developed during the International Conference on Popular Participation in the Recovery and Development Process in Africa by the African peoples’ organisations, African governments, non-governmental organizations and United Nations agencies.

³⁹ Para 11 African Charter for Popular Participation in Development and Transformation.

⁴⁰ Para 37 African Charter for Popular Participation in Development and Transformation.

⁴¹ Inkome (n 26 above) 30.

stability and the ‘necessary process of democratisation as a prerequisite for the peace and tranquillity’ of the continent.⁴²

These developments were significant as most UCG’s that took place in the continent resulted from the absence of democratic governance and violations of peoples’ right to freely participate in government.⁴³ As Sturman⁴⁴ correctly states, ‘the problem facing the AU is that constitutional democracy is seldom firmly in place prior to the ‘unconstitutional change’ and the instigators of change have a legitimate claim for seeking to restore or establish democracy.’ Inkome⁴⁵ classifies *coups* that aim to restore democracy as ‘good *coups*’ that present relief to the oppressed.

Henwood⁴⁶ describes the African state as weak with ‘high incidence of violence, ethnic strife, civil war and regional wars’ and its existence is under constant threat due to such occurrences and because of the measures taken by leaders to maintain power.⁴⁷ Udombana, on the other hand, presents greed as the underlying cause of UCGs in the continent, individuals lured by the promise of power and money, which also ‘accounts for the sit-tight syndromes.’⁴⁸

On the occasion of the Harare, Zimbabwe Summit in 1997,⁴⁹ the Council of Ministers (CoM) of the OAU took a firm stand against UCG declaring its total rejection and condemnation of the *coup d’état*⁵⁰ which occurred in Sierra Leone on 25 May 1997 and called for ‘the immediate restoration of constitutional order.’⁵¹ The CoM further called upon OAU member states and the international community as a whole to abstain from

⁴² Olusegun Obasanjo in Africa Leadership Forum ‘The Kampala Document: Towards a Conference on Security, Stability, Development and Cooperation in Africa’ (June 1991) 4 available at www.africleadership.org/rc/the_kampala_document.pdf (accessed 9 October 2012).

⁴³ The *coups* in Central African Republic in 2003, Mauritania in 2005 and Niger in 2010 are examples of UCGs against authoritarian regimes.

⁴⁴ K Sturman ‘Unconstitutional changes of government: The democrat’s dilemma in Africa’ (March 2011) *South African Institute of International Affairs (SAIIA)* 2.

⁴⁵ Inkome (n 26 above) 49.

⁴⁶ R Henwood ‘The state in Africa’ *University of Pretoria, Department of Political Science lecture notes* 2012 5. For an analysis of the nature of the state in Africa, see R Cornwell ‘The collapse of the African state’ in J Cilliers & P Mason (eds) *Peace, profit or plunder?: The privatization of security in war-torn African societies* (1999) and R Jackson ‘Violent internal conflict and the African state: Towards a framework of analysis’ (2002) 20 *Journal of Contemporary African Studies* 29 – 52.

⁴⁷ See Inkome (n 26 above) 18.

⁴⁸ NJ Udombana ‘Can the leopard change its spots? The African Union treaty and human rights’ (2002) 17 *American University International Law Review* 1177 – 1197.

⁴⁹ There were 10 successful *coups* from 1990 to 1997. See Omorogbe (n 24 above) 127.

⁵⁰ A *coup d’état* is ‘a sudden, usually violent, change of government through seizure of power’. See, BA Garner *Black’s Law Dictionary* 8thed (2004) 1066. For the elements of *coup d’état*, see, Souare (n 25 above) 2.

⁵¹ CM/Dec.356 (LXVI) on Sierra Leone adopted by the OAU CoM at the 66th Ordinary Session in Harare, Zimbabwe, from 28 – 31 May 1997.

recognising the instigators of the *coup* and appealed to the Economic Community of West African States (ECOWAS) to take measures to assist citizens of Sierra Leone and to restore constitutional order in the country.⁵² The ECOWAS Military Observer Group (ECOMOG) proceeded with what may be referred to as ‘pro-democratic military intervention’ and restored to power the democratically elected President Ahmed Tejan Kabbah of Sierra Leone.⁵³ Ebo describes the Harare Declaration as a ‘significant point in the codification of normative frameworks for democratic control at the continental level.’⁵⁴

During the Algiers, Algeria Summit of 1999, the Assembly of HoSG decided that governments which came to power through UCG following the Harare Summit must restore constitutional order before the next Summit.⁵⁵ The OAU built up on the Algiers Decision and introduced the first comprehensive document on UCG, the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration) during the Lomé, Togo Summit in 2000.⁵⁶ This was the earliest attempt by the OAU to define what constitutes UCG and put in place the measures the OAU would take in response to such changes of government. Analysis of the Lomé Declaration reveals that the OAU associated lack of democratic governance with the occurrence of UCG. Hence, it stressed the need to elaborate on the principles of democratic governance to be adhered to by all OAU member states. Although not exhaustively, the Lomé Declaration set basic principles for democratic governance, including the adoption of a democratic constitution, the preparation, content and method of revision of which should conform to generally accepted principles of

⁵² As above.

⁵³ K Nowrot & EW Schbacker ‘The use of force to restore democracy: International legal implications of the ECOWAS intervention in Sierra Leone’ (1998) 14 *American University International Law Review* 320 – 323.

⁵⁴ A Ebo ‘Towards a Code of Conduct for Armed and Security Forces in Africa: Opportunities and Challenges’ (March 2005) *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper* 7.

⁵⁵ AHG/Dec. 142 (XXXV) adopted at the 35th Ordinary Session of the OAU HoSG in Algiers, Algeria, from 12 – 14 July 1999. Other documents adopted by the OAU with bearing on UCG include the 1996 Resolution on Electoral Process and Participatory Governance; 1999 Grand Bay (Mauritius) Declaration and Plan of Action; AHG/Dec. 141 (XXXV) adopted at 35th Ordinary Session of the OAU HoSG; CM/Dec. 483 (LXX) Decision on UCG adopted at the 70th Ordinary Session of the OAU CoM in Algiers, Algeria, from 8 – 19 July 1999, where the CoM expressed its grave concern about the resurgence of coups in Africa and mandated the Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution to re-activate the Committee on Anti-Constitutional Changes to finalise its work in light of the Harare Declaration and particularly on measures to apply in *coup d’états* occurring in member states; and AHG/Dec.150 (XXXVI) Decision on UCG in Africa adopted at the 36th Ordinary Session of the OAU HoSG in Lomé, Togo, from 10 – 12 July 2000.

⁵⁶ AHG/Decl.5 (XXXVI) adopted at the 36th Ordinary Session of the OAU HoSG in Lomé, Togo, from 10 – 12 July 2000.

democracy; separation of powers and independence of the judiciary; promotion of political pluralism or any other form of participatory democracy and the role of the African civil society; the principle of democratic change and recognition of a role for the opposition; organisation of free and regular elections and the guarantee and promotion of human rights among others. The HoSG stated their belief that observance to these principles and the strengthening of democratic institutions would significantly reduce incidences of UCG.

The Lomé Declaration defined the constituent elements of UCG as follows:

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

It further stated that in the event that UCG takes place, the OAU Chairman and the Secretary-General 'should immediately and publicly condemn' the change and 'urge for the speedy return to constitutional order.' The Central Organ of the OAU Mechanism for Conflict Prevention, Management and Resolution (Central Organ)⁵⁷ takes charge of the situation and condemns the UCG. The concerned country will thereafter be given a six months period to return to constitutional order, during which time the country will be suspended from participation in the OAU policy organs and be sanctioned. However, the Secretary-General with the assistance of prominent African leaders and personalities as well as regional groupings⁵⁸ will try to reach an agreement with the UCG instigators and facilitate the restoration of constitutional order. Failing the restoration of constitutional order at the end of the six months period, additional sanctions are instituted, including visa denials for instigators of UCG, inter-government contract restrictions as well as trade restrictions.

The Declaration calls on member states, regional groupings and the international community as a whole to cooperate with the OAU in implementing the sanction. It did

⁵⁷ The Lomé Declaration established a Central Organ Sanctions Sub-committee to monitor compliance with decisions on UCG and to recommend appropriate review measures to the OAU policy organs.

⁵⁸ The REC to which the concerned state belongs.

however stress that ‘ordinary citizens of the concerned country should not suffer disproportionately’ as a result of the sanctions.

2.3 The AU on unconstitutional changes of government

Although the OAU achieved its goal of ridding Africa from the scourge of colonialism and allowed Africans to speak with one voice in the international arena, it failed in areas of respect for human rights, ensuring the rule of law and democracy, in the prevention and management of conflicts and the socio-economic integration of the continent.⁵⁹

9.9.99 is recognised as the day the AU was conceived, as it was during the Sirte, Libya Summit on 9 September 1999 that the HoSG of the OAU adopted the Sirte Declaration⁶⁰ which provided for the establishment of the AU.⁶¹ The AU Constitutive Act was then prepared to replace the OAU Charter and was adopted at the Lomé Summit of HoSG in 2000. The Act came into force in 2002 at the Durban, South Africa Summit and the OAU changed into the AU.

The Act embodies principles that would address the short-comings of the OAU, including in the area of human rights, democratic values, UCG and international crimes.⁶² Article 4(p) of the Act condemns and rejects UCG and article 30 provides that governments which come to power through UCG will not be allowed to participate in the activities of the AU.⁶³ This indicates how seriously the AU considers incidences of

⁵⁹ K Kindiki ‘The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal’ (2003) 3 *African Human Rights Law Journal* 97 – 118.

⁶⁰ EAHG/Draft/Decl. (IV) Rev.1 adopted at the 4th Extraordinary Session of the OAU HoSG in Sirte, Libya, from 8 – 9 September 1999.

⁶¹ Para 8(i) Sirte Declaration.

⁶² The most advanced principle in the Act is Article 4(h), which provides the right of the AU to intervene in member states, following a decision of the Assembly in instances of war crimes, genocide and crimes against humanity, which is a long way from the OAU’s fixation with state sovereignty and territorial integrity. Article 4(j) further recognises the right of member states to request intervention from the AU to restore peace and security.

⁶³ The inclusion of these provisions is crucial because the Act is binding on all AU member states and is not ‘soft law’ like the Lomé Declaration.

UCG, since it is only for the violation of the principle against UCG that the Act specifically authorises sanctioning.⁶⁴

Article 5(2) of the Act provides for the establishment of Organs as decided by the Assembly of HoSG. Thus the AU PSC,⁶⁵ formerly the Central Organ of the OAU was established, to among its other mandates over-look situations of UCG. The PSC⁶⁶ has the power to impose sanctions on perpetrators of UCG.⁶⁷ Over most of the last decade, the PSC has been at the forefront of dealing with matters of UCG and has been tested by the evolving nature of political events in the continent that raised doubts regarding the adequacy of the AU framework on UCG.

Congruent to the development of the Constitutive Act was the introduction of the New Partnership for Africa's Development (NEPAD).⁶⁸ One of the objectives of NEPAD is to consolidate democracy.⁶⁹ The NEPAD Implementation Committee adopted the Declaration on Democracy, Political, Economic and Corporate Governance in 2002, which among other things embodied the commitment of member states to put an end to UCG and promote democracy, good governance, peace and security.⁷⁰ The African Peer Review Mechanism (APRM) was also set up on the basis of voluntary accession to monitor compliance with the commitments contained in the Declaration.⁷¹

Although the AU brought to light instruments which either directly or indirectly address the plight of UCG,⁷² the most important initiative related to UCG was the

⁶⁴ The sanctions include those listed under article 23(2) of the AU Constitutive Act. See also rule 37 of the Rules of Procedure of the Assembly of the Union on sanctions for UCG. There are however doubts as to how effective the imposition of sanctions is in combating UCGs. See, Vunyingah (n 30 above) 21.

⁶⁵ Article 2(1) Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol). See also, Decision AHG/Decl.160 (XXXVII) adopted at the 37th Ordinary Session of the OAU HoSG in Lusaka, Zambia, from 9 to 11 July 2001 on the decision to make the Central Organ of the OAU one of the organs of the AU.

⁶⁶ The PSC came into operation in 2004. It is assisted by the Panel of the Wise, the Continental Early Warning System, the African Standby Force, the Special Fund and the AU Commission. See, article 2(2) PSC Protocol.

⁶⁷ Article 7(1)(g) PSC Protocol. The PSC derives its power to institute sanctions from articles 5(2) and 30 of the AU Constitutive Act.

⁶⁸ NEPAD was initially the New African Initiative (NAI) in the Declaration on the New Common Initiative. See, AHG/Decl. 1 (XXXVII) adopted by the OAU HoSG at its 37th Ordinary Session in Lusaka, Zambia, from 9 to 11 July 2001.

⁶⁹ See the New Partnership for Africa's Development (NEPAD) Declaration (2001).

⁷⁰ Paras 3 & 13 Declaration on Democracy, Political, Economic and Corporate Governance in 2002.

⁷¹ As above, para 28.

⁷² Declaration on the Principles Governing Democratic Elections (2002), Solemn Declaration on a Common African Defence and Security Policy (2004), Guidelines for AU Electoral Observation and Monitoring

adoption of the ACDEG on 30 January 2007 at the 8th Ordinary Session of the Assembly of HoSG in Addis Ababa. The Charter entered into force on 15 February 2012.⁷³ One of the objectives of the ACDEG is to uphold the rule of law, based on the supremacy of the Constitution⁷⁴ and constitutional order.⁷⁵ It prohibits, rejects and condemns UCG and deems it ‘a serious threat to stability, peace, security and development.’⁷⁶ The ACDEG attempts to address one of the factors that make *coup d’états* in Africa relatively easy, lack of civilian control over the military. Article 14(1) of the ACDEG provides that ‘States Parties shall strengthen and institutionalize constitutional civilian control over the armed and security forces to ensure the consolidation of democracy and constitutional order.’

Article 23(5) of the ACDEG added a fifth element that constitutes UCG, which was not included in the Lomé Declaration, the ‘amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.’ Article 24 of the ACDEG empowers the PSC to exercise its powers to maintain constitutional order even before a full-fledged UCG takes place and article 25(1) allows it to suspend a state party in which UCG has taken place. In addition to the sanctions provided under article 23 of the Constitutive Act, ‘the Assembly may decide to apply other forms of sanctions on perpetrators of UCG, including punitive economic measures.’⁷⁷ Article 25(4) of the ACDEG provides that perpetrators of UCG are not allowed ‘to participate in elections held to restore democratic order or hold any position of responsibility in the political institutions of their State.’⁷⁸

The ACDEG created a legislative framework for making accountable instigators of UCG, which was previously lacking. State parties are obliged to either prosecute or extradite perpetrators of UCG.⁷⁹ In line with this, article 14 (2) of the ACDEG obliges

Missions (2004), Resolution on Elections in Africa (2008) and Ezulwini Framework for the Enhancement of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa (2009).

⁷³ It has been ratified by 17 member states as at 22 October 2012.

⁷⁴ Article 10 ACDEG.

⁷⁵ Article 2(2) ACDEG. Article 5 requires state parties to ensure constitutional rule, especially constitutional transfer of power.

⁷⁶ Articles 2(4) and 3(10) ACDEG.

⁷⁷ Articles 25(6) and (7) ACDEG.

⁷⁸ This was reiterated in Assembly/AU/Dec.269(XIV) Decision adopted at the 14th Ordinary Session of the AU HoSG in Addis Ababa, Ethiopia, from 31 January – 2 February 2010.

⁷⁹ It seems this article gives UCG the status of an international crime that must not go unpunished, which explains the invocation of the principle *aut dedere aut judicare*. See, J Dugard *International Law: A South African Perspective* 4th ed. (2011) 154.

state parties to take legislative and regulatory measures to ensure that perpetrators of UCG are dealt with in accordance with the law. Article 25(5) provides that perpetrators of UCG may be tried before the competent court of the AU. Although it was not clear which court this would be at the time, most did assume that it would be the African Court of Justice.⁸⁰ However, it has now become clear that the proposed African Court of Justice and Human and Peoples' Rights with a criminal chamber will be responsible if article 28E of the Draft Statute on UCG is adopted.⁸¹ This will be discussed in more detail under Chapter IV.

2.4 Regional and sub-regional organisations on unconstitutional changes of government

2.4.1 The OAS

During its early years, the American continent was a haven for dictators and was characterized by the lack of democracy, violations of human rights and prevalence of impunity.⁸² Influenced by the wave of democratisation that followed the end of the Cold War, in June 1991, the Assembly of the OAS adopted Resolution 1080 (XXI-O/91), also called the Santiago Commitment to Democracy and the Renewal of the Inter-American System.⁸³ It incorporated procedures of response to any sudden or irregular disruption of constitutional order or 'of the legitimate exercise of power by the democratically elected government.' This was the earliest attempt by a regional organisation to address UCG.⁸⁴ Following the adoption of Resolution 1080, OAS member states adopted the Washington Protocol to the OAS Charter, which amends article 9 of the OAS Charter, making it a requirement that a state adhere to democratic rules to join the Organisation.⁸⁵ In April 2001, during the 3rd Summit of the Americas held in Quebec, Canada, the HoSG of the Americas adopted the Declaration of Quebec City, where they recognised the insurmountable obstacle posed by UCG in the

⁸⁰ Omorogbe (n 24 above) 136.

⁸¹ See article 28A(4) and 28E Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Exp/Min/IV/Rev.7, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters 7 to 11 and 14 to 15 May 2012 Addis Ababa, Ethiopia.

⁸² C Grossman 'The Inter-American system of human rights: Challenges for the future' (2008) 83 *Indiana Law Journal* 1267 – 1268.

⁸³ TJ Piccone 'International mechanisms for protecting democracy' (2004) *Democracy Coalition Project* 10.

⁸⁴ United Nations Review of Political Missions 2011 'Political missions and departures from constitutional order' (2011) 15.

⁸⁵ Piccone (n 83 above).

participation of a state's government in Summits. Shortly after this Summit, on 11 September 2001, a special General Assembly of the OAS adopted the Inter-American Democratic Charter,⁸⁶ which among other things addresses UCGs, including the possible responses.⁸⁷ However, unlike the AU instruments, none of the aforementioned instruments clearly explain what constitutes UCG.

2.4.2 The Commonwealth

The Commonwealth, mainly composed of former colonies of the British Empire, has developed its own method of dealing with UCG in its member states.⁸⁸ One-third of the Commonwealth states have experienced at least one UCG or attempted UCG between 1973 and 2003.⁸⁹ The Commonwealth adopted the 1991 Harare Commonwealth Declaration which reaffirms its commitment to practices of democracy, accountable administration and the rule of law. In 1995 it adopted the Millbrook Commonwealth Action Programme on the Harare Declaration which clearly stipulates the measures to be taken in situations of unconstitutional overthrows of democratically elected governments. The measures include condemnation of the act by the Secretary-General of the Commonwealth, initiation of diplomatic talks with the perpetrators, sanctions and assistance for the restoration to constitutional order.⁹⁰

2.4.3 The Regional Economic Communities

The RECs are integral to the attainment of democratic governance in Africa.⁹¹ Article 16 of the PSC Protocol provides that the regional mechanisms are part of the overall

⁸⁶ The Democratic Charter is a resolution and therefore not binding.

⁸⁷ AF Perez 'Mechanisms for the protection of democracy in the Inter-American system and the competing Lockean and Aristotelian constitutions' (2006) 217 – 222, available at www.oas.org/dil/esp/217-240_Perez-Democracy_def.pdf (accessed 20 October 2012).

⁸⁸ Similarly, the Community of Democracies, a global intergovernmental coalition of democratic countries, expressed its goal of preventing or responding 'to scenarios of violence against a democratic government, disruption of constitutional rule, persistent alteration of the democratic order...' See Seoul Plan of Action 'Democracy: Investing for peace and prosperity' adopted at the Second Ministerial Conference of the Community of Democracies in Seoul, South Korea on 12 November 2002. The European Union (EU) on the other hand does not have a policy framework on UCG, but membership to the Union is based on adherence to the principles of representative democracy, the rule of law, social justice and respect for human rights. It rejects and condemns UCG in other parts of the world. See, 'Joining the EU' available at europa.eu/about-eu/countries/joining-eu/index_en.htm (accessed 20 October 2012).

⁸⁹ J Hatchard & TI Ogowewo *Tackling the unconstitutional overthrow of democracies: Emerging trends in the Commonwealth* (2003) 7.

⁹⁰ Para 3(i) – (vi) and para 4 Millbrook Commonwealth Action Programme on the Harare Declaration adopted by the Heads of Government in Millbrook, New Zealand on 12 November 1995.

⁹¹ 'Good governance in Africa' (January – March 2011) 1 *African Governance Newsletter Issue 1 5*.

security architecture of the AU and that the PSC should work closely with the RECs in the promotion and maintenance of peace, security and stability. The AU and the RECs have exhibited strong collaboration in attempts to address incidences of UCG due to their zero tolerance policy on unconstitutional changes.⁹² The RECs include ECOWAS, the Economic Community of Central African States (ECCAS), the Intergovernmental Authority on Development (IGAD), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel Saharan States (CEN-SAD) and the Southern Africa Development Community (SADC).

Following the AU's rejection and condemnation of UCG, ECOWAS and SADC have outlawed UCG.⁹³ ECOWAS has been exemplary in its response to UCG in West African states,⁹⁴ and has even responded to situations ignored by the AU.⁹⁵ Although not to the same level as ECOWAS, SADC has also been active in addressing UCG in Southern Africa.⁹⁶

2.5 Conclusion

In this chapter the development of the normative framework for addressing UCG under the OAU, then AU was discussed. Even though the AU is the body accredited for taking the major stride in rejecting and condemning UCG in the continent, the OAU, albeit late, had played a significant role in developing the normative and institutional frameworks for addressing UCG. The AU has progressed past the point of condemning and sanctioning UCG to possible prosecution of its perpetrators. However, the Court responsible for the prosecution has not yet been established.

Although not to the same level as the AU, other regional bodies, such as the OAS and the Commonwealth have put in place mechanisms to tackle UCG in their member states. The sub-regional bodies in Africa, especially ECOWAS and SADC, play a major role in dealing with UCGs in their respective sub-region.

⁹² As above 17.

⁹³ As above.

⁹⁴ West Africa has suffered the most UCGs of all regions in Africa, with 44 *coups* from 1955 to 2004. See, UNOWA (n 32 above) 15.

⁹⁵ In 2010, ECOWAS requested return to constitutional order, following an unlawful constitutional amendment by President Tandja of Niger, despite the AU's silence on the matter. This is discussed in more detail under Chapter III.

⁹⁶ G Cawthra 'The Role of SADC in Managing political crisis and conflict: The Cases of Madagascar and Zimbabwe (2010) *Friedrich-Ebert-Stiftung* 7.

Chapter III

3. AU response to unconstitutional changes of government in member states

3.1 Introduction

Africa has suffered several UCGs during the age of the AU despite the organisation's robust approach in condemning and rejecting such changes of government. In 2012, *coups* shook West Africa, as Mali and Guinea Bissau suffered yet another UCG.⁹⁷

The AU condemns UCG's whether it is against a democratically elected government or not⁹⁸ as will be illustrated in the case studies below. This is due to the AU's stance on changing government strictly through free, fair and regular elections and because not condemning an unconstitutional change on the basis that it was against an undemocratic government would set a dangerous precedent.⁹⁹ However, the AU was eventually forced to reconsider this approach during the North African uprising of 2011.

This chapter will focus on the implementation of the norms developed by the AU in addressing incidences of UCG in the continent. In so doing, determination will be made of whether the normative framework developed by the AU is broad enough to address all forms of UCG. The AU responses in Guinea, Niger, Comoros and North Africa (Tunisia, Egypt and Libya) will be analysed. It is the author's view that the situations in these countries are worth consideration as they brought out the weaknesses and strengths in the

⁹⁷ PSC/MIN/3 Report of the Chairperson of the Commission on the situation in Guinea Bissau, Mali and between The Sudan and South Sudan adopted at the 319th PSC Meeting at the level of Ministers in Abuja, Nigeria on 24 April 2012 1.

⁹⁸ However the 2008 *coup* in Mauritania which occurred a year after the AU ensured the conduction of free and fair elections in 2007 to restore constitutional order was against a democratically elected government, which led the AU to be firm and for the first time request for the unconditional return of a President to Office. The AU demanded that President Sidi Ould Cheikh Abdallahi be unconditionally restored to Office within a fixed date, failing which the *coup* perpetrators and their civilian supporters risked isolation and sanctions. See, Communique PSC/MIN/Comm.2 (CLI) adopted at the 151st PSC Meeting in New York, United States of America on 22 September 2008 para 6.

⁹⁹ Not only would this require the AU to determine whether a regime was democratically elected in difficult situations such as disputed elections, but it may also come across a regime which was democratically elected, but then became undemocratic in the course of governing.

AU's UCG framework and double-standards in the AU's response to situations of UCG perpetrated by incumbent regimes.

3.2 Republic of Guinea

The crisis in Guinea started on 23 December 2008, hours after the announcement of the death of long-serving President Lansana Conte,¹⁰⁰ who came to power through a *coup* in 1984.¹⁰¹ Captain Moussa Dadis Camara of the National Council for Democracy and Development (CNDD) headed the *coup*, suspending the Constitution and dissolving state institutions.¹⁰²

On 24 December 2008, the PSC condemned the act and demanded respect for the Guinean Constitution and requested the transfer of power in accordance with the Constitution.¹⁰³ The PSC supported ECOWAS' efforts to address the *coup*¹⁰⁴ and called on the international community to cooperate in bringing the *coup* to an end.¹⁰⁵ Guinea was suspended from the activities of the AU pending the restoration of constitutional order on 29 December 2008.¹⁰⁶ The Assembly of HoSG condemned the UCG in Guinea during its January 2009 Summit in Addis Ababa, Ethiopia and expressed its concern at the resurgence of *coups* in Africa.¹⁰⁷

An International Contact Group on Guinea (ICG-G) was established to broker a deal with the *coup* perpetrators for the rapid return to constitutional order.¹⁰⁸ Political dialogue,

¹⁰⁰ In January and February 2007, security forces in Guinea, under the watch of President Conte had used disproportionate force to disperse protestors during a general strike. This was strongly condemned by the PSC which stated that the problems facing Guinea are deep-rooted and need to be addressed 'within the framework of open dialogue and consultations among concerned parties'. See, Communique PSC/PR/Comm(LXXI) adopted at the 71st PSC Meeting in Addis Ababa, Ethiopia on 16 February 2007 paras 2 & 3.

¹⁰¹ UN Review of Political Missions (n 84 above) 9.

¹⁰² As above. The *coup* was favoured by the people of Guinea due to the oppression they suffered at the hands of President Conte. See, 'Guinea ministers submit to rebels' *BBC* 26 December 2008 available at www.news.bbc.co.uk/2/hi/africa/7799548.stm (accessed 24 September 2012).

¹⁰³ Communique PSC/PR/Comm(CLXIV) adopted at the 164th PSC Meeting in Addis Ababa, Ethiopia on 24 December 2008 paras 4 & 5.

¹⁰⁴ As above, para 7.

¹⁰⁵ As above, para 10

¹⁰⁶ Communique PSC/PR/Comm(CLXV) adopted at the 165th PSC Meeting in Addis Ababa, Ethiopia on 29 December 2008. ECOWAS suspended Guinea from the organisation on 10 January 2009 following a communiqué to that effect during an Extraordinary Summit of ECOWAS HoSG in Abuja, Nigeria.

¹⁰⁷ *Coups* had taken place in Guinea Bissau on 5 August 2008 and in Mauritania on 6 August 2008. See, Assembly/AU/Dec.220(XII) adopted at the 12th Ordinary Session of the HoSG in Addis Ababa, Ethiopia, from 1 – 3 February 2009.

¹⁰⁸ PSC/PR/BR/1(CLXIX) Press statement at the 169th PSC Meeting in Addis Ababa, Ethiopia on 10 February 2009.

facilitated by the ICG-G, commenced among the CNDD and stakeholders, including Forces Vives, which comprises CSOs and political groups.¹⁰⁹ It was agreed that free and fair legislative and presidential elections be organised in 2009 as part of the transitional process and that the *coup* perpetrators not participate in the elections.¹¹⁰

However in July 2009, the AU expressed its concern at the slow pace, if any at all, of progress in the transition process which included the conduction of elections before the end of the year.¹¹¹ The commitment of CNDD to the talks was questionable as it was back-tracking on the agreements that were reached with the various stakeholders, including its exclusion from the elections. Troubled by the situation, on 28 September 2009, protestors took to the streets to voice their complaints, resulting in the deaths of 156 people, the rape of at least 109 women, the arbitrary arrest, detention and torture of many others.¹¹² There was international and domestic outcry at the atrocities and on 3 December 2009 Camara was shot in the head by the person whom he had blamed for the events of 28 September 2009.¹¹³

The PSC had repeatedly condemned the atrocities of 28 September and on 29 October 2009 it imposed targeted sanctions in the form of visa denials, travel restrictions and freezing of assets on all individuals who participated in maintaining unconstitutional order in Guinea.¹¹⁴ It also decided to communicate the measures and the list of individuals to the United Nations Security Council (UNSC), the EU, the Organisation of Islamic Conference (OIC), the International Organisation of La Francophonie, the League of Arab States (LAS) and all AU partners, including members of the ICG-G.¹¹⁵

In the absence of Camara, who was in voluntary exile, Defence Minister Sekouba Konate became Acting President.¹¹⁶ An agreement¹¹⁷ was reached with Konate and elections were scheduled to take place on 27 June 2010, excluding from participation individuals involved

¹⁰⁹ UN Review of Political Missions (n 84 above) 9.

¹¹⁰ Omorogbe (n 24 above) 147.

¹¹¹ Communiqué PSC/PR/Comm(CXC VII) adopted at the 197th PSC Meeting in Addis Ababa, Ethiopia on 10 July 2009.

¹¹² United Nations Security Council *Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea* (18 December 2009) 2.

¹¹³ UN Review of Political Missions (n 84 above) 10.

¹¹⁴ Communiqué PSC/AHG/Comm.2(CCVII) adopted at the 207th PSC Meeting at the level of the HoSG in Abuja, Nigeria on 29 October 2009 para 4.

¹¹⁵ As above, para 5.

¹¹⁶ UN Review of Political Missions (n 84 above) 10.

¹¹⁷ The Ouagadougou Agreement of 15 January 2010 brokered by President Blaise Compaore of Burkina Faso.

in the *coup*.¹¹⁸ Although the first round of elections on 27 June 2010 was contested by some,¹¹⁹ the second round on 7 November 2010 was generally accepted as free and fair.¹²⁰ On 9 December 2010, sanctions imposed on Guinea were lifted by the PSC following the restoration of constitutional order in the country.¹²¹

AU's action in Guinea is noteworthy not only because of the AU's unrelenting mediation efforts in partnership with ECOWAS, the UN and other actors, but also because it ensured the non-participation of the *coup* perpetrators in elections to restore constitutional order.¹²² The AU had failed to do so in its previous endeavours in Togo and Mauritania, where the *coup* perpetrators were elected, and the AU watched as elections validated/legitimised the *coups*.¹²³

3.3 Union of The Comoros

Comoros is characterised by its delicate state of peace and security. It has suffered more than 20 *coup* or *coup* attempts since gaining its independence in 1975.¹²⁴ The presidential term of office in Comoros is four years and the presidency rotates amongst the three islands, Grande Comore, Anjouan and Moheli which also have their own parliament and regional presidents.¹²⁵ This federal arrangement was organised by the OAU in 1999 after extensive negotiations to find a solution for the unilateral declaration of independence of the island of Anjouan on 3 August 1997 which dragged the country into chaos.¹²⁶

Following relative stability brought about by the agreement, the country once again descended into anarchy in 2007 when President of the Autonomous Island of Anjouan, Colonel Mohamed Bacar refused to step down after finishing his term and declared himself

¹¹⁸ PSC/PR/BR.2(CCXXXII) Press statement at the 232nd PSC Meeting in Addis Ababa, Ethiopia on 17 June 2010.

¹¹⁹ ISS *Peace and Security Council Report No 13* August 2010 17.

¹²⁰ PSC/PR/BR.(CCXLVIII) Press statement at the 248th PSC Meeting in Addis Ababa, Ethiopia on 13 November 2010.

¹²¹ Communique PSC/PR/Comm.2(CCLII) adopted at the 252nd PSC Meeting in Addis Ababa, Ethiopia on 9 December 2010 paras 1 & 2.

¹²² Although article 25(4) of the ACDEG prohibits *coup* perpetrators from participating in such elections, the Charter had not entered into force at the time.

¹²³ Omorogbe (n 24 above) 149.

¹²⁴ 'Africa crushes Comoros coup' *newser* 26 March 2008 available at www.newser.com/story/22569/africa-crushes-comoros-coup.html (accessed 24 September 2012).

¹²⁵ Unpublished: K Forander 'Dealing with unconstitutional changes of government- The African Union way' unpublished Master thesis, University of Lund, 2010 47.

¹²⁶ ISS *Peace and Security Council Report No 8* March 2010 8.

leader of Anjouan for yet another term.¹²⁷ The Constitutional Court of Comoros decided that Bacar's mandate had expired on 14 April 2007 and that it was the duty of the President of the Union of The Comoros 'as arbiter and moderator' to handle the matter.¹²⁸ Based on the Constitutional Court's assertion, the President of the Union appointed an Acting President for Anjouan pending elections later in the year and postponed the elections scheduled for 10 June 2007 to 17 June 2007 via a Presidential Decree.¹²⁹ This triggered tensions between the President of the Union and Anjouanese authorities supporting Bacar.¹³⁰

On May 2007, the PSC seized itself of the matter and expressed concern over the situation in Comoros, especially in consideration of the effects it would have on upcoming elections of presidents of the autonomous islands scheduled to take place from 10 – 24 June 2007.¹³¹ The PSC also called for the respect of the Comoros Constitution.¹³² It was decided that the AU Electoral and Security Assistance Mission to Comoros (MAES) be deployed for an initial period starting from 13 May to July 2007¹³³ with mandates ranging from the monitoring of electoral process to strengthening the capacity of Comorian forces and facilitating 'the effective restoration of the authority of the central government in Anjouan'.¹³⁴

The AU endorsed the Presidential Decree and warned that it will not recognise the result of an election which would take place on 10 June 2007, and neither would the international community.¹³⁵ Despite the warnings, Bacar conducted elections on 10 June 2007, but it was not given any recognition.¹³⁶

¹²⁷ Forander (n 125 above).

¹²⁸ PSC/PR/2(LXXXVII) Report of the Chairperson of the Commission on the situation in The Comoros adopted at the 87th PSC Meeting in Addis Ababa, Ethiopia on 13 August 2007 para 8.

¹²⁹ As above.

¹³⁰ As above.

¹³¹ Communiqué PSC/MIN/Comm.1(LXXVII) adopted at the 77th PSC Meeting in Durban, South Africa on 9 May 2007 para 1.

¹³² As above, para 2.

¹³³ The mandate of MAES was extended for an additional one month. See, Communiqué PSC/PR/Comm(LXXXIV) adopted at the 84th PSC Meeting in Addis Ababa, Ethiopia on 31 July 2007 para 2.

¹³⁴ Chairperson Report at 87th PSC Meeting (n 128 above) para 6.

¹³⁵ PSC appealed to the UNSC and all AU partners to comply with its decision. See, Communiqué PSC/PR/Comm(LXXVIII) adopted at the 78th PSC Meeting in Addis Ababa, Ethiopia on 9 June 2007 paras 1, 2 & 8.

¹³⁶ PSC/PR/PS(LXXXII) Press statement on the situation in The Comoros adopted at the 82nd PSC Meeting in Addis Ababa, Ethiopia on 23 July 2007.

There was deadlock when the de facto authorities of Anjouan were unwilling to cooperate with the PSC, as a result of which the mandate of MAES was extended once again until 31 December 2007 and it was tasked to ensure the ‘effective implementation of the institutional framework as provided for in the Constitution of Comoros’.¹³⁷ On 10 October 2007, the PSC imposed sanctions on all ‘illegal Anjouanese authorities and all other persons that impede the reconciliation process...’ in the form of travel restrictions from the island and freezing of funds, assets and economic resources.¹³⁸ PSC requested the support of the international community in enforcing the above-mentioned measures.¹³⁹

During its 10th Ordinary Session, the AU HoSG requested capable member states to assist the Government of Comoros in restoring democratic order.¹⁴⁰ To that effect, operation ‘Democracy in The Comoros’ was launched on 25 March 2008 with military, logistical and financial support from Tanzania, Sudan, Libya and Senegal.¹⁴¹ Constitutional order was restored, but the AU nonetheless extended the mandate of MAES for an additional six months to among other reasons provide assistance for the upcoming elections.¹⁴²

Although it was able to garner international support after massive efforts, the AU took sole responsibility in addressing the Comoros crisis.¹⁴³ It was on the ground even before the fraudulent elections of 10 June 2007 and had even tried to prevent it. AU’s intervention in Comoros is significant as it prevented a possible UCG from taking place. Fraudulent election is not listed as one element of UCG in the Lomé Declaration or the ACDEG,¹⁴⁴ for which the AU has been heavily criticised.¹⁴⁵ The AU was however able to show that it can

¹³⁷ Communique Rev.1 PSC/PR/Comm(LXXXVII) adopted at the 87th PSC Meeting in Addis Ababa, Ethiopia on 13 August 2007 paras 6 & 7.

¹³⁸ Communique PSC/PR/Comm(XCV) adopted at the 95th PSC Meeting in Addis Ababa, Ethiopia on 10 October 2007 para 5.

¹³⁹ As above, para 10.

¹⁴⁰ Assembly/AU/Dec.186 (X) adopted at the 10th Ordinary Session of the HoSG in Addis Ababa, Ethiopia, from 31 January – 2 February 2008.

¹⁴¹ Communique PSC/PR/Comm(CXXIV) adopted at the 124th PSC Meeting in Addis Ababa on 30 April 2008 paras 3 & 4.

¹⁴² As above, 6.

¹⁴³ *ISS Peace and Security Council Report No 2* September 2009 17.

¹⁴⁴ Forander (n 125 above) 50.

¹⁴⁵ The AU was not able to display the same commitment it showed in Comoros to the fraudulent elections in Kenya (2007) and Zimbabwe (2008), leading to accusations of lack of consistency in response and protecting the ‘big boys’ of politics in Africa. See, Cawthra (n 96 above) 30 on Zimbabwe and UN Review of Political Missions (n 84 above) 12 on Kenya.

act regardless of the limitations in the definitions under the Lomé Declaration and the ACDEG.¹⁴⁶

3.4 Republic of Niger

Even though the AU responded to the incidence in Comoros despite the absence of a corresponding provision to that particular situation in its policy framework, it failed to address the UCG in Niger,¹⁴⁷ although article 23(5) of the ACDEG prohibits the revision of a constitution to undemocratically prolong tenures.¹⁴⁸ On 26 May 2009 President Mamadou Tandja dissolved parliament for non-compliance with his decision to amend the 1999 Nigerien Constitution to run for a third term.¹⁴⁹ Tandja then organised a referendum which allowed him to amend the Constitution and remove presidential term limits and also extend his stay in office for another three years.¹⁵⁰ Tandja dissolved the Niger Constitutional Court after it declared the amendments unconstitutional.¹⁵¹

ECOWAS imposed sanctions on Niger in accordance with its Supplementary Protocol on Democracy and Good Governance and referred the matter to the AU for a similar action.¹⁵² The AU endorsed the decision of the ECOWAS Communiqué on 29 October 2009 and became seized of the matter.¹⁵³ The AU, with the lead of ECOWAS, was in the course of mediating¹⁵⁴ when on 18 February 2009 Major Salou Djibo detained Tandja and demanded

¹⁴⁶ The situation could however fall under article 17 of the ACDEG.

¹⁴⁷ It was ECOWAS alone which tried to address the UCG by Tandja from the very beginning. See, U Engel 'Unconstitutional changes of government – New AU policies in defence of democracy' (2010) *Working Paper Series of the Graduate Centre Humanities and Social Sciences of the Research Academy Leipzig* 10.

¹⁴⁸ Although the ACDEG had not yet come into force, the AU should have at least released a press statement condemning the act.

¹⁴⁹ Article 36 of the Nigerien Constitution allows the President to hold office for five years and a maximum of two terms. See, Omorogbe (n 24 above) 151.

¹⁵⁰ Omorogbe above.

¹⁵¹ ISS *Peace and Security Council Report No 1* July 2009 16.

¹⁵² Article 2(1) of the 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 of 2001. See also, ECOWAS Communiqué adopted at the Extraordinary ECOWAS HoSG Summit in Abuja, Nigeria on 17 October 2009 paras 14(a), 15 & 17.

¹⁵³ Communiqué PSC/AHG/Comm.3(CCVII) adopted at the 207th PSC Meeting at the level of the HoSG in Abuja, Nigeria on 29 October 2009 paras 2 & 5.

¹⁵⁴ Assembly/AU/Dec.268(XIV) Decision on the Report of the PSC on its Activities and the State of Peace and Security in Africa adopted at the 14th Ordinary Session of the HoSG in Addis Ababa, Ethiopia, from 31 January – 2 February 2010 para 21.

for the return to constitutional order.¹⁵⁵ The move by Djibo was accepted by thousands of Nigerien citizens who voiced their support for the *coup* by taking to the streets.¹⁵⁶

The AU condemned the UCG by Djibo, demanded the return to constitutional order and suspended Niger from participation in AU activities.¹⁵⁷ Worth noting is the demand by the AU for the restoration of constitutional order ‘as it existed before the referendum of 4 August 2009’ which allowed Tandja to extend his term. The AU was trying to address the two UCG’s that occurred in the country in a period of six months. The AU engaged in talks with the *coup* perpetrators, but stressing their ineligibility for participation in elections for the restoration of constitutional order.¹⁵⁸ As part of the transition process organised by the Supreme Council for the Restoration of Democracy (CSRD), a constitutional referendum was conducted on 31 October 2010.¹⁵⁹ Presidential and legislative elections which meet international standards were successfully held on 31 January 2011,¹⁶⁰ resulting in one of the smoothest transitions to constitutional order following a military *coup*.¹⁶¹

Although the matter in Niger was eventually resolved to the satisfaction of all parties, the AU’s reluctance to condemn President Tandja’s unconstitutional amendment of the Constitution is concerning. The AU has also failed to act when President Paul Biya of Cameroon on 10 April 2008 and President Abdelaziz Bouteflika of Algeria on 9 April 2009 amended their respective Constitutions to run for a third term.¹⁶² Such ‘unconstitutional persistence of government’¹⁶³ has led some scholars to suggest the formulation of a continent wide policy, which would set an acceptable and democratic term limit for leaders and be applicable to all AU member states.¹⁶⁴

¹⁵⁵ Engel (n 147 above) 6.

¹⁵⁶ ‘Thousands rally in support of Niger coup’ *BBC* 20 February 2010 available at <http://news.bbc.co.uk/2/hi/africa/8526072.stm> (accessed 25 September 2012).

¹⁵⁷ Communique PSC/PR/COMM.2(CCXVI) adopted at the 216th PSC Meeting in Addis Ababa, Ethiopia on 10 February 2010 paras 2, 4 & 5.

¹⁵⁸ See PSC/PR/BR.2(CCXX) Press statement at the 220th PSC Meeting in Addis Ababa, Ethiopia on 11 March 2010 and PSC/PR/BR.1(CCXXXII) Press statement at the 232nd PSC Meeting in Addis Ababa, Ethiopia on 17 June 2010.

¹⁵⁹ PSC/PR/BR.(CCXLVIII) Press statement at the 248th PSC Meeting in Addis Ababa, Ethiopia on 13 November 2010 3.

¹⁶⁰ *ISS Peace and Security Council Report No 20* March 2011 10.

¹⁶¹ *ISS Peace and Security Council Report No 27* October 2011 10.

¹⁶² Engel (n 147 above) 10.

¹⁶³ UN Review of Political Missions (n 84 above) 9.

¹⁶⁴ Souare (n 25 above) 9; Vunyingah (n 30 above) 4; and E Harsch ‘Africa defends democratic rule “Zero tolerance” for coups, constitutional violations’ (April 2010) *African Renewal* 10 available at <http://www.un.org/en/africarenewal/vol24no1/defending-democratic-rule.html> (accessed 10 September 2012).

3.5 Tunisia, Egypt and Libya

The popular uprising that started in Tunisia in 2010 spread across North Africa and ended in the regime change of long-serving leaders in Tunisia, Egypt and Libya in 2011. The AU had never been faced with such a scenario and the international community watched closely as it tried to cope with the events. The Chairperson of the AU had the following to say:

‘The popular uprisings that occurred in Tunisia and in Egypt posed serious doctrinal problems because they do not correspond to any of the cases envisaged by the 2000 Lomé Declaration on Unconstitutional Changes of Government. While the AU, like other international players, did not anticipate these developments, it nonetheless reacted creatively. Indeed, the AU exhibited the necessary flexibility, basing its response not on a dogmatic interpretation of the existing texts, but rather on the need to contribute the attainment of the overall AU objective of consolidating democracy in the continent.’¹⁶⁵

Tunisia

The AU condemned the disproportionate use of force against demonstrators in Tunisia, expressed its solidarity with the people and stated the need for ‘a peaceful and democratic transition respecting the will of the people’.¹⁶⁶ In accordance with article 56 of the Tunisian Constitution, President Ben Ali had handed over power to Prime Minister Mohammed Ghannouchi before his exile.¹⁶⁷ However, article 56 applies only in cases of temporary disability. Therefore, the Constitutional Court of Tunisia rejected the President’s action and in accordance with article 57 of the Constitution, certified the vacancy of the Office of the President and appointed the Speaker of Parliament as Interim President until elections within 60 days.¹⁶⁸

Egypt

The AU’s response to the situation in Egypt was not much different from Tunisia. It expressed its

¹⁶⁵ AU Commission Chairperson ‘The African Union and the Libyan Crisis: Putting the Records Straight’ (November 2011) *Letter From The Chairperson – Issue 1 1*.

¹⁶⁶ PSC/PR/Comm.2(CCLVII) Press statement at the 257th PSC Meeting in Addis Ababa, Ethiopia on 15 January 2011.

¹⁶⁷ ISS *Peace and Security Council Report No 19* February 2011 4.

¹⁶⁸ As above, 5.

‘solidarity with the Egyptian people whose desire for democracy is consistent with the relevant instruments of the AU and the continent’s commitment to promote democratization, good governance and respect for human rights’

and condemned the violence against demonstrators and requested that those responsible be brought to justice.¹⁶⁹ The transfer of power in Egypt was neither transparent nor constitutional.¹⁷⁰ The Military Council, the only body which had the trust of the Egyptian people, took control, dissolving parliament and suspending the Constitution pending the conduction of a referendum to amend the Constitution.¹⁷¹ This led to arguments as to whether the event that unfolded in Egypt was UCG or a popular uprising. However, the AU recognised the Egyptian movement as being consistent with the AU commitments.¹⁷²

Libya

The AU encountered its biggest challenge with the uprising in Libya,¹⁷³ which escalated from a peoples’ revolution into a rebel movement and then a full-fledged civil war in a matter of weeks.¹⁷⁴ Similar to its position in Tunisia and Egypt the AU condemned the indiscriminate use of force by Libyan authorities and called for the respect of the legitimate aspiration of the Libyan people for democracy, political reform, justice and socio-economic development.¹⁷⁵

On 10 March 2011, the PSC established a High Level *Ad Hoc* Committee on Libya comprising of the HoSGs of the Congo, Mali, South Africa and Uganda as well as the Chairperson of the AU Commission¹⁷⁶ and on 19 March 2011, the Committee devised the AU Roadmap¹⁷⁷ for a peaceful solution. While the AU preferred a diplomatic/political

¹⁶⁹ Communique PSC/PR/Comm.(CCLX) adopted at the 260th PSC Meeting in Addis Ababa, Ethiopia on 16 February 2011 paras 3 & 4.

¹⁷⁰ O Tungwarara ‘The Arab Spring and the AU Response’ (19 September 2011) *Open Society Institute* 2.

¹⁷¹ ISS *No 20* (n 160 above) 5. See also Communique PSC/PR/Comm.(CCLX) (n 169 above) para 5 where the PSC recognised the exceptional nature of the situation in Egypt with regards to the transfer of power.

¹⁷² Communique PSC/PR/Comm.(CCLX) (n 169 above).

¹⁷³ Libya is one of the most powerful AU member states contributing a huge chunk to the AU budget and pushing for ground-breaking ideas, such as the transformation of the AU Commission into the AU Authority. See, ISS *Peace and Security Council Report No 21* April 2011 5. See also, Assembly/AU/Dec.263 (XIII) on the Transformation of the AU Commission into the AU Authority adopted at the 13th Ordinary Session of the HoSG in Sirte, Libya, from 1 – 3 July 2009.

¹⁷⁴ Tungwarara (n 170 above).

¹⁷⁵ Communique PSC/PR/Comm(CCLXI) adopted at the 261st PSC Meeting in Addis Ababa, Ethiopia on 23 February 2011 paras 2 & 5.

¹⁷⁶ ISS *No 21* (n 173 above) 4.

¹⁷⁷ The elements of the Roadmap include the cessation of hostilities, cooperation among disputants to facilitate delivery of humanitarian aid, the protection of foreign nationals, especially African migrant workers in Libya

settlement of the situation in Libya, most of the rest of the world favoured military intervention.¹⁷⁸ This became apparent when the North Atlantic Treaty Organisation (NATO) intervened, legitimising its action on the inclusion of the phrase ‘all necessary measures’ to protect civilians as provided for in UNSC Resolution 1973.¹⁷⁹

Although a lot can be said on which approach was more appropriate, this study is limited to determining whether the change of government was constitutional or not. The situation in Libya is different from that of Tunisia and Egypt due to the involvement of rebels, mercenaries and NATO airstrikes, which some say was targeted towards regime change instead of civilian protection.¹⁸⁰ There is evidence that both Gaddafi and the National Transitional Council (NTC) were assisted by mercenaries to carry out their attacks.¹⁸¹

The Lomé Declaration and the ACDEG categorise intervention by mercenaries as well as armed dissident or rebel movements to topple a democratically elected government as UCG. Although the rise of Gaddafi to power is anything but democratic,¹⁸² as mentioned earlier,¹⁸³ the AU does not refrain from condemning and rejecting UCG because it is against an undemocratic regime. There were obvious reasons for the AU to deem the change of government in Libya unconstitutional, which explains its delay in recognising the NTC as the legitimate government of Libya.¹⁸⁴ On 20 October 2011, the AU allowed representatives of NTC ‘to occupy the seat of Libya in the AU and its organs’ ‘taking into account the uniqueness of the situation in Libya and the exceptional circumstances surrounding it, and without prejudice to the relevant AU instruments.’¹⁸⁵ Maru described AU’s recognition of the NTC as supporting the party that exercised the least unconstitutional power, since both factions had violated the AU normative frameworks.¹⁸⁶

and the adoption and implementation of political reforms to address the concerns of the Libyan population. See, Communique adopted by the Meeting of the AU High-level *Ad Hoc* Committee on Libya in Nouakchott, Mauritania on 19 March 2011 para 5.

¹⁷⁸ However, seeing the deadlock between the rebels and Gaddafi forces, the UN, France, UK and even NATO were eventually inclined to a peaceful settlement. See, ISS *Peace and Security Council Report No 25* August 2011 10 – 11.

¹⁷⁹ Resolution S/RES/1973 (2011) adopted at the 6498th UNSC Meeting on 17 March 2011 para 4.

¹⁸⁰ MT Maru ‘On unconstitutional changes of government: The case of the National Transitional Council of Libya’ (March 2012) 21 *African Security Review* 67 – 69.

¹⁸¹ As above, 70.

¹⁸² S Koko & MB Osula ‘Assessing the African Union’s Response to the Libyan Crisis’ (2012) 1 *ACCORD Conflict Trends* 6.

¹⁸³ See Chapter III, sec 3.1.

¹⁸⁴ ISS *Peace and Security Council Report No 26* September 2011 5.

¹⁸⁵ Communique PSC/PR/Comm/2.(CCXCVII) adopted at the 297th PSC Meeting in Addis Ababa, Ethiopia on 20 October 2011 para 4.

¹⁸⁶ Maru (n 180 above) 70.

He adds that recognising the NTC undermines AU's advance against UCG, including its delicate policy framework on UCG.¹⁸⁷

In the uprisings in Tunisia, Egypt and Libya, the AU had expressed its solidarity with the people and had demanded that the necessary political reforms be undertaken to meet the aspiration of the people. However, exactly what those reforms are was not clear, especially in the case of Libya. Sturman proposes that the Pan African Parliament (PAP) prepare guidelines on how to ensure return to constitutional order following such uprisings, 'including provision for transitional government, a timeframe for elections and the consolidation of democratic institutions'.¹⁸⁸ The AU has made efforts to overcome this challenge as well as others associated with popular uprisings, including through the organisation of workshops for the Panel of the Wise of PSC to find appropriate solutions.¹⁸⁹

3.6 Conclusion

The evolving nature of UCGs in Africa has presented the AU with an ever-changing set of challenges, testing its normative and institutional framework in the area. It has often addressed the challenges it faces by further developing its existing framework and taking a firm stand on certain issues, such as the banning of *coup* perpetrators from elections to restore constitutional order.

However, the AU is yet to lay down a clear policy on how to handle popular uprisings, but it had set a precedent with its response to the uprisings in North Africa. Other challenges the AU has to overcome include dealing with the loopholes in its definition of UCG, especially the absence of fraudulent elections by incumbents as one category of UCG, as it is a major form of unconstitutional governance in Africa. It must also apply the AU normative framework on UCG consistently to all countries and avoid double-standards.

¹⁸⁷ As above, 71.

¹⁸⁸ Sturman (n 44 above) 1.

¹⁸⁹ The 4th Thematic Workshop of the Panel of the Wise on strengthening political governance for peace, security and stability in Africa in Zanzibar, Tanzania, from 5 – 6 December, 2011, focused on the challenges and prospects of the North African uprising and among other things, considered 'recognition that citizens demand for change through extra-constitutional means'. The Panel of the Wise is expected to make concrete recommendations on the issue of UCG and the existing framework as well as other challenges following the completion of the workshops. See, <http://www.fahamu.org/images/AUPoWZanzibarReport.pdf> (accessed on 25 September 2012).

Chapter IV

4. Prospects and challenges of prosecuting unconstitutional changes of government

4.1 Article 28E of the Draft Statute

Article 28E of the Draft Statute to the Protocol on the African Court of Justice and Human and Peoples' Rights (the Draft Statute) empowers the African Court of Justice and Human and Peoples' Rights (the Court) to prosecute perpetrators of UCG. It provides as follows;

[Article 28E *1 The Crime of Unconstitutional Change of Government 1. For the purposes of this Statute, “unconstitutional change of government” means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a. A putsch or coup d'état against a democratically elected government;
 - b. An intervention by mercenaries to replace a democratically elected government;
 - c. Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
 - d. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - e. Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
 - f. 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.
2. For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.
3. [Any act of a sovereign people peacefully exercising their inherent right which results in a change of government shall not constitute an offence under this Article.] ”]

Initially, the provision on UCG in the Draft Statute was exactly the same as provided under article 23 of the ACDEG. However, following extensive deliberations during the Follow-

up Meeting of Government Experts on the Review of the Protocols relating to the PAP¹⁹⁰ and the African Court of Justice and Human and Peoples' Rights, held from 31 October – 11 November 2011, alterations were made, upon the suggestion of the consultants¹⁹¹ and government experts of member states.

Article 28E is substantially similar to the UCG definition under the Lomé Declaration and the ACDEG, with the exception of 28E(1)(c) which has been expanded to include replacement of a democratically elected government by 'political assassination'.

Sub-article 28E(1)(e) on amendment or revision of the Constitution or legal instruments which infringes on the principles of democratic change of government was also made more specific by adding the phrase 'or is inconsistent with the Constitution'. However, sub-article 28(1)(f) on significant modification of the electoral laws six months before election date without the consent of the majority of political actors is a completely new addition and was borrowed from the ECOWAS Protocol on Democracy¹⁹² upon the recommendation of ECOWAS member states.¹⁹³

The inclusion of article 28E(2) suggests there are concerns about UCG against 'democratically elected governments.' The article however does not shed much light on what it constitutes, as it directs readers to other AU instruments, without specifying which instruments.

Article 28E proved to be one of the most controversial provisions, if not the most controversial. Although article 28E was bracketed as a whole, sub-article 28E(3) on popular uprisings was in fact the first sub-article to be bracketed upon the request of government experts during the Government Legal Experts Meeting that was held from 31

¹⁹⁰ The Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament was also revised during the Meetings in accordance with Assembly/AU/Dec.223(XII) Decision on the Review of the Protocol Relating to the PAP adopted at the 12th Ordinary Session of the HoSG Assembly in Addis Ababa, Ethiopia, from 1 – 3 February 2009.

¹⁹¹ The AU Commission engaged PALU to carry out studies on the feasibility of expanding the jurisdiction of the African Court and propose normative and/or institutional reforms, including drawing up a Draft Statute to that effect. See, Exp/Legal/AUC-Auth./6(V) 'Report of the study on the implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern' PALU March 2011 1.

¹⁹² Article 2(1) ECOWAS Protocol on Democracy (n 152 above).

¹⁹³ Information provided by Mr. Donald Deya, PALU CEO via email on 15 October 2012.

October – 11 November 2011.¹⁹⁴ Sub-article 28E(3) received the most support from countries that were part of the Arab Uprising, especially Egypt.¹⁹⁵ Certain government experts were opposed to the inclusion of sub-article 28E(3)¹⁹⁶ in particular and article 28E in general, stressing the political nature of the provision and the inappropriateness of a Court to handle it.¹⁹⁷

In response to scepticism over the empowerment of the Court, the Legal Counsel of the AU Commission explained that a policy decision to grant the Court jurisdiction over UCG has already been made at the level of HoSG, as contained in various decisions and instruments, particularly article 25(5) of the ACDEG.¹⁹⁸ He clarified that there are rules in various AU instruments that lay out the procedures to be followed in the case of UCG's which would 'invariably lead the Court to declare that a *prima facie* case exists.'¹⁹⁹ He added that if politicians with 'varying political considerations determine that an unconstitutional change of government has occurred, then it should be much easier for judges, free from political wrangling, to do so'.²⁰⁰

Despite explanations by the Legal Counsel on the need to allow the Court to exercise jurisdiction over the crime of UCG, representatives of few member states remained unconvinced.²⁰¹ While some representatives resisted the granting of jurisdiction over UCG, others were concerned about the definition of UCG in the Draft Statute. During their 14 – 15 May 2012 Meeting, the Ministers of Justice/Attorneys General finally decided to adopt the Draft Statute, except article 28E on UCG declaring 'the high political nature' of the provision and so decided 'to submit it to the Assembly through the Executive Council for

¹⁹⁴ The whole provision was completely bracketed during the Government Legal Experts Meeting that took place from 7 – 11 May 2012 for further consideration by the Ministers of Justice/Attorneys General during their Meeting, held from 14 – 15 May 2012 in Addis Ababa, Ethiopia.

¹⁹⁵ The author was in attendance during the Government Legal Experts Meeting in Addis Ababa, Ethiopia from 31 October – 11 November 2011.

¹⁹⁶ Sudan was strongly resistant to the inclusion of article 28E(3) and eventually 'expressed its reservation to the adoption of the entire article and requested that it be bracketed'. See Legal/ACJHR-PAP/Draft/Rpt. Follow-up Meeting of Government Experts on the Review of the Protocols Relating to the Pan-African Parliament and the African Court of Justice and Human and Peoples' Rights, held in Addis Ababa, Ethiopia, from 31 October – 11 November 2011 para 73.

¹⁹⁷ Few, but very vocal delegations were opposed to article 28E(3). They were worried that the *provisio* would encourage popular uprisings in member states. Deya (n 193 above).

¹⁹⁸ Legal/ACJHR-PAP/Draft/Rpt. (n 196 above) para 72.

¹⁹⁹ As above.

²⁰⁰ As above.

²⁰¹ The majority of member states were supportive of the adoption of article 28E, however, few member states, especially a couple of the SADC states were 'totally opposed to the principle of having an international criminal jurisdiction for the African Court.' Deya (n 193 above).

consideration²⁰² during the July 2012 AU Summit. They further stated that article 28E's definition on UCG needed more precision, even though most of the sub-articles were taken from the ACDEG.²⁰³

The Executive Council considered the provision during the July 2012 Summit in Addis Ababa, Ethiopia and requested the AU Commission, the AUCIL and the African Court on Human and Peoples' Rights to work on and submit a definition on UCG for consideration by AU policy organs during the January 2013 Summit.²⁰⁴ The delegated organs have already started work on refining the definition of UCG based on the Executive Council decision, although there are doubts that the final definition will be ready in time for the January 2013 AU Summit.²⁰⁵

Article 28E on UCG has been at the forefront of discussions since November 2011, but agreement on the provision is still not in sight. Although time-taking, it is most probable that the Court will be empowered to prosecute UCG because as stated by the Legal Counsel of the AU Commission above,²⁰⁶ a policy decision to grant the Court has already been made at the level of HoSG.²⁰⁷ Furthermore, due to the growing commitment of the AU to fight the scourge of UCG in Africa the empowerment of the Court seems to be the next logical step in this commitment. The precautionous approach taken regarding the definition of UCG is understandable as problems have been identified in the definitions under the Lomé Declaration and the ACDEG. The concerns raised include the fact that the normative framework developed by the AU is not broad enough to address all forms of UCG, and that it does not cater to incidences of popular uprisings similar to the ones that took place in North Africa.²⁰⁸

²⁰² Min/Legal/Rpt Report (n 13 above).

²⁰³ As above, para 17.

²⁰⁴ EX.CL/DEC.706(XXI) Decision (n 12 above). This request was reiterated by the Assembly in its decision Assembly/AU/Dec.427(XIX) adopted at the 19th Ordinary Session of the HoSG in Addis Ababa, Ethiopia, from 15 – 16 July 2012 para 3. However, the Assembly decision was later deemed invalid by the Chairperson of the Assembly because there was no quorum when it was adopted and consideration of the whole protocol was transferred to January 2013. This information was provided by Mr. Bright Mando, legal officer in OLC, AU Commission in Addis Ababa, Ethiopia on 28 September 2012 via email.

²⁰⁵ Mando above, in an email correspondence of 21 September 2012 explained that the final definition of UCG is unlikely to be ready for the January 2013 AU Summit.

²⁰⁶ Legal/ACJHR-PAP/Draft/Rpt. (n 196 above).

²⁰⁷ The ACDEG entered into force on 15 February 2012, thus measures to enforce its provisions should be strengthened, including the establishment of a competent Court to prosecute UCG.

²⁰⁸ Chapter III of this study addresses the short-comings in relation to AU responses to UCGs in member states based on the AU normative framework on UCG.

4.2 Challenges of prosecuting UCG

4.2.1 Defining UCG

As it stands now, the definition of UCG under article 28E of the Draft Statute lacks precision and does not fully address the problems raised under Chapter III of this study.²⁰⁹ One such problem is the unconstitutional *persistence* of government through the conduction of fraudulent elections, such as the 2007 Kenyan elections,²¹⁰ the 2008 Zimbabwean elections²¹¹ or the 2010 elections in Ethiopia, seat of the AU, where the incumbent secured an unbelievable 99.6% of the seats in parliament.²¹² Similar to the Lomé Declaration and the ACDEG, article 28E of the Draft Statute does not address fraudulent elections and only considers the refusal of an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections. However the reality on the ground is that most African countries do not conduct free, fair and regular elections. The report of the Economist Intelligence Unit's 2011 democracy index provides that elections in the assessed 44 Sub-Saharan African countries are often rigged, and only elections in six countries, namely Botswana, Cape Verde, Ghana, Mauritius, South Africa and Zambia can be classified as free and fair.²¹³ Hence, there is need to include fraudulent elections as one form of UCG.

Besides holding fraudulent elections, African leaders attempt to hold on to power by extending their term limits. Leaders who successfully amended their Constitutions to extend their terms include Tandja Mamadou of Niger in 2010, Ismail Omar Guelleh of Djibouti in 2010, Abdelaziz Bouteflika of Algeria in 2008, Paul Biya of Cameroon in 2008, Idriss Deby of Chad in 2005, Yoweri Museveni of Uganda in 2005, Omar Bongo of Gabon in 2003, Zein el-Abidine Ben Ali of Tunisia in 2002, Gnassingbe Eyadema of Togo

²⁰⁹ The Draft Statute is a compromise document. Because of resistance to novel ideas, the approach taken by the consultants and the OLC during the Government Legal Experts and Ministers of Justice/Attorneys General Meetings was that of pragmatism, where they had to work within the confines of the ACDEG and the ECOWAS Protocol on Democracy. Deya (n 193 above).

²¹⁰ UN Review of Political Missions (n 84 above) 12.

²¹¹ Cawthra (n 96 above) 30.

²¹² The preconditions for a free and fair election were non-existent during the 2010 Ethiopian elections, including meaningful participation of effective political parties where voters would have different choices, freedom of candidates to publicly discuss their policy proposals and freedom of voters to vote without fear of reprisal. Ethiopia received 0.00 points for electoral process and pluralism, was classified an authoritarian regime and was ranked 121st out of 167 countries on the 2011 democracy index report prepared by the Economist Intelligence Unit. See, Economist Intelligence Unit 'The Democracy index 2011: Democracy under stress' 2011 7.

²¹³ Economist Intelligence Unit above, 26.

in 2002,²¹⁴ Lansana Conte of Guinea in 2001, Blaise Compaore of Burkina Faso in 2000²¹⁵ and Samuel Nujoma of Namibia in 1998.²¹⁶

Although such extension of terms would fall under article 23(5) of the ACDEG,²¹⁷ which has also been included in the Draft Statute, the AU has not been active in condemning and rejecting this form of UCG. It is thus doubtful that the proposed Court would be any different.

The AU has made it a practice to condemn and reject UCG, whether it is against a democratically elected government or not, despite the fact that the provisions in its policy framework provide that UCG is an act against a ‘democratically elected government.’ Article 28E(2) of the Draft Statute, though poorly, attempts to shed light on what a democratically elected government is. The inclusion of this sub-article is a sign that the method through which the government came to power may become an important factor when the Court considers a case. It would be interesting to witness which approach the Court would take.

Regardless of the means of acquiring power, be it democratic or not, a government could become undemocratic in the course of ruling, in which case, the government would be illegitimate, unconstitutional and governing against the will of the people. The Draft

²¹⁴ Term limits were removed from the Constitution in 2002. Furthermore in 2005, there was another constitutional amendment aimed at transferring power to Faure Gnassingbe, son of the late President, Gnassingbe Eyadema. See, A Banjo ‘Constitutional and succession crisis in West Africa: The case of Togo’ (2008) 2 *African Journal of Legal Studies* 147–152.

²¹⁵ Compaore assumed power via a *coup* in 1987 and it was only in a 2001 constitutional amendment that presidential term limits became limited to five years, renewable once. However, Compaore is still in power claiming that the amendment does not apply retroactively. He is currently serving his last term, although there are signs that he intends to amend the term-limits. See, United States Department of State ‘Background note: Burkina Faso’ 2012 available at www.state.gov/r/pa/ei/bgn/2834.htm (accessed 7 October 2012).

²¹⁶ Abdoulaye Wade of Senegal in 2012, Olusegun Obasanjo of Nigeria in 2006, Bakili Muluzi of Malawi in 2002 and Frederick Chiluba of Zambia in 2001 also attempted to extend their terms, but failed. See, ‘Changing the constitution to remain in power’ *France24* 23 October 2009 available at www.france24.com/en/20091023-changing-constitution-remain-power (accessed 7 October 2012) and JS Omotola ‘Unconstitutional changes of government in Africa: What implications for democratic consolidation?’ (2011) *Discussion paper 70 Nordiska Afrikainstitutet* 26.

²¹⁷ The initial draft of article 23(5) was ‘amendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the State Party concerned, to prolong the tenure of office for the incumbent government.’ Since most member states (especially Uganda which entered reservations) were unhappy with the phrase ‘to prolong the tenure of office for the incumbent government,’ it was rephrased as ‘which is an infringement on the principles of democratic change of government.’ See, EX.CL/258(IX) 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 considered at the 9th Ordinary Session in Banjul, Gambia, from 25 – 29 June 2006, paras 9 and 40 – 44. See also, I Kane ‘The implementation of the African Charter on Democracy, Elections and Governance’ (2008) 17 *Institute of Security Studies (ISS) African Security Review* 43 – 51.

Statute does not address this kind of scenario, despite the fact that the majority of African countries are undemocratic in practice. In 2011, of the 44 Sub-Saharan African countries assessed by the Economist Intelligence Unit, 23 were authoritarian regimes,²¹⁸ 11 hybrid regimes, 9 flawed democracies and only 1 full democracy.²¹⁹ Inkome states that the AU policy framework on UCG ‘is painfully silent on the omissions and commissions of sitting African governments,’ ‘prescribing only how power must be acquired, and not how it should be exercised.’²²⁰ The ACDEG does contain several provisions on governance and the development of a strong democratic culture; its provisions on UCG however do not deal with undemocratic practices in the course of governing a country. Inkome further states that one of the major causes of UCG is ‘poor and autocratic leadership’ and ‘unconstitutional and illegitimate exercises of power.’²²¹ It is therefore crucial that the Draft Statute’s provision on UCG be amended to consider undemocratic governance as UCG.

4.2.2 Elements of crimes

Article 9 of the Rome Statute of the ICC provides that an ‘Elements of Crimes’ document shall assist the ICC in the interpretation and application of three of the crimes over which it has jurisdiction.²²² The inclusion of a corresponding provision in the Draft Statute might solve most of the above-mentioned problems in the definition of UCG.²²³ However, the Draft Statute does not contain a provision on elements of crimes.²²⁴ Having an Elements of Crimes document would not only assist the Court in dealing with UCG, but also the other 14 crimes over which the Court is proposed to have jurisdiction. Deya proposes a contrary

²¹⁸ Most authoritarian regimes are outright dictatorships and are characterized by massive human rights violations, the absence of strong CSOs, political parties, independent judiciary and separation of power. Economist Intelligence Unit (n 212 above) 30.

²¹⁹ Economist Intelligence Unit (n 212 above) 9.

²²⁰ Inkome (n 26 above) 33.

²²¹ As above 48.

²²² The ICC Elements of Crimes is a 50 page document which elaborates on the crime of genocide, crimes against humanity and war crimes.

²²³ Article 28A(2) of the Draft Statute, which states that the Assembly may extend the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law may be helpful.

²²⁴ The Study by PALU on the implications of expanding the mandate of the African Court of Justice and Human Rights to try serious crimes of international concern does suggest the preparation of an Elements of Crimes document. See, Exp/Legal/AUC-Auth./6(V) (n 191 above) 20.

argument, stating that such document would unduly restrict the Court, and prevent it from using jurisprudence to extend and clarify the frontiers of law.²²⁵

4.2.3 Immunity

The issue of immunity will arise if the Court intends to prosecute a sitting HoSG, Minister or other government officials for UCG. Article 46B(2) of the Draft Statute considered during the Government Legal Experts Meeting from 31 October – 11 November 2011 states that the official position of the accused person would not relieve such person of criminal responsibility nor would it mitigate punishment. This was rephrased as ‘*without prejudice to the immunities provided for under international law,*²²⁶ the official position of any accused person... shall not relieve such person of criminal responsibility nor mitigate punishment’ during the Government Legal Experts and Ministers of Justice/Attorneys General Meeting that was held from 7 – 15 May 2012.²²⁷

Immunity is a sensitive and controversial matter, especially following the issuance of the arrest warrant by the ICC against Omar Al-Bashir of Sudan,²²⁸ a sitting HoSG, and the AU’s concern over the abuse of the principle of universal jurisdiction. The Court may overcome the issue of immunity by arguing that in UCGs, the *de facto* government assumes power unconstitutionally and is therefore illegitimate, and will thus not enjoy immunity. Nevertheless, member states will not respond positively to this and may even refuse to cooperate with the Court as envisaged in article 46L of the Draft Statute.

4.2.4 Who would the Court prosecute?

One of the concerns that was raised during the Government Legal Experts Meeting of 31 October – 11 November 2011 regards which persons to hold responsible for the crime of

²²⁵ He presents the International Criminal Tribunal for Rwanda (ICTR) as an example, arguing that had the ICTR possessed an Elements of Crimes document, it would not have been able to define and proscribe genocidal rape as it did. Deya (n 193 above).

²²⁶ Emphasis added.

²²⁷ Article 27 of the Rome Statute of the ICC states that immunities shall not exempt anyone from criminal responsibility, mitigate sentences or bar the Court from exercising jurisdiction. It was on this basis the ICC issued a warrant of arrest for Al-Bashir. But article 98 of the Statute provides that the ICC should not request a state to surrender or assist it, if it would require the state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state. The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Statute of the ICTR and the Statute of the Special Court for Sierra Leone also contain provisions waiving immunity.

²²⁸ For a brief summary of the ICC’s case against Al-Bashir and the issue of immunity, see Dugard (n 79 above) 197 – 199.

UCG. The Legal Counsel of the AU Commission explained that the prosecutor of the Court would not have difficulty in determining who is the most responsible.²²⁹ Deya explains that ‘the Court will try those most responsible for planning, financing, undertaking, supervising acts of UCG and/or the ultimate beneficiaries thereof.’²³⁰ It is also the author’s opinion that identifying which persons to prosecute will not be a problem, because the AU PSC for example has extensive experience in instituting targeted sanctions against individuals which it believes are the principal perpetrators of UCG. It is possible for the Court to cooperate with the PSC on this matter. According to article 46B of the Draft Statute, the punishment of an accused person who acted under the order of a Government or of a superior may be mitigated if the Court determines that justice so requires. Therefore, not all individuals may receive the same level of punishment.

4.2.5 Commitment of member states

The attitude of some member states towards the provision on UCG in the Draft Statute is not encouraging.²³¹ Despite the fact that article 25(5) of the ACDEG unequivocally provides for the establishment of a court competent to try UCG, member states question the appropriateness of a Court to entertain such ‘a politically sensitive matter’.²³² This seems like regressing on positive steps already taken towards the rejection of UCG and the consolidation of constitutional order and democratic rule. This lack of political will brings to question the success the Court would have even if the Draft Statute becomes adopted allowing the Court to prosecute the crime of UCG and whether member states would cooperate with it.

4.3 Prospects of prosecuting UCG

4.3.1 Defining UCG

During its July 2012 Summit, the Executive Council had requested the AU Commission, the AUCIL and the African Court on Human and Peoples’ Rights to refine the UCG

²²⁹ Legal/ACJHR-PAP/Draft/Rpt (n 196 above).

²³⁰ Deya (193 above).

²³¹ It is the only provision in the Draft Statute which has been bracketed for further consideration. Min/Legal/Rpt Report (n 13 above).

²³² Legal/ACJHR-PAP/Draft/Rpt (n 196 above), para 71.

definition in the Draft Statute.²³³ These organs are the appropriate bodies to undertake such task.

The PSC, which is at the forefront of dealing with UCG in the continent and the OLC, which is responsible for the Draft Statute and for organising the Government Legal Experts and Ministers of Justice/Attorneys General Meetings are both under the AU Commission, and will thus be able to significantly contribute to the development of a more comprehensive definition of UCG.

The AUCIL, an independent body, comprised of 11 professionals in international law, acting in their individual/personal capacity, thus avoiding political considerations,²³⁴ is also well placed to assist in defining UCG. The AUCIL was established to act as an independent legal advisory organ to the AU and ‘to undertake activities relating to the codification and progressive development of international law in Africa.’²³⁵ It is also mandated to conduct studies on legal matters of interest to the AU and its member states.²³⁶

The input of the African Court on Human and Peoples’ Rights is important as well, as it is a section of the Court, which in the end will have jurisdiction over the crime of UCG. Furthermore, the Court has been part of the discussions during the Government Legal Experts and Ministers of Justice/Attorneys General Meetings and the drafting process.

The lack of agreement on the current definition of UCG in the Draft Statute may have been for the best, because there is still need to work on the definition as has been elaborated above.²³⁷

4.3.2 Free from politicisation

Even though the AU PSC has been active in addressing incidences of UCG, it has not been consistent in its responses, being aggressive in certain instances and weak in others. It has failed miserably in responding to matters of constitutional amendment which extend the tenure of incumbent regimes and as illustrated in Chapter III, it did not respond with the

²³³ EX.CL/DEC.706(XXI) (n 16 above).

²³⁴ Article 3(1) Statute of the AUCIL.

²³⁵ Article 4(a) Statute of the AUCIL and AUCIL Strategic Plan 2011 -2013 7.

²³⁶ Article 4(d) Statute of the AUCIL .

²³⁷ See sec 4.2.1 above.

same force to the elections in Zimbabwe and Kenya as it did in the case of The Comoros.²³⁸

Inkome states that the response of the AU is dependent on the member states that have an interest in the country affected by the UCG, ‘the power coalition patterns in the continent and in the AU’ as well as ‘the leadership of the AU at any given time,’ that is whether the leadership is ‘united or divided on a coup situation, and therefore on what line of action needs to be taken.’²³⁹

This selective approach is not something particular to the AU; the UNSC has also ‘been selective in carrying out its Charter-given mandate.’²⁴⁰ There has been an instance where a P5 member of the UNSC vetoed a resolution containing an advisory opinion of the International Court of Justice (ICJ).²⁴¹ The ICJ has however been able to decide land mark cases, such as, *Nicaragua v USA*²⁴² in which the ICJ ruled against the United States, a world super-power, reinforcing views that the ICJ is independent, although there are dissenting opinions.²⁴³

There is no guarantee the proposed African Court would be completely independent and objective, but it is likely to be more consistent in its approach and less susceptible to political considerations as opposed to the AU PSC. Although the current African Court on Human and Peoples’ Rights has so far not decided any pertinent cases to reflect on its level of independence, the African Commission on the other hand has proven that it is not intimidated in deciding cases.²⁴⁴ The African Commission has further been a pioneer in its

²³⁸ Forander (n 125 above) 60.

²³⁹ Inkome (n 26 above) 34.

²⁴⁰ DS Kumalo ‘Mediation, prevention and resolution of conflicts’ (2011) in *Development Dialogue no. 57 The United Nations and regional challenges in Africa – 50 years after Dag Hammarskjold* 182.

²⁴¹ The United States rejected a 2004 ICJ advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* whereby the ICJ found Israel in violation of its obligations under international law, and advised that Israel cease construction and clear the sections of the wall already built. See, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ (9 July 2004) (2004) Reports p. 136 and UN General Assembly Resolution A/64/150 on the right of the Palestinian people to self-determination (26 March 2010). See also, Dugard (n 79 above) 470 – 471.

²⁴² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* ICJ (27 June 1986) (1986) Reports para 292.

²⁴³ There are arguments that the ICJ is biased. See, EA Posner & M Figueiredo ‘Is the International Court of Justice biased?’ (December 2004) *University of Chicago Law & Economics, Olin Working Paper No. 234* 28 – 30.

²⁴⁴ In *Jawara v The Gambia*, the African Commission decided that the military *coup d’état* that took place in The Gambia ‘was a grave violation of the right of Gambian people to freely choose their government as entrenched in article 20(1) of the African Charter on Human and Peoples’ Rights (African Charter). In *Constitutional Rights Project and another v Nigeria*, the African Commission found the Nigerian

generous and innovative method of interpreting the provisions of the African Charter, recognising rights that are not even specifically mentioned in the Charter, dubbed ‘implicit rights’.²⁴⁵ If the Court adopts the adventurous approach taken by the African Commission, limitations in the definition of UCG may not prevent it from prosecuting perpetrators of UCG. Deya states that ‘the Court, in practice, will have to define, circumscribe and refine the limits of the crime.’²⁴⁶

In addition, the Court is likely to be relatively free from external interferences in its adjudication process, which was a problem faced by the PSC. An example is Gaddafi’s interference in the PSC’s diplomatic talks to restore constitutional order during the 2008 *coup* in Mauritania²⁴⁷ or the way the international community as well as some African countries disregarded the AU’s decision not to recognise the illegitimate government during the 2002 Madagascar *coup*.²⁴⁸

4.3.3 Addressing non-compliance

There have been cases where UCG perpetrators have out-right refused to cooperate with the AU as in the case of Madagascar. The international community²⁴⁹ and the AU through SADC²⁵⁰ are still attempting to resolve the political impasse in Madagascar following the 2009 *coup*.²⁵¹ Progress in negotiations for a return to constitutional order is slow with the *coup* perpetrators having refused compliance with the Maputo Agreement of August

government in violation of the Nigerian peoples’ right to vote and freely choose their government as guaranteed under articles 13 and 20 of the African Charter. See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 73 and *Constitutional Rights Project and another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) paras 50 - 53.

²⁴⁵ The most popular case in this regard is *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, where the African Commission held the Nigerian government responsible for the violation of the Ogoni peoples’ rights to food and shelter. See, *SERAC and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2002) paras 60 & 64.

²⁴⁶ Deya (n 193 above).

²⁴⁷ Unpublished: MS Nkosi ‘Analysis of OAU/AU responses to unconstitutional changes of government in Africa’ unpublished Master mini-dissertation, University of Pretoria, 2010 65.

²⁴⁸ The AU was under pressure from the United Kingdom, China, the United States and France to recognise the UCG perpetrators as the legitimate government. AU member states such as Senegal, Mauritius and three other African countries also recognised the *de facto* government despite AU’s request to deny recognition. See, Inkome (n 26 above) 35 and Nkosi above 69.

²⁴⁹ The United Nations, European Union, Indian Ocean Commission, International Organisation of *La Francophonie* and the AU formed the International Contact Group to ensure return to constitutional order. Cawthra (n 96 above) 15.

²⁵⁰ RECs, such as SADC form ‘part of the AU’s African Peace and Security Architecture (APSA).’ See Cawthra above 11.

²⁵¹ See Communiqué PSC/PR/Comm.(CLXXXI) adopted at the 181st PSC Meeting in Addis Ababa, Ethiopia on 20 March 2009 condemning the UCG in Madagascar and suspending its membership from the AU.

2009.²⁵² But there is now some hope with the Transition Roadmap of September 2011.²⁵³ In addition to diplomatic talks, the AU has suspended Madagascar and placed targeted sanctions,²⁵⁴ but until recently none of this had much effect.²⁵⁵

In extreme situations like Madagascar, when all means have been exhausted, the issuance of arrest warrants against UCG perpetrators would be an appropriate next step. Vunyingah states that the predicament in Madagascar warranted prosecution of the *coup* perpetrators by the Court envisaged under article 25(5) of the ACDEG.²⁵⁶

4.3.4 Entities eligible to submit cases to the Court

The entities eligible to bring cases before the Court to enable it exercise jurisdiction include state parties by referral to the Court Prosecutor, the Assembly of HoSG, the PSC and the Prosecutor *proprio motu*.²⁵⁷ It is advantageous to have different bodies that can bring matters to the attention of the Court. In cases of UCG, especially those relating to manipulation of constitutional provisions to extend terms or fraudulent elections, where the Assembly or the PSC become uninvolved or are slow to act, state parties committed to democratic rule or the Prosecutor may take the initiative to draw the attention of the Court.

4.3.5 Complementary jurisdiction

Similar to the ICC, the jurisdiction of the Court is complementary to national courts²⁵⁸ and to the courts of RECs.²⁵⁹ The Court will have jurisdiction only when a state is either unwilling or unable to prosecute perpetrators of UCG.²⁶⁰ Marshall²⁶¹ states that

²⁵² Cawthra (n 96 above).

²⁵³ The Transition Roadmap of September 2011 is the fourth such agreement. See L Ploch & N Cook 'Madagascar's political crisis' (18 June 2012) *Congressional Research Service* 1.

²⁵⁴ Following the UCG, Madagascar lost US \$400 million of donor grants from the international community. As above 15.

²⁵⁵ L Ploch & N Cook (n 253 above).

²⁵⁶ Vunyingah (n 30 above) 4.

²⁵⁷ Article 46F & 46G Draft Statute.

²⁵⁸ National courts may prosecute perpetrators of UCG for the crime of treason, seditious conspiracy, advocating overthrow of government, mutiny and rebellion or insurrection. For example, article 3(3) of the 1992 Constitution of Ghana provides that 'any person who...by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act....commits the offence of high treason...'

²⁵⁹ Article 46H Draft Statute.

²⁶⁰ As above.

²⁶¹ KA Marshall 'Prevention and complementarity in the International Criminal Court: A positive approach' (2010) 17 *Human Rights Brief* 21.

complementarity will most likely have a positive effect on national and international criminal justice. She had the following to say about the ICC's complementarity approach:

“By proactively engaging with and assisting domestic legal institutions, the ICC will be able to strengthen the rule of law in nations suffering from violent conflict and instability.”²⁶²

States may not have the necessary legislative or judicial framework on UCG to carry out prosecutions,²⁶³ nor is it likely that national courts will prosecute an incumbent government that held fraudulent elections or amended the constitution to stay in power. It is therefore imperative that the Court be empowered to prosecute perpetrators of UCG where national courts are unwilling or unable.

4.3.6 Implementing a policy decision

The ACDEG envisions the prosecution of UCG perpetrators before a competent Court. Five years after its adoption, there exists no competent Court to try UCG perpetrators. The process of expanding the jurisdiction of the African Court of Justice and Human Rights to try international crimes presents a good opportunity to empower the Court to also prosecute UCG as an international crime.

4.3.7 Deterrence effect

Although addressing the underlying causes of UCG should be the primary avenue of overcoming the plight of UCG's in Africa, the empowerment of the Court to prosecute such crimes may serve as a deterrence mechanism. It is not always easy to ascertain the link between the establishment of an international criminal tribunal and a decrease in crimes over which the tribunal has jurisdiction.²⁶⁴ Regardless, the empowerment of the Court could deter potential UCG plotters.

‘Laws can deter *coup* plotting – the prosecution now of those that subverted democracy in the past affects the perception of those that may now plan to subvert democracy – in the same way that laws against theft can deter rampant robbery.’²⁶⁵

²⁶² As above 22.

²⁶³ Article 14(2) of the ACDEG obliges state parties to take legislative and regulatory measures to prosecute UCG perpetrators. Article 25(9) of the ACDEG obliges state parties to either prosecute or extradite UCG perpetrators.

²⁶⁴ Marshall (n 261 above).

²⁶⁵ J Hatchard & TI Ogowewo (n 89 above) 12.

4.4 Conclusion

The process of finalising the Draft Statute has proven slow, but in the near future,²⁶⁶ there will likely, for the first time be a Court with the power to prosecute UCG as an international crime. This may become one of the ingenious ideas Africa introduced to the rest of the world, like the right to development, group rights, or the binding treaties on mercenaries, internally displaced persons and the responsibility to protect. Deya states that although a compromise document, the Draft Statute is still a very revolutionary instrument that will radically change the face of Africa, and possibly that of the world.²⁶⁷

The Court will face difficulties, similar to the ones that the AU PSC has already faced. Some of these difficulties include the lack of a comprehensive definition of UCG, issues of immunity, identifying which persons to prosecute and the lack of commitment of member states.

Some of the prospects of empowering the Court include the possibility that the Court may follow in the footsteps of the African Commission and be innovative in interpreting the provision on UCG, the Court may be free from politicisation, the alternative in bodies eligible to submit cases before the Court as well as the deterrence effect it may have.

²⁶⁶ Even if the Draft Statute is finally adopted, it may take some time for it to acquire the required number of ratifications to come into force.

²⁶⁷ Deya (n 193 above).

5. Conclusion and recommendations

5.1 Conclusion

Sub-Saharan Africa has experienced 80 *coups* and 180 attempted *coups* between 1956 and 2001.²⁶⁸ UCG is a serious threat in the continent, with two West African countries, Mali and Guinea Bissau having suffered *coups* in 2012 alone. Several authors attribute the occurrence of *coups* and other unconstitutional changes of government in Africa to the prevalence of autocratic rule and the absence of a democratic means of changing government. The Lomé Declaration reiterates this view by associating lack of democratic governance with the occurrence of UCG. The Declaration further lists down a set of basic democratic principles to guide member states, which ultimately aims to reduce the plight of UCGs in the continent. It should thus be noted that the primary means of overcoming the prevalence of UCG in member states is instilling a democratic government that adheres to the principles of rule of law and popular sovereignty among other democratic values.

The AU's predecessor, the OAU strictly adhered to the principle of sovereignty and non-interference in domestic matters, including the means of changing government in member states.²⁶⁹ The AU however has not adopted a policy of indifference to unconstitutional changes of government in member states. It has developed an elaborate framework to address incidences of UCG.

The major instruments dealing with UCG include the Lomé Declaration, the AU Constitutive Act and the ACDEG.²⁷⁰ Despite the advancements these instruments brought in the area of UCG, they still do not cover all forms of UCG, such as unconstitutional persistence of governments through the conduction of fraudulent election, systemic violations of democratic and human rights by governments leading to what may be termed as 'good *coups*' and popular uprisings such as the movements that took place in North Africa in 2011.

The latest attempt by the AU to battle the scourge of UCG in the continent is the prosecution of UCG perpetrators by the proposed Court in accordance with article 28E of

²⁶⁸ Vandegniste (n 18 above).

²⁶⁹ On the eve of the formation of the AU, the OAU took interest in UCG, formulated the Lomé Declaration and even authorised military intervention by ECOWAS during the 1997 *coup* in Sierra Leone to restore constitutional order.

²⁷⁰ Souare (n 25 above) 2.

the Draft Statute. Article 28E already contains provisions which attempt to address situations of popular uprisings as well as other factors not considered in the Lomé Declaration and the ACDEG. Unfortunately, article 28E lacks precision and does not adequately cater for all the short-comings identified in the other UCG instruments. However, the Executive Council has requested the AU Commission, the African Court on Human and Peoples' Rights and the AUCIL to come up with a more comprehensive definition of UCG under the Draft Statute. This is an ideal opportunity to come up with an all-inclusive definition of UCG which accounts for all forms of unconstitutional changes, including unconstitutional persistence of government, unconstitutional/undemocratic governance and popular uprisings which result in a change of government.

The process of realising article 25(5) of the ACDEG which provides for the prosecution of perpetrators of UCG by the competent court has been slow, with five years having passed since the adoption of the Charter. Discussions on the empowerment of the Court during the Government Legal Experts and Ministers of Justice/Attorneys General Meetings have been tense and consensus on the contents of the provision on UCG seems out of reach. Political will of some states to empower the Court is lacking. There is however hope that the bodies authorised by the Executive Council to review article 28E will come up with a comprehensive and agreeable definition of UCG.

5.2 Recommendations

The following recommendations are presented to enable the Court to effectively carry out its mandate of prosecution of UCG perpetrators:

- i. The definition of UCG should be expanded to include the conduction of fraudulent elections to retain power, and not only refusal to hand over power after free and fair elections.
- ii. It is necessary to consider the formulation of a continent wide policy setting an acceptable and democratic term limit for leaders²⁷¹ which will be applicable to all AU member states. For example, a 5 year term, renewable only once.
- iii. It is important to liaise with the PSC's Panel of the Wise to strengthen the provision on popular uprisings (article 28E(3)), as the Panel has been

²⁷¹ Leaders with the highest level of executive power, whether Presidents or Prime Ministers, depending on the country's state structure, should have term-limits.

- deliberating on the uprisings in North Africa and their implications on the AU policy framework since late 2011.
- iv. Unconstitutional governance in the form of systemic violations of democratic and human rights should fall under article 28E of the Draft Statute.
 - v. The attempt to define ‘democratically elected government’ under article 28E(2) of the Draft Statute does not add any value in its current state. It would thus be appropriate to either remove the sub-article or clearly explain what is meant by ‘democratically elected government’ or make reference to the specific instruments which elucidate the meaning.
 - vi. Consideration should be given to the UCG definition proposed by the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa in their Report in 2000, which includes the refusal by a government to call for general elections at the end of its term of office; any form of election rigging and electoral malpractice, duly established by the OAU or ascertained by an independent and credible body established for that purpose; systematic and persistent violation of the common values and principles of democratic governance referred to above; and any other form of unconstitutional change as may be defined by the OAU policy organs.²⁷²
 - vii. The definition should exhibit sufficient flexibility to cope with developments in the means of changing governments and allow the Court to have wider room in interpreting article 28E of the Draft Statute.
 - viii. Consider the development of an Elements of Crimes document similar to the ICC’s or a Guideline²⁷³ detailing the interpretation and application of the international crime provisions in the Draft Statute.
 - ix. The AU Commission, in collaboration with other organs of the AU should encourage the ratification and domestication of the ACDEG, so as to instil and strengthen a culture of democracy in member states.
 - x. There is need for consistency in holding perpetrators of UCG accountable. The Court should avoid double-standards and especially not over-look UCG’s by incumbent governments, which has been one of the major failures of the AU.

²⁷² Report of the Sub-committee of the Central Organ on Unconstitutional Changes in Africa (2000) paras 25(v) – (iv) cited in CA Odinkalu ‘Concerning Kenya: The current AU position on unconstitutional changes in government’ (January 2008) *Open Society Institute AfriMAP*, footnote 17.

²⁷³ The African Commission adopted the ‘Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ in 2010 to assist it in the interpretation and application of the social, economic and cultural rights provisions in the African Charter.

Thus the Court should be free from the politicisation that characterised some of the PSC actions on UCGs in member states.

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